

**SENATE STANDING COMMITTEE**

**FOR THE**

**SCRUTINY OF BILLS**

**FOuRTEENTH rePORT**

**OF**

**2011**

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**SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

**MEMBERS OF THE COMMITTEE**

Senator M Fifield (Chair)

Senator C Brown (Deputy Chair)

Senator M Bishop

Senator S Edwards

Senator G Marshall

Senator R Siewert

**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**

**FOURTEENTH REPORT OF 2011**

The Committee presents its Fourteenth Report of 2011 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:

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# Coal Mining Industry (Long Service Leave) Legislation Amendment Bill 2011

Introduced into the Senate on 21 September 2011

Portfolio: Education, Employment and Workplace Relations

***Introduction***

The Committee dealt with amendment to the bill in *Alert Digest No. 12 of 2011.* The Minister responded to the Committee’s comments in a letter dated 10 November 2011. A copy of the letter is attached to this report.

***Alert Digest No. 12 of 2011 - extract***

**Background**

This bill amends the *Coal Mining Industry (Long Service Leave Fund) Act 1992;* the *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992;* the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992; and* the *Coal Mining Industry (Long Service Leave Funding) Amendment Act 2009* to:

* legislate minimum long service leave entitlements for all eligible employees in the black coal mining industry based on the precursor award entitlement;
* change the basis on which the levy is imposed and to facilitate changes to the employer reimbursement arrangements;
* provide for a greater compliance role for the Coal Mining Industry (Long Service Leave Funding Corporation;
* make changes to the structure and representation of the Board of Directors of the Corporation; and
* establish a regime for transition from the award-derived long service leave scheme.

Possible trespass on personal rights

Clause 39F

Clause 39F provides that any benefits or rights in respect of long service leave are subject to cancellation, revocation, termination or variation under legislation and no compensation is payable in that event. The rights are being granted by legislation and it is possible for future legislation to modify or revoke them. While this does not automatically give rise to a problem, the explanatory memorandum merely repeats the effect of this provision and does not indicate the need for it and whether it could be the basis of amendments that could trespass unduly on personal rights and liberties. As employees may justifiably act on the basis of an understanding of the statutory rights intended to be granted by this Bill, the Committee **seeks the Minister’s advice as to the reasons for the proposed approach**.

*Pending the Minister’s reply, 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.*

***Minister's response - extract***

Possible trespass on personal rights - clause 39F

Clause 39F provides that any benefits or rights in respect of long service leave are subject to cancellation, revocation, termination or variation under legislation and no compensation is payable in that event. The policy position is that if the long service leave entitlements were legislated, there may be a need to alter the entitlements in the future (in the same way that long service leave entitlements in industrial instruments are subject to potential change through re-negotiation).

Clause 39F will mean that the new statutory long service leave entitlement will be treated in the same way as the existing long service leave entitlements that are preserved by statute, that is, the current award entitlement to long service leave in the black coal mining industry preserved by the *Fair Work Act 2009.*

***Committee Response***

The Committee thanks the Minister for this response and requests that the key aspects of the information are included in the explanatory memorandum.

***Alert Digest No. 12 of 2011 - extract***

Reversal of onus

Clause 49CB

Clause 49CB imposes an evidential burden on a person who wishes to rely on the mistake of fact defence to avoid the imposition of a civil penalty order. As the explanatory memorandum does not justify this approach, the Committee **seeks the Minister's advice as to the justification for the provision**.

*Pending the Minister's reply, 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.*

***Minister's response - extract***

Reversal of onus - clause 49CB

I considered it appropriate for the particular offences contained in the Bill that if a person sought to rely on the defence of mistake of fact then that person should have the evidential burden for proving that there was a mistake of fact.

This approach was taken because; if such a defence is relied on, the particular circumstances and evidence that will need to be relied on to establish the existence of a mistake of fact will be peculiar to the knowledge of the defendant.

***Committee Response***

The Committee thanks the Minister for this response and requests that the key aspects of the information are included in the explanatory memorandum.

***Alert Digest No. 12 of 2011 - extract***

Strict liability

Clause 49CC

Clause 49CC, in effect, makes civil penalty provisions strict liability offences. As the explanatory memorandum does not justify this approach, the Committee **seeks the Minister's advice as to the justification for the provision**.

*Pending the Minister's reply, 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.*

Strict liability

Subclause 52A(6)

Subclause 52A(6) provides that the offence of failing to comply with a notice to produce information or documents is one of strict liability. Although similar provisions appear in other Commonwealth legislation, the Committee expects that the justification for the use of strict liability is in accordance with the *Guide to framing Commonwealth Offences* and is outlined in the explanatory memorandum. In this case the explanatory memorandum does not address in the issue and the Committee therefore **seeks the Minister's advice as to the justification for the proposed approach**.

*Pending the Minister's reply, 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.*

***Minister's response - extract***

Offences of strict liability: clause 49CC; subclause 52A(6)

Strict liability offences are necessary and appropriate for the Bill. These offences have been made strict liability offences consistent with the criteria specified in the AGO Guide. Notably these offences, consistent with the AGO Guide, are not punishable by imprisonment; the penalty level does not exceed 60 penalty units; the punishment of these offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring non-compliance with the scheme; and, there are legitimate grounds for penalising a person lacking fault, in this case it is that it places persons on notice to guard against contraventions of the scheme.

***Committee Response***

The Committee thanks the Minister for this response and requests that the key aspects of the information are included in the explanatory memorandum.

***Alert Digest No. 12 of 2011 - extract***

Strict liability

Schedule 3, item 11; and item 14 subsections 10(2) and 10A(4)

Item 11 of Schedule 3 proposes to substitute a new subsection 5(3) in the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992.* The proposed subsection makes it an offence of strict liability for a person to contravene the requirement for an employer to make a return within 28 days of the end of the month in which they employ an eligible employee. The explanatory memorandum does not address why a strict liability offence is necessary in the circumstances.

The same issue also arises in relation to item 14 of Schedule 3, proposed subsections 10(2) and 10A(4).

The Committee therefore **seeks the Minister's advice as to the justification for the proposed** approach in these provisions.

*Pending the Minister's reply, the Committee draws Senators’ attention to the 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.*

***Minister's response - extract***

Schedule 3, item 11; and item 14 subsections 10(2)and 10A(4)

It is necessary and appropriate to provide that failure to make a return on eligible wages is an offence of strict liability again consistent with the AGO Guide, further noting that returns are an integral part of the long service leave scheme and that timely returns help ensure the financial viability of the scheme.

The Bill also provides that failure to give a report to the Corporation (prepared by an auditor in respect of eligible employees) within 6 months of the end of a financial year is a strict liability offence as these reports are essential for the Corporation to effectively monitor compliance. This provision similarly meets the AGO Guide criteria for a strict liability offence, and I note that 6 months is a generous time frame to allow for an employer to give the report to the Corporation. The same reasoning applies to an auditor that is required to give such a report to the Corporation, and it was judged that 28 days was a reasonable timeframe in which to require a professional auditor to produce the report.

***Committee Response***

The Committee thanks the Minister for this response and requests that the key aspects of the information are included in the explanatory memorandum.

Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011

Introduced into the House of Representatives on 19 September 2011

By: Mr Katter

***Introduction***

The Committee dealt with amendment to the bill in *Alert Digest No. 12 of 2011.* The Mr Katter has responded to the Committee’s comments in an email received on 9 November 2011 advising of the attached explanatory memorandum. A copy of the email together with the explanatory memorandum is attached to this report.

***Alert Digest No. 12 of 2011 - extract***

Background

This bill amends the *Competition and Consumer Act 2011* to provide for a code of conduct for the horticulture industry.

No explanatory memorandum

This bill, introduced as a non-government bill, was not accompanied by an explanatory memorandum. The Committee prefers to see an explanatory memorandum for every bill and recognises the manner in which such documents assist in the interpretation of bills, and ultimately, Acts. The Committee therefore **requests that the Private Member** provides an explanatory memorandum to the bill.

***Member's response - extract***

Dear Chair of the Committee Senator Mitch Fifield,

In response to a letter sent to our office from the Standing Committee for the Scrutiny of Bills, attached is an explanatory memorandum, as requested, on Mr Katter’s Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011.

***Committee Response***

The Committee thanks the Mr Katter for providing the Committee with a copy of the explanatory memorandum to the bill.

Tax Laws Amendment (2011 Measures No.8) Bill 2011

Introduced into the House of Representatives on 13 October 2011

Portfolio: Treasury

***Introduction***

The Committee dealt with amendment to the bill in *Alert Digest No. 13 of 2011.* The Assistant Treasurer responded to the Committee’s comments in a letter dated 22 November 2011. A copy of the letter is attached to this report.

***Alert Digest No. 13 of 2011 - extract***

Background

This bill amends various taxation laws as follows:

Schedule 1 amends the *Income Tax Assessment Act 1997* to provide the Commissioner of Taxation with discretion to disregard certain events that would otherwise trigger the assessment of certain income for a primary production trust in the year of the event.

Schedule 2 amends the *Petroleum Resource Rent Tax Assessment Act 1987* to clarify the location of the 'taxing point' for the purposes of the petroleum resource rent tax.

Schedule 3 amends the *Taxation Administration Act 1953* to allow the Commissioner of Taxation to commence proceedings to recover director penalties in certain circumstances without issuing a director penalty notice. The bill amends the *Income Tax Assessment Act 1997, Taxation Administration Act 1953* and *Taxation (Interest on Overpayments and Early Payments) Act 1983* to make directors and their associates liable to pay as you go withholding non-compliance tax in certain circumstances. The bill also provides for directors to be personally liable for their company's unpaid superannuation guarantee amount.

Schedule 4 amends the *Excise Act 1901* and *Fuel Tax Act 2006* to clarify taxation arrangements for gaseous fuels.

Retrospective application

Schedule 2

The amendments in Schedule 2 clarify what constitutes a ‘marketable petroleum commodity’ under the *Petroleum Rent Tax Assessment Act 1987* (*PRRTAA*). This clarification is said to confirm ‘long established application’ of the relevant provisions and to be consistent with the interpretation given to the provisions in a recent Federal Court decision. The explanatory memorandum at page 17 notes that although the ‘narrow’ interpretation (rejected in the recent Federal Court case) may have reduced the PRRT payable on the Bass Strait project, ‘the impact on other PRRT taxpayers would have been less certain, and potentially increased their tax liability’.

The relevant provisions are complex, but the issue from a scrutiny perspective is that it is proposed that the amendments apply retrospectively from 1 July 1990, the date from which the application of the *PRRTAA* was extended to the Bass Strait project (see Schedule 2, item 3). The justification given at page 26 of the explanatory memorandum for the retrospective application of the amendments is that they: (1) will ‘remove any uncertainty regarding the long-established operation of the PRTT’ and (2) will not ‘impose any new tax burden, as they merely clarify and confirm the current application of the PRRT’.

Broadly, the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole. However, given that the proposed clarification of the law may have a detrimental effect on some taxpayers (insofar as the ‘narrow’ interpretation is thereby rejected) the Committee **seeks the Treasurer's further advice about whether the amendments are intended to apply to any cases or appeals which are currently pending before the courts and, if so, the justification for this approach.**

*Pending the Treasurer's reply, the Committee draws Senators’ attention to the 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.*

***Minister's response - extract***

**Schedule 2**

**Issue**

The Committee seeks the Treasurer's further advice, given that the proposed clarification of the law may have a detrimental effect on some taxpayers (insofar as the 'narrow' interpretation is thereby rejected, about whether the amendments are intended to apply to any cases or appeals which are currently pending before the courts and, if so, the justification for this approach.

**Response**

The issue of how the 'taxing point' is determined for the purposes of the Petroleum Resource Rent Tax (PRRT) was a central issue in a dispute between the participants in the Bass Strait project and the Australian Taxation Office. The PRRT taxing point is normally where a 'marketable petroleum commodity' (MPC) becomes an 'excluded commodity', usually by being sold. The point defines the boundary of a PRRT project, and so is central to calculating project receipts, expenses and profits.

On 13 April 2011, the Federal Court ruled on this matter *(Esso Australia Resources Pty Ltd v The Commissioner for Taxation [2011] FCA 360),* finding in favour of the Commissioner's position and the long established administration of the PRRT. The Court rejected the companies' argument that the taxing point for a project should be determined in a purely mechanistic way, having regard only to substances' chemical and physical properties and not to the actual circumstances and objectives of the project.

While the Bass Strait project would unambiguously benefit from an earlier taxing point due to its unique circumstances relating to when it transitioned to the PRRT in 1990 (that being the inability to deduct project expenditures incurred prior to that time), the impact on other PRRT taxpayers would be less certain, and could potentially increase their tax liability. This is because, for those projects, having an earlier taxing point than the one intended could well reduce their allowable deductions by more than their assessable receipts.

Subsequently, on 10 May 2011, as part of the 2011-12 Budget, the Government announced it would seek to amend the law to put beyond doubt the way the Commissioner has always administered the PRRT with effect from 1 July 1990 (so as to cover the period related to the amendments that transitioned the Bass Strait project into the PRRT). The Government's Budget announcement noted that the measure has no revenue impact because it merely confirms the rights and liabilities imposed by the current application of the PRRT law. Clarifying the taxing point ensures that PRRT taxpayers are not detrimentally impacted by a narrow interpretation of the taxing point.

On 1 June 2011 the companies lodged an appeal to the Full Federal Court.

On 13 October 2011, the amendments to give effect to the Budget measure were introduced into the House of Representatives.

The Full Federal Court heard the companies appeal during the week beginning 7 November 2011 and has not nominated a judgement date.

The amendments provide statutory support for the Federal Court's decision in *Esso Australia Resources Pty Ltd v The Commissioner for Taxation* and provide certainty for all PRRT taxpayers by putting beyond doubt that a marketable petroleum commodity is only produced when it is in its final form for its intended purpose (within the context of a particular project), and not at some earlier point part-way through the production process. The amendments are consistent with the original policy intent of the PRRT as a profits-based tax, and the way it has applied for over 20 years. They do not impose any new or additional tax liability on any PRRT taxpayers.

***Committee Response***

The Committee thanks the Assistant Treasurer for the detailed reply, notes the explanation provided and notes that a judgement on the appeal to the Full Federal Court is pending. In the circumstances the **Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate**.

Senator Mitch Fifield

Chair