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Australian Radiation Protection and Nuclear
Safety (Licence Charges) Amendment Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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Australian Radiation Protection and Nuclear Safety
(Licence Charges) Amendment Bill 2002

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Contents

Purpose	1
Background	1
Main Provisions	3
Commencement	3
Schedule 1	3
Concluding Comment	3
Endnotes.	4

Australian Radiation Protection and Nuclear Safety (Licence Charges) Amendment Bill 2002

Date Introduced: 21 March 2002

House: House of Representatives

Portfolio: Health and Ageing

Commencement: The Bill will be retrospective - commencement will be taken to have been on 5 February 1999.

Purpose

To retrospectively make holders of source¹ or facility² licences who are otherwise legislatively exempt from Commonwealth taxes or charges liable to pay charges levied under the *Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998*.

Background

Nuclear installations and facilities, radioactive material and associated apparatus are regulated in Australia by the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) through a licensing system. In approving the drafting instructions for the *Australian Radiation Protection and Nuclear Safety Act 1998* (the ARPANS Act) in August 1997, Federal Cabinet decided that ARPANSA's regulatory function should operate on a cost recovery basis.

ARPANSA levies both an application charge and an annual charge in relation to both facility and source licences. In both cases the imposition of the charges are authorised by an Act but the amount of the charge is set out in regulations.

The application fee is authorised by section 34 of the ARPANS Act and the amount set out in the Australian Radiation Protection and Nuclear Safety Regulations 1999. The annual charge is authorised under section 4 of the *Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998* (the Charges Act) and the amount set out in Australian Radiation Protection and Nuclear Safety (Licence Charges) Regulations 2000.

Warning:

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Approximately \$2.36 million in application and annual charges were collected by ARPANSA in 2000-2001.³

Since 1999, various Commonwealth statutory authorities such as the Australia New Zealand Food Authority, the Australian Nuclear Science and Technology Organisation, the Commonwealth Scientific and Industrial Research Organisation, the Australian Institute of Marine Science, the Australian National University, the Federal Airports Corporation, and the Australian War Memorial have paid these annual fees. These authorities are all exempt from taxation under their relevant legislation.

In 2000, the Director of National Parks⁴ was issued a facility licence under the ARPANS Act for certain sites located in Kakadu National Park. Acting on legal advice, the Director declined to pay the annual licence charge on the basis of section 514W of the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBCA). Section 514W states

the income of the Australian National Parks Fund and the property and transactions of the Director *are not subject to taxation under a law of the Commonwealth* or of a State or Territory [italics added]

The Australian Government Solicitor (AGS) was then retained jointly by ARPANSA and the Director of National Parks to advise on the whether the annual licence charges were a tax for the purposes of the EPBCA and a range of other legislation relating to Commonwealth statutory authorities holding facility or source licences.

The Chief General Counsel of the Office of the Counsel General, AGS, agreed that the annual licence charge was a tax. A key issue in reaching this view was that the Parliament 'clearly contemplated' that the Charges Act was a law imposing taxation given its form⁵ and the fact that did not limit the fees that could be prescribed under regulations. The AGS advice referred to the statement of Gibbs J in *General Practitioners Society v Commonwealth* (1980) 145 CLR 532 in which his honour said at 562 'an Act which gave power by regulation to impose a tax would itself be an Act imposing taxation'. The advice considered that while the level of the charges actually set out in the Australian Radiation Protection and Nuclear Safety (Licence Charges) Regulations 2000 might be consistent with a fee for service, this did not alter the fact the Charges Act itself was an Act imposing a tax. The AGS therefore concluded that 'the charges must, unless there is some contrary intention, be characterised as amounting to taxation'.

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Main Provisions

Commencement

Item 2 provides that the Bill is taken to have retrospectively commenced on 5 February 1999, the date on which *Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998* came into force.

Schedule 1

Item 1 of Schedule 1 inserts a **new section 5A**. **New subsection 5A(1)** provides that a holder of a facility or source licence is liable to pay the 'charge imposed' by the *Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998* even if another law otherwise exempts them from paying 'taxes or charges'. However, this general rule does not apply if another law **specifically** exempts a person or organisation from the *Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998*: **new subsection 5A(2)**.

Concluding Comment

It is arguable that the principal case that the AGS cites in its advice (*Practitioners Society v Commonwealth*) is not a particularly strong authority for the conclusion reached by the AGS. Neither Gibbs J or Aiken J (his honour was also cited in the AGS advice) appear to say in *Practitioners Society v Commonwealth* that a charge must *necessarily* be a tax if the relevant authorising Act was intended by Parliament to be a law imposing taxation. More recent cases such as *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 concentrate on the nature of the relevant charges to determine whether they are in fact taxes rather than, as in the AGS advice, reaching a conclusion primarily by considering the nature of the authorising Act.

Finally, as an aside, neither the Bill's second reading speech or Explanatory Memorandum provide any indication if the Commonwealth has conducted any review as to whether there are any more types of charges or fees authorised by other Commonwealth laws that might, on the basis of the AGS advice, be taxes.

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Endnotes

- 1 In general, source licences cover apparatus or material that emit or are capable of emitting ionizing radiation.
- 2 Facility licences would cover nuclear reactors, premises producing radioisotopes, nuclear waste storage or disposal sites etc. Whether a licence is required may depend on the 'activity level' of the radioactive material at the facility.
- 3 ARPANSA 2000-2001 *Annual report* p. 75.
- 4 Part of the Environment and Heritage Portfolio.
- 5 The Minister's second reading speech introducing the Charges Act specifically identifies the annual charge as a tax: see House of Representatives *Debates* 11 November 1998 p. 90. However, Parliament did not acknowledge or address this issue in debating the Bill.

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