SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRD REPORT

OF

2009

18 March 2009

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MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)
Senator M Bishop (Deputy Chair)
Senator D Cameron
Senator J Collins
Senator R Siewert
Senator the Hon J Troeth

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

THIRD REPORT OF 2009

The Committee presents its Third Report of 2009 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:

Employment and Workplace Relations Amendment Bill 2008

Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008

Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008

Employment and Workplace Relations Amendment Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2009*. The Minister for Employment and Workplace Relations responded to the Committee's comments in a letter dated 16 March 2009. A copy of the letter is attached to this report.

Relevant extract from Alert Digest No. 1 of 2009

Introduced into the House of Representatives on 3 December 2008
Portfolio: Employment and Workplace Relations

Background

This bill amends the *Safety, Rehabilitation and Compensation Act 1988*, the *Social Security Act 1991*, the *Social Security (Administration) Act 1999*, the *Social Security (International Agreements) Act 1999* and the *Social Security Legislation Amendment (2007 Budget Measures for Students) Act 2007* to provide for a range of measures.

The bill amends the *Safety, Rehabilitation and Compensation Act 1988* to bring the federal workers' compensation scheme into line with state workers' compensation schemes by increasing the amount of benefits payable to an employee's dependants in the event of a work-related death.

The bill amends the *Social Security Act 1991* to extend to Sickness Allowance and Parenting Payment (single) the provisions which prevent a person from receiving payment while there is an Assurance of Support in force and the assurer is willing and able to provide support to the person, and it would be reasonable for them to accept that support.

The bill makes minor technical amendments to the *Social Security Act 1991* to:

- ensure that Rent Assistance received by the partners of recipients of Austudy is taken into account in the calculation of the recipient's own Rent Assistance;

- clarify that a partner with a rent-increased benefit includes a partner who is in receipt of a payment under the ABSTUDY scheme which includes an amount of living allowance increased to take account of rent; and

- clarify the method of calculating the amount of youth disability supplement that is to be added to a person's rate of youth allowance.

The bill also makes other minor technical amendments to the *Social Security Act 1991*, the *Social Security (Administration) Act 1991*, the *Social Security (International Agreements) Act 1999* and the *Social Security Legislation Amendment (2007 Budget Measures for Students) Act 2007*.

Retrospective commencement
Subclause 2(1)

Item 6 in the table to subclause 2(1) provides that item 42 of Schedule 2 is to commence immediately after the commencement of item 18 of Schedule 2 to the *Social Security Legislation Amendment (2007 Budget Measures for Students) Act 2007*, on 28 September 2007.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes that the explanatory memorandum (at page 3) merely repeats the substance of the contents of item 6 in the table, and (at page 14) describes the effect of the amendment to be made by item 42 of Schedule 2. However, in neither place does the explanatory memorandum indicate whether the retrospective commencement will adversely affect any person. Therefore, the Committee **seeks the Minister's advice** as to the effect of this retrospective commencement.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it 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

Thank you for the letter of 5 February 2009 concerning the request from Ms Julie Dennett, Committee Secretary, Standing Committee for the Scrutiny of Bills, seeking advice about the effect of the retrospective commencement of a minor technical amendment to the *Social Security Act 1991* (the Act) made by item 42 of Schedule 2 of the *Employment and Workplace Relations Amendment Bill 2008* (the Bill) in relation to Austudy and Rent Assistance.

Rent Assistance was extended to Austudy recipients from 1 January 2008 as part of the 2007-08 Budget which aligned Austudy payment with other social security payments. Item 42 of Schedule 2 of the Bill amends a transitional provision introduced by item 18 of Schedule 2 of the *Social Security Legislation Amendment (2007 Budget Measures for Students) Act 2007* (the Budget Measures for Students Act) (which came into effect from 28 September 2007), the intention of which was to prevent Austudy recipients receiving Rent Assistance prior to 1 January 2008.

Item 18 of Schedule 2 of the Budget Measures for Students Act provided for the calculation of Rent Assistance to apply to Austudy instalments for the fortnight including 1 January 2008 and later fortnights. Sub item 18(2) provided for a *pro rata* calculation for the fortnight in which 1 January occurred. However, under the social security law, the rate of Austudy is a daily rate, not a fortnightly rate, and hence the reference in the original item 18 to fortnightly calculations and pro-rating those calculations for the fortnight including 1 January are incorrect. Item 42 of Schedule 2 of the Bill provides that the amendments to the provisions relating to the calculation of Austudy apply to calculations of the daily rate of Austudy on and after 1 January 2008.

While Item 6 in the table to subclause 2(1) of the Bill states that item 42 commences from 28 September 2007 (as it replaces the original item 18 which technically came into effect on that date), in practice, item 42 has no effect until 1 January 2008.

The replacement of item 18 of Schedule 2 of the Budget Measures for Students Act made by item 42 of Schedule 2 to the Bill is not intended to have any substantive effect but will ensure that the transitional provision is consistent with the way in which Austudy is calculated under the social security law and that it operates in the way it was administered by Centrelink.

No person will be disadvantaged by the proposed replacement of item 18, and no re-calculations of a person's Austudy will be done as a result of the replacement.

I trust this information is of assistance.

The Committee thanks the Minister for this response.

Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2009*. The Minister for Competition Policy and Consumer Affairs responded to the Committee's comments in a letter dated 10 March 2009. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses of Parliament the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 1 of 2009

Introduced into the House of Representatives on 4 December 2008
Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997* to introduce a comprehensive framework for the taxation of financial arrangements (TOFA) designed to reduce tax-induced distortions to investment and financing, to facilitate efficient risk management, and to reduce compliance and administration costs. The bill is the final stage of the TOFA reforms which were first announced in the 1992 Budget and have been implemented progressively since 2001.

In particular, the bill:

- establishes criteria that determine how different financial arrangements are assigned to, and treated under, the different tax-timing methods;
- removes the capital/revenue distinction for most financial arrangements by treating the gains and losses on revenue account, except where specific rules apply;

- increases the post-tax efficiency and effectiveness of hedging, and provides for effective and efficient risk management by permitting alignment of character and tax-timing of eligible hedging arrangements;

- reduces the complexity of accruals calculations present in current tax rules on discounted and deferred interest securities, and reduces compliance and administration costs by permitting close alignment between tax and accounting outcomes on an elective basis; and

- allows eligible taxpayers to use results from their financial reports for tax purposes.

The bill also makes consequential amendments to the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Income Tax (Transitional Provisions) Act 1997*, the *Taxation Administration Act 1953* and the *New Business Tax System (Taxation of Financial Arrangements) Act (No. 1) 2003*.

The bill also contains application and transitional provisions.

Retrospective commencement and application
Subclause 2(1); Schedule 1, item 114

Item 3 in the table to subclause 2(1) provides that Part 4 of Schedule 1 is to commence immediately after the commencement of the *New Business Tax System (Taxation of Financial Arrangements) Act (No. 1) 2003*, on 17 December 2003. Item 114 of Schedule 1 provides that the amendments to be made by Part 4 of Schedule 1 'apply on and after 17 December 2003'.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes that the explanatory memorandum, which apparently deals with the changes proposed to be made by Part 4 of Schedule 1 [at paragraphs 11.152-11.161] does not appear to indicate whether this retrospective commencement and application will adversely affect anyone other than the Commonwealth. Therefore, the Committee **seeks the Treasurer's advice** whether these amendments will have an adverse effect on any individual.

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 correspondence of 5 February 2009 from Ms Julie Dennett, Secretary of the Standing Committee for the Scrutiny of Bills, originally directed to the Treasurer, concerning the Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008.

Alert Digest 01/09 of the Standing Committee for the Scrutiny of Bills contains comments regarding the retrospective application of Part 4 of Schedule 1 to the Bill, and seeks my advice as to whether these amendments will have any adverse effect on any individual.

Items 106 to 108, 110, 111 and 113 are aimed at ensuring that certain types of entity are not subject to Division 775 and certain parts of Subdivision 960-C of the *Income Tax Assessment Act 1997*. Broadly, Division 775 and Subdivision 960-C bring to account for income tax purposes gains and losses made by taxpayers due to exchange rate movements and provide for the translation of certain foreign-currency denominated amounts into Australian currency. In other words, these items can have the effect of either increasing or decreasing a taxpayer's assessable income, and in this sense may have the effect of altering a taxpayer's liability. However, I would note that the amendments contained in these items implement recommendations made in representations to the current and previous Government by industry bodies. The amendments, including their retrospective nature, were announced by the then Minister for Revenue and Assistant Treasurer in Press Release No. 073 of 2 September 2005.

I would also observe that the Australian Taxation Office has advised that where taxpayers have acted reasonably in anticipating this change, there will be no tax shortfall penalty and, if they then actively seek to amend their return or activity statement within a reasonable time, the Tax Office will remit the general interest charge attributable to the amendment to nil.

Items 109 and 112 extend the eligibility of certain accounts for certain elective methods tax treatments under Division 230 and Division 775. While the extension of eligibility can be on a retrospective basis, it is elective. Accordingly, it would be reasonable to expect that a taxpayer would not make such a retrospective election if it would be to their detriment.

I trust this information will be of assistance to you.

The Committee thanks the Minister for this response. While the Committee does not welcome ‘legislation by press release’, the Minister’s explanation of a taxpayer’s ability to elect to participate is helpful.

Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2009*. The Minister for Competition Policy and Consumer Affairs responded to the Committee's comments in a letter dated 10 March 2009. A copy of the letter is attached to this report.

Although this bill has been passed by both Houses of Parliament the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 1 of 2009

Introduced into the House of Representatives on 3 December 2008
Portfolio: Treasury

Background

Introduced with the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008, this bill amends the *Trade Practices Act 1974*, the *Telecommunications (Interception and Access) Act 1979* and the *Proceeds of Crime Act 2002* to establish criminal penalties and parallel civil sanctions for serious cartel conduct.

The bill also:

- provides exemptions from the criminal and parallel civil prohibitions on cartel conduct in certain circumstances;
- enables individuals to be held directly liable for criminal and civil prohibitions in relation to cartel conduct in certain circumstances;
- incorporates statutory bars in the Trade Practices Act to protect against double jeopardy;
- modifies existing investigatory powers and remedies to apply them to the criminal offences and parallel civil penalty prohibitions;

- enables the Australian Consumer and Competition Commission (ACCC) to use intercepted material in relation to cartel investigations;

- provides for the protection of cartel information provided by whistleblowers to the ACCC under the ACCC's leniency and immunity policies;

- provides that a breach of the proposed cartel offences will fall under Commonwealth legislation dealing with the proceeds of crime;

- ensures that the search, seizure and information gathering provisions in the Trade Practices Act are better aligned with equivalent provisions in the *Crimes Act 1914*; and

- provides the Federal Court, together with the state and territory Supreme Courts, jurisdiction to deal with the new offences.

The bill also makes minor and technical amendments to the Trade Practices Act and contains application, consequential and transitional provisions.

Abrogation of the privilege against exposure to a penalty
Schedule 2, item 5, new section 86F

Proposed new section 86F of the Trade Practices Act, to be inserted by item 5 of Schedule 2, would abrogate the privilege against being exposed to the penalty of being disqualified from managing a corporation for a person required to answer a question, produce a document or do any other act in civil or criminal proceedings under, or arising out of, the Trade Practices Act. The explanatory memorandum does not appear to refer to this particular amendment. The Committee **seeks the Treasurer's advice** as to the reasons for the abrogation of the privilege against exposure to a penalty in these circumstances.

Pending the Treasurer's advice, the Committee draws Senators' attention to the provision, as it 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

The Committee's letter was referred to me as I have responsibility for this Bill.

The Committee sought feedback on provisions of the Cartels Bill that abrogate the privilege against exposure to a penalty.

The Committee sought advice as to the reasons for the abrogation of privilege against exposure to a penalty in proposed section 86F of the Trade Practices Act ('the TPA').

Section 86E was inserted into the TPA by the *Trade Practices Legislation Amendment Act (No. 1) 2006* ('the Dawson Act'). It enabled the Court to make an order disqualifying a person from managing corporations for a period that the Court considers appropriate if:

- the Court is satisfied that the person has contravened, or attempted to contravene or has been involved in a contravention of Part IV; and

- the Court is satisfied that the disqualification is justified.

A similar disqualification provision exists in section 206C of the *Corporations Act 2001.*

The High Court decision of *Rich v ASIC* [2004] HCA 42 had the consequence that individuals against whom disqualification orders are sought by the Australian Securities and Investments Commission ('ASIC') may claim the privilege against the imposition of a penalty. This decision overturned the previous understanding that disqualification orders were 'protective' and not 'penal' in nature.

Consistent with section 1349 of the *Corporations Act 2001*, proposed section 86F will ensure that an order under section 86E is deemed not to be a civil penalty order, thus preventing the High Court's decision from applying. This will mean that discovery and other orders may be made against a person in proceedings seeking a disqualification order.

The Committee thanks the Minister for this response.

Abrogation of the privilege against exposure to a penalty
Schedule 2, items 43 to 47, subsection 155(7)

Subsection 155(7) of the Trade Practices Act is to be amended by items 43 to 47 of Schedule 2, with the effect that the abrogation of the privilege against self-incrimination is extended to also abrogate the privilege against being exposed to a penalty. The subsection is further amended so as to no longer provide any immunity for any document produced in pursuance of section 155, although it continues to provide 'use immunity' to the information so provided.

The Committee notes that the explanatory memorandum (at paragraphs 8.9 to 8.12, and at paragraph 8.13) explains the effect of the relevant items in Schedule 2, but does not provide a reason for either the abrogation of the privilege against being exposed to a penalty, nor for the removal of the immunity which currently attaches to the production of a document under section 155. The Committee **seeks the Treasurer's advice** as to these reasons.

Pending the Treasurer's advice, the Committee draws Senators' attention to the provision, as it 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

The Committee noted that the explanatory memorandum explains the effect of items 43 to 47 of Schedule 2 of the Cartels Bill, but does not provide a reason for the abrogation of the privilege against exposure to a penalty, or for the removal of the immunity which currently attaches to the production of a document under section 155.

Section 155 enables the Australian Competition and Consumer Commission ('the ACCC') to investigate, before it initiates proceedings, possible breaches of the TPA by requiring information and documents to be provided to it. Subsection 155(7) provides that a person is not excused from furnishing information or producing a document in pursuance of section 155 on the ground that the information or document may incriminate the person. However, answers given or documents produced in pursuance of such a notice are not admissible in certain proceedings.

The Cartels Bill amends subsection 155(7) so that:

- the privileges against self incrimination and the imposition of a penalty are abrogated for a person that is required to furnish information, produce documents, or required to give evidence pursuant to subsection 155(1).
- answers given (but not documents produced) by an individual pursuant to subsection 155(1) cannot be used in evidence against the individual in any criminal proceeding other than proceedings for an offence against section 155 or proceedings for an offence against sections 137.1 (False or misleading information), 137.2 (False or misleading documents), 149.1 (obstruction of Commonwealth public official) of the Criminal Code in relation to section 155.
- any evidentiary material obtained from a body corporate under subsection 155(1) may be used against that body corporate in any proceeding.

The High Court in *Pyneboard Pty Ltd v TPC* (1983) 152 CLR 328 found that individuals and corporations required to furnish information, produce documents or give evidence pursuant to subsection 155(1) could not claim either the privilege against self-incrimination or the privilege against the imposition of a penalty.

Current paragraph 155(7)(a) of the TPA provides that the answer to any question asked, the furnishing of any information or the production of any documents pursuant to subsection 155(1) cannot be used against an individual in any criminal proceeding, other than a proceeding under section 155 for non-compliance. This provides a degree of protection for an individual that is greater than that which is appropriate. In particular, documents produced by an individual should be able to be used in criminal proceedings against that individual.

In addition, although an answer to a question asked, the furnishing of any information or the production of any documents pursuant to subsection 155(1) can be used in a criminal proceeding against an individual for an offence against section 155 (in particular, failing to comply or furnishing information that is known to be false or misleading), such information cannot be used in similar proceedings against the individual under the Criminal Code, such as subsections 137.1 (False or misleading information), 137.2 (False or misleading documents) or 149.1 (obstruction of Commonwealth public official).

Current paragraph 155(7)(b) provides that the answer to questions asked, the furnishing of information or the production of documents pursuant to subsection 155(1) cannot be used against a corporation in any criminal proceedings other than proceedings under the TPA. In light of *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96 and section 187 of the *Evidence Act 1995* which abolish the privilege against self-incrimination and the imposition of a penalty for corporations, paragraph 155(7)(b) is inappropriately wide in prohibiting the answers to any question asked, the furnishing of any information or the production of any documents from being used in criminal proceedings against the corporation under an Act other than the TPA, such as the Criminal Code.

These changes are consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* which allows – in the case of the enforcement powers of the ACCC, ASIC and APRA – that the privilege against self-incrimination be abrogated for an individual and a corporation and that only use immunity be provided for individuals in prosecutions for an offence. This is because long experience and a number of studies have found that full 'use' and 'derivative use' immunity would unacceptably fetter investigation and prosecution of corporate misconduct offences.

The Committee thanks the Minister for this very comprehensive response, but notes that it would have been helpful if this information had been included in the explanatory memorandum.

Abrogation of the privilege against exposure to a penalty
Clarification of statement in explanatory memorandum
Schedule 2, items 48 and 49, section 159

Section 159 of the Trade Practices Act is to be amended by items 48 and 49 of Schedule 2, with the effect that any person appearing before the ACCC who is required to give evidence or produce a document can no longer claim the privilege against exposure to a penalty in any subsequent civil proceedings, and can claim that privilege only in subsequent criminal proceedings.

The explanatory memorandum states (at paragraph 8.15) that these amendments will 'align [section 159] with Commonwealth policy relating to other corporate enforcement agencies (such as the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority), and with current section 154R' of the Trade Practices Act.

Similar to its comments in relation to subsection 154R(4) (above), the Committee notes that the first part of this statement is correct, in that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* accepts (at page 104 of the 2007 Interim New Edition) that legislation governing the ACCC and other corporate enforcement agencies may need to abrogate the privilege against self-incrimination. The Committee also notes that the *Guide* says nothing about abrogating the privilege against exposure to a penalty. However, while noting the extension of the abrogation of the privilege against exposure to a penalty in section 159, the Committee makes no further comment on it.

In relation to paragraph 8.15 of the explanatory memorandum, the Committee suggests that it should refer to 'section 154R of the *Trade Practices Act 1974* as proposed to be amended by item 30 of Schedule 2', rather than to 'current section 154R'. The Committee **brings this matter to the Treasurer's attention** and **seeks his advice** as to whether it might be possible to amend the explanatory memorandum.

Relevant extract from the response from the Minister

> The Committee sought advice regarding the capacity to amend the explanatory memorandum, where it states (at paragraph 8.15) that amendments will 'align [section 159] with Commonwealth policy relating to other corporate enforcement agencies (such as the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority), and with current section 154R' of the TPA.
>
> As subsection 154R(4) will be amended by item 30 of Schedule 2 of the Cartels Bill, I have asked my department to arrange for the proposed correction to the explanatory memorandum to be made.

The Committee thanks the Minister for this response.

Senator the Hon Helen Coonan
Chair

THE HON JULIA GILLARD MP
DEPUTY PRIME MINISTER

Parliament House
Canberra ACT 2600

16 MAR 2009

Senator the Hon Helen Coonan
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for the letter of 5 February 2009 concerning the request from Ms Julie Dennett, Committee Secretary, Standing Committee for the Scrutiny of Bills, seeking advice about the effect of the retrospective commencement of a minor technical amendment to the *Social Security Act 1991* (the Act) made by item 42 of Schedule 2 of the *Employment and Workplace Relations Amendment Bill 2008* (the Bill) in relation to Austudy and Rent Assistance.

Rent Assistance was extended to Austudy recipients from 1 January 2008 as part of the 2007–08 Budget which aligned Austudy payment with other social security payments. Item 42 of Schedule 2 of the Bill amends a transitional provision introduced by item 18 of Schedule 2 of the *Social Security Legislation Amendment (2007 Budget Measures for Students) Act 2007* (the Budget Measures for Students Act) (which came into effect from 28 September 2007), the intention of which was to to prevent Austudy recipients receiving Rent Assistance prior to 1 January 2008.

Item 18 of Schedule 2 of the Budget Measures for Students Act provided for the calculation of Rent Assistance to apply to Austudy instalments for the fortnight including 1 January 2008 and later fortnights. Sub item 18(2) provided for a *pro rata* calculation for the fortnight in which 1 January occurred. However, under the social security law, the rate of Austudy is a daily rate, not a fortnightly rate, and hence the reference in the original item 18 to fortnightly calculations and pro-rating those calculations for the fortnight including 1 January are incorrect. Item 42 of Schedule 2 of the Bill provides that the amendments to the provisions relating to the calculation of Austudy apply to calculations of the daily rate of Austudy on and after 1 January 2008.

While Item 6 in the table to subclause 2(1) of the Bill states that item 42 commences from 28 September 2007 (as it replaces the original item 18 which technically came into effect on that date), in practice, item 42 has no effect until 1 January 2008.

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The replacement of item 18 of Schedule 2 of the Budget Measures for Students Act made by item 42 of Schedule 2 to the Bill is not intended to have any substantive effect but will ensure that the transitional provision is consistent with the way in which Austudy is calculated under the social security law and that it operates in the way it was administered by Centrelink.

No person will be disadvantaged by the proposed replacement of item 18, and no re-calculations of a person's Austudy will be done as a result of the replacement.

I trust this information is of assistance.

Yours sincerely

Julia Gillard
Minister for Employment and Workplace Relations

The Hon Chris Bowen MP
Assistant Treasurer
Minister for Competition Policy and Consumer Affairs

10 MAR 2009

Senator the Hon Helen Coonan
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan

I refer to correspondence of 5 February 2009 for Ms Julie Dennett, Secretary of the Standing Committee for the Scrutiny of Bills, originally directed to the Treasurer, concerning the Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008.

Alert Digest 01/09 of the Standing Committee for the Scrutiny of Bills contains comments regarding the retrospective application of Part 4 of Schedule 1 to the Bill, and seeks my advice as to whether these amendments will have any adverse effect on any individual.

Items 106 to 108, 110, 111 and 113 are aimed at ensuring that certain types of entity are not subject to Division 775 and certain parts of Subdivision 960-C of the *Income Tax Assessment Act 1997*. Broadly, Division 775 and Subdivision 960-C bring to account for income tax purposes gains and losses made by taxpayers due to exchange rate movements and provide for the translation of certain foreign-currency denominated amounts into Australian currency. In other words, these items can have the effect of either increasing or decreasing a taxpayer's assessable income, and in this sense may have the effect of altering a taxpayer's liability. However, I would note that the amendments contained in these items implement recommendations made in representations to the current and previous Government by industry bodies. The amendments, including their retrospective nature, were announced by the then Minister for Revenue and Assistant Treasurer in Press Release No. 073 of 2 September 2005.

I would also observe that the Australian Taxation Office has advised that where taxpayers have acted reasonably in anticipating this change, there will be no tax shortfall penalty and, if they then actively seek to amend their return or activity statement within a reasonable time, the Tax Office will remit the general interest charge attributable to the amendment to nil.

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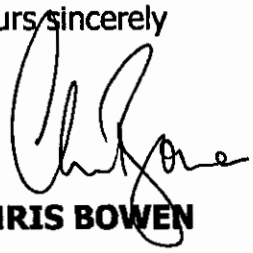
Items 109 and 112 extend the eligibility of certain accounts for certain elective methods tax treatments under Division 230 and Division 775. While the extension of eligibility can be on a retrospective basis, it is elective. Accordingly, it would be reasonable to expect that a taxpayer would not make such a retrospective election if it would be to their detriment.

I trust this information will be of assistance to you.

Yours sincerely



CHRIS BOWEN

The Hon Chris Bowen MP
Assistant Treasurer
Minister for Competition Policy and Consumer Affairs

10 MAR 2009

Senator the Hon Helen Coonan
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Helen Coonan

I refer to correspondence of 5 February 2009 from Ms Julie Dennett, Secretary of the Standing Committee for the Scrutiny of Bills, originally directed to the Treasurer, regarding the Committee's comments in Alert Digest No.1 of 2009 (4 February 2009).

The Alert Digest provided the Committee's views in relation to the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 ('the Cartels Bill'). The Committee's letter was referred to me as I have responsibility for this Bill.

The Committee sought feedback on provisions of the Cartels Bill that abrogate the privilege against exposure to a penalty.

Abrogation of the privilege against exposure to a penalty (Schedule 2, item 5, new section 86F)

The Committee sought advice as to the reasons for the abrogation of privilege against exposure to a penalty in proposed section 86F of the Trade Practices Act ('the TPA').

Section 86E was inserted into the TPA by the *Trade Practices Legislation Amendment Act (No. 1) 2006* ('the Dawson Act'). It enabled the Court to make an order disqualifying a person from managing corporations for a period that the Court considers appropriate if:

- the Court is satisfied that the person has contravened, or attempted to contravene or has been involved in a contravention of Part IV; and
- the Court is satisfied that the disqualification is justified.

A similar disqualification provision exists in section 206C of the *Corporations Act 2001*.

The High Court decision of *Rich v ASIC* [2004] HCA 42 had the consequence that individuals against whom disqualification orders are sought by the Australian Securities and Investments Commission ('ASIC') may claim the privilege against the imposition of a penalty. This decision overturned the previous understanding that disqualification orders were 'protective' and not 'penal' in nature.

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Consistent with section 1349 of the *Corporations Act 2001*, proposed section 86F will ensure that an order under section 86E is deemed not to be a civil penalty order, thus preventing the High Court's decision from applying. This will mean that discovery and other orders may be made against a person in proceedings seeking a disqualification order.

Abrogation of the privilege against exposure to a penalty (Schedule 2, items 43 to 47, subsection 155(7))

The Committee noted that the explanatory memorandum explains the effect of items 43 to 47 of Schedule 2 of the Cartels Bill, but does not provide a reason for the abrogation of the privilege against exposure to a penalty, or for the removal of the immunity which currently attaches to the production of a document under section 155.

Section 155 enables the Australian Competition and Consumer Commission ('the ACCC') to investigate, before it initiates proceedings, possible breaches of the TPA by requiring information and documents to be provided to it. Subsection 155(7) provides that a person is not excused from furnishing information or producing a document in pursuance of section 155 on the ground that the information or document may incriminate the person. However, answers given or documents produced in pursuance of such a notice are not admissible in certain proceedings.

The Cartels Bill amends subsection 155(7) so that:

- the privileges against self incrimination and the imposition of a penalty are abrogated for a person that is required to furnish information, produce documents, or required to give evidence pursuant to subsections 155(1).

- answers given (but not documents produced) by an individual pursuant to subsection 155(1) cannot be used in evidence against the individual in any criminal proceeding other than proceedings for an offence against section 155 or proceedings for an offence against sections 137.1 (False or misleading information), 137.2 (False or misleading documents), 149.1 (obstruction of Commonwealth public official) of the Criminal Code in relation to section 155.

- any evidentiary material obtained from a body corporate under subsection 155(1) may be used against that body corporate in any proceeding.

The High Court in *Pyneboard Pty Ltd v TPC* (1983) 152 CLR 328 found that individuals and corporations required to furnish information, produce documents or give evidence pursuant to subsection 155(1) could not claim either the privilege against self-incrimination or the privilege against the imposition of a penalty.

Current paragraph 155(7)(a) of the TPA provides that the answer to any question asked, the furnishing of any information or the production of any documents pursuant to subsection 155(1) cannot be used against an individual in any criminal proceeding, other than a proceeding under section 155 for non-compliance. This provides a degree of protection for an individual that is greater than that which is appropriate. In particular, documents produced by an individual should be able to be used in criminal proceedings against that individual.

In addition, although an answer to a question asked, the furnishing of any information or the production of any documents pursuant to subsection 155(1) can be used in a criminal proceeding against an individual for an offence against section 155 (in particular, failing to comply or furnishing information that is known to be false or misleading), such information cannot be used in similar proceedings against the individual under the Criminal Code, such as subsections 137.1 (False or misleading information), 137.2 (False or misleading documents) or 149.1 (obstruction of Commonwealth public official).

Current paragraph 155(7)(b) provides that the answer to questions asked, the furnishing of information or the production of documents pursuant to subsection 155(1) cannot be used against a corporation in any criminal proceedings other than proceedings under the TPA. In light of *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96 and section 187 of the *Evidence Act 1995* which abolish the privilege against self-incrimination and the imposition of a penalty for corporations, paragraph 155(7)(b) is inappropriately wide in prohibiting the answers to any question asked, the furnishing of any information or the production of any documents from being used in criminal proceedings against the corporation under an Act other than the TPA, such as the Criminal Code.

These changes are consistent with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* which allows — in the case of the enforcement powers of the ACCC, ASIC and APRA — that the privilege against self-incrimination be abrogated for an individual and a corporation and that only use immunity be provided for individuals in prosecutions for an offence. This is because long experience and a number of studies have found that full 'use' and 'derivative use' immunity would unacceptably fetter investigation and prosecution of corporate misconduct offences.

Abrogation of the privilege against exposure to a penalty - clarification of statement in explanatory memorandum (Schedule 2, items 48 and 49, section 159)

The Committee sought advice regarding the capacity to amend the explanatory memorandum, where it states (at paragraph 8.15) that amendments will 'align [section 159] with Commonwealth policy relating to other corporate enforcement agencies (such as the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority), and with current section 154R' of the TPA.

As subsection 154R(4) will be amended by item 30 of Schedule 2 of the Cartels Bill, I have asked my department to arrange for the proposed correction to the explanatory memorandum to be made.

The contact officer in my department is Ms Simone Abbot, phone 02 6263 3816 or email simone.abbot@treasury.gov.au.

Yours sincerely

CHRIS BOWEN