SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTH REPORT

OF

2005

15 June 2005

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MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator B Mason (Deputy Chair)
Senator G Barnett
Senator D Johnston
Senator G Marshall
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

FIFTH REPORT OF 2005

The Committee presents its Fifth Report of 2005 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:

Asbestos-related Claims (Management of Commonwealth Liabilities) Bill 2005

New International Tax Arrangements (Foreign-owned Branches and Other Measures) Bill 2005

Payment Systems (Regulation) Amendment Bill 2005

Superannuation Bill 2005

Asbestos-related Claims (Management of Commonwealth Liabilities) Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2005*. The Minister for Employment and Workplace Relations responded to the Committee's comments in a letter received on 14 June 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 5 of 2005

Introduced into the House of Representatives on 25 May 2005
Portfolio: Employment and Workplace Relations

Background

According to the Minister's second reading speech, the bill 'will allow Comcare to manage all asbestos-related claims brought at common law against the Government.' This follows the recommendation of an interdepartmental committee established in 2002, which recommended establishing a central unit within Comcare to manage all such claims.

The bill allows Comcare to assume liability for all such claims, provides Comcare with an additional function of managing that liability and makes a special appropriation to enable Comcare to meet those liabilities.

The bill was introduced with the Asbestos-related Claims (Management of Commonwealth Liabilities) (Consequential and Transitional Provisions) Bill 2005.

Special appropriations – Audit Report No. 15 of 2004-05
Clause 8

Clause 8 of this bill appropriates to Comcare out of Consolidated Revenue 'such amounts as are necessary to enable Comcare to discharge any liability' transferred to it as a result of the operation of this measure. This appears to be a special appropriation of the kind referred to by the Auditor-General in Audit Report No. 15 of 2004-05.

In that report, the Audit Office concluded, at page 12, that 'widespread shortcomings have existed in the management and disclosure of Special Appropriations' and, at page 14, that 'there are many important considerations of appropriate accountability, including transparency, in relation to the Parliament.'

Under paragraph (v) of its terms of reference, the Scrutiny of Bills Committee reports on clauses of bills which 'insufficiently subject the exercise of legislative power to parliamentary scrutiny'. The appropriation of money from consolidated revenue is a legislative function. The use of special appropriations may limit accountability and scrutiny by denying the Parliament the opportunity to approve expenditure through its annual appropriations processes.

In the light of the report, and the subsequent debate in the Senate, the Committee determined to keep a watching brief on the use of special appropriations. The Committee does not question the need to ensure the liabilities dealt with by this bill are properly met, only whether the use of a special appropriation is appropriate.

The bill provides for the centralisation of liability for asbestos-related claims in one agency. There is no indication in the explanatory memorandum how these liabilities are currently met and, in particular, whether the mechanism in the bill merely replaces special appropriations currently contained in other legislation. If that is the case, the question which arises is whether the provisions establishing those appropriations are to be repealed. If, however, liabilities are currently met out of ordinary appropriations, then it would appear that the mechanism in the bill *will* operate to reduce parliamentary scrutiny.

Accordingly, the Committee **seeks from the Minister** an explanation justifying the inclusion of a special appropriation in the bill and the exclusion of that appropriation from subsequent parliamentary scrutiny and renewal through the ordinary appropriations process.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

> Funding for asbestos settlements is currently met through a number of mechanisms including the operation of trust accounts and by inclusion in annual appropriations.

In most cases, no specific provision is made in appropriations that would currently allow for scrutiny of asbestos related liabilities. The transfer of all liabilities to Comcare and the creation of specific outcomes and outputs will increase the level of scrutiny available.

The two agencies which do have funds set aside for asbestos claims are the Department of Finance and Administration and the Stevedoring Industry Finance Committee, which is in the Transport portfolio. The Finance portfolio will return its trust account funds to Consolidated Revenue, and does not have any associated legislation. The remaining funds of the SIFC will be returned to the Commonwealth when the asbestos legislation has commenced. The SIFC legislation will be repealed by the *Asbestos Related Claims (Management of Commonwealth Liabilities) (Consequential and Transitional Provisions) Bill 2005* following the commencement of the asbestos legislation.

Until recently, actuarial assessments of asbestos liabilities have not been made. Regular actuarial assessment will be undertaken as part of the centralisation of asbestos claims management and policy responsibilities. This practice is consistent with Comcare's $1.6 billion workers' compensation claims management activities. An improved measure of accountability is the comparison, over time, of estimates to actual expenditure.

The nature of asbestos related diseases is such that expenditure on settlements in a given year cannot be predicted with a high degree of accuracy. This makes it difficult to determine a level of appropriation necessary to settle claims. It is important that funding arrangements do not limit or delay claimant access to entitlements.

Comcare participated in the Australian National Audit Office (ANAO) audit of the Financial Management of Special Appropriations (Audit report No. 15 2004-05). In this audit there was only one minor finding for Comcare, which related to disclosure. In all other respects, the ANAO found that Comcare's management of Special Appropriations was appropriate.

The Committee thanks the Minister for this response, and for the explanation of the mechanisms under which agencies meet liabilities for asbestos-related claims.

As noted in *Alert Digest No. 5 of 2005*, the Committee does not question the need to ensure that these liabilities are properly met, only whether the use of a special appropriation is appropriate. The Committee considers that where a legislative proposal contains a special appropriation the Parliament should consider whether that provision will operate to reduce parliamentary scrutiny.

In this case, the Committee notes the Minister's suggestion that 'the transfer of all liabilities to Comcare and the creation of specific outcomes and outputs will increase the level of scrutiny available.' The Committee also notes the difficulty in determining 'a level of appropriation necessary to settle claims.'

In the circumstances, the Committee makes no further comment on this provision.

New International Tax Arrangements (Foreign-owned Branches and Other Measures) Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2005*. The Minister for Revenue and Assistant Treasurer responded to the Committee's comments in a letter dated 30 May 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 4 of 2005

[Introduced in the House of Representatives 17 March 2005. Portfolio: Treasury]

The bill contains five schedules, proposing amendments to four bills, arising out of the Government's review of international tax arrangements. The amendments deal with:

- the taxation treatment of dividends received by Australian branches of non-resident entities;
- controlled foreign companies rules;
- the taxation treatment of Australian branches of foreign non-bank financial institutions;
- the taxation treatment of employee shares and rights where individuals move between countries; and
- an error in the application of amendments contained in a previous instalment of reforms.

Retrospective application
Schedule 2, items 6, 7, 8 and 10

By virtue of subitem 11(2) of Schedule 2, the amendments proposed by items 6, 7, 8 and 10 of that Schedule would apply 'to things happening on or after 1 July 2004.' 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.

In this case, it appears from the explanatory memorandum that those amendments correct 'a deficiency in the law relating to "adjusted distributable profits" when a controlled foreign company changes residence from an unlisted country to a listed country or Australia.' The explanatory memorandum does not, however, indicate whether this amendment will have any financial impact. Since the amendment is said to correct a deficiency in the law, it may be assumed that it has no financial impact, but the Committee **seeks the Minister's assurance** that no-one will be disadvantaged by the retrospective application of the provisions.

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

> The amendments referred to correct a technical deficiency in the laws relating to the definition of 'adjusted distributable profits', a concept relevant to the operation of Australia's international taxation laws. Although the amendments apply retrospectively, they correct an unintended consequence and, as a result, have no financial impact nor do they disadvantage taxpayers.
>
> I trust this information will be of assistance to the Committee.

The Committee thanks the Minister for this assurance.

As the Committee has noted on many occasions, where there is a proposal for legislation to have retrospective effect, the explanatory memorandum should set out in detail the reasons that retrospectivity is sought and whether it adversely affects any person. The inclusion of that information in explanatory memoranda alleviates the need for correspondence on such matters.

The Committee makes no further comment on this provision.

Payment Systems (Regulation) Amendment Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2005*. The Parliamentary Secretary to the Treasurer responded to the Committee's comments in a letter dated 6 April 2005 and received on 10 June 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 3 of 2005

[Introduced in the House of Representatives 10 March 2005. Portfolio: Treasury]

The Reserve Bank of Australia (RBA) has established an interchange fees standard for participants in credit card schemes. The bill amends the *Payment Systems (Regulation) Act 1998* to ensure that conduct of participants which complies with the standard is authorised for the purposes of the *Trade Practices Act 1974*. This avoids the risk that participants complying with the standard would be engaging in restrictive trade practices, in contravention of Part IV of that Act.

Incorporation of extrinsic material
Proposed new subsection 18A(2)

Item 1 of Schedule 1 to this bill proposes a new subsection 18A(1), which would authorise certain conduct to which 'an interchange fees standard applies'. Proposed subsection 18A(2) defines ***interchange fees standard*** by adopting the existing RBA standard 'as amended and in force from time to time' [paragraph (a)], and providing for the adoption – on the same basis – of other standards specified by regulations [paragraph (b)].

The Committee routinely draws attention to provisions which seek to incorporate into delegated legislation material 'as in force from time to time' where that incorporation involves material which appears not to be subject to sufficient parliamentary scrutiny.

A similar concern may arise in respect of the adoption of the existing RBA standard 'as amended and in force from time to time'. The question turns on whether the standard, and any amendment to the standard, is subject to sufficient parliamentary scrutiny. This will be the case if the standard (and any amendment to that standard) is a legislative instrument under the *Legislative Instruments Act 2003* (LIA) and, under that Act, subject to the usual tabling and disallowance regime, including the oversight of the Senate Regulations and Ordinances Committee.

It appears that the standard meets the definition of a ***legislative instrument*** in section 5 of the LIA, but the Committee **seeks the Minster's advice** as to whether the standard is in fact a legislative instrument and whether any amendment to the standard would be subject to the usual tabling and disallowance regime set out in that Act.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Parliamentary Secretary

I can confirm that the Reserve Bank standards made under section 18 of the *Payment Systems (Regulation) Act 1998* (PSRA) are legislative instruments for the purposes of section 5 of the *Legislative Instruments Act 2003* (LIA) and are required to be tabled in accordance with section 38 of the LIA.

The Reserve Bank may, however, set standards under section 18 of the PSRA without Parliament having the ability to overturn or limit the period of their operation. Sections 44 and 54 of the LIA provide that 'standards determined, or instruments varying or evoking such standards, under section 18 … of the Payment Systems (Regulation) Act 1998' are legislative instruments that are not subject to disallowance or 'sunsetting'. Such standards include the Reserve Bank's interchange fee standards.

I do not consider that the application of the proposed legislative amendments to Reserve Bank interchange fee standards made under section 18 of the PSRA 'as amended or in force from time to time' should be a matter of concern for the Committee.

The PSRA was enacted by Parliament in accordance with the recommendations of the Financial System Inquiry, with the fundamental goals of increasing competition and improving efficiency in the financial system, while preserving its integrity, security and fairness. As a means of achieving those objectives, the Reserve Bank was given the authority to designate a payment system (where it considered this to be in the public interest). The Reserve Bank may set an access regime, determine standards, give enforceable directions and arbitrate on disputes in relation to designated payments systems.

The Reserve Bank is currently pursuing a broad reform agenda for the Australian payments system to provide consumers with a cheaper, more transparent and more competitive market for these services. To date, this has included the establishment of interchange fee standards for participants in 'four-party' credit card schemes (i.e. Bankcard, MasterCard and Visa). The Reserve Bank has also designated the EFTPOS and Visa Debit payment systems and has gazetted proposals for interchange fee standards for those systems.

The amendments contained in the Payment Systems (Regulation) Amendment Bill 2005 merely address an unintended effect that flows from the interaction of the standard setting powers conferred on the Reserve Bank under the PSRA and the restrictive trade practices provisions contained in Part IV of the *Trade Practices Act 1974*. A temporary measure to address this conflict has been adopted under the Payment Systems (Regulation) Regulations 2003 but is due to expire on 30 June 2005.

I note that the Explanatory Memorandum to the Legislative Instruments Bill 2003 indicates that a number of potential rationales exist for the exclusion of such standards from disallowance. These include 'where there is an alternate parliamentary role in relation to that type of instrument' and 'where the rule-making process has been appropriately depoliticised'.

The Reserve Bank is the independent regulator of the payments system.

The Payments System Board (PSB) is responsible for ensuring that the Reserve Bank regulates the payments system in accordance with its charter; balancing efficiency, competition and stability objectives (see subsection 10B(3) of the *Reserve Bank Act 1959* attached). The PSB is also required to make regular, detailed public reports on its operations and is answerable to the Parliament through the Treasurer as responsible Minister. This provides accountability of the Reserve Bank and allows for scrutiny on the effectiveness and continued relevance of its regulatory approach.

In light of the nature of the proposed amendments, the government considers that the level of parliamentary scrutiny of Reserve Bank interchange fee standards should not affect the passage of the Payment Systems (Regulation) Amendment Bill 2005. Further, given the independence of the Reserve Bank, the accountability measures provided by the operation of the PSB, and the determination of Parliament that Reserve Bank standards should not be subject to disallowance (or 'sunsetting'), the Government also considers that the level of parliamentary scrutiny that currently applies to Reserve Bank interchange fee standards is sufficient.

I trust this information will be of assistance to the Committee.

The Committee thanks the Parliamentary Secretary for this detailed response.

The Committee makes no further comment on this provision.

Superannuation Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2005*. The Minister for Finance and Administration responded to the Committee's comments in a letter dated 14 June 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 5 of 2005

Introduced into the House of Representatives on 12 May 2005
Portfolio: Finance and Administration

Background

The Public Sector Superannuation Accumulation Plan (PSSAP) will be established as a fully-funded accumulation scheme for new Australian Government employees and office holders (and certain other prescribed persons) from 1 July 2005. The bill, together with the Superannuation (Consequential Amendments) Bill 2005, provides for the separation of the PSSAP from the Public Sector Superannuation Scheme, allowing it to operate on the same basis as similar superannuation schemes.

The bill provides the framework for Australian Government employers to offer employees and office holders with choice of fund and also provides that the PSSAP will be the 'default' fund for people employed under the *Public Service Act 1999* and certain other people prescribed by the Minister.

Parliamentary scrutiny
Subclause 10(2)

Subclause 10(2) provides that the Trust Deed by which the Public Sector Superannuation Accumulation Plan is established is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*, but that section 42 of that Act does not apply, with the result that the Trust Deed is not disallowable.

The Committee regards that provision, by itself, as unexceptionable: section 44 of the Legislative Instruments Act generally exempts legislative instruments relating to superannuation from the disallowance provisions of the Act. However, clause 11 of the bill provides that **amendments** of the Trust Deed are legislative instruments and that '(4) Despite anything in section 44 of the *Legislative Instruments Act 2003*' such amendments *are* subject to disallowance. The explanatory memorandum does not provide any reason for the original Trust Deed not being subject to disallowance, but any amendments thereof being subject to such disallowance.

The Committee **seeks the Minister's advice** as to why, if amendments of the Trust Deed are to come under the scrutiny of the Regulations and Ordinances Committee, the Trust Deed itself is not subject to the same parliamentary oversight.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Committee has noted that the Trust Deed and Rules to be established under section 10 of the Bill would not be subject to disallowance by the Parliament. It is intended that the Bill and the Trust Deed made under the Bill will replicate the *Superannuation Act 1990* (the 1990 Act), the 20th Amending Deed and any subsequent Amending Deed under that Act, which will establish the PSS Accumulation Plan (PSSAP) as a sub plan of the Public Sector Superannuation Scheme (PSS) from 1 July 2005.

The Bill will provide that the PSSAP is to be established by Trust Deed as a scheme separate from the PSS. As far as practicable, it is intended that the Trust Deed to be made under the Bill would provide the same superannuation arrangements as are currently reflected in the 20th Amending Deed made under the 1990 Act and any subsequent Amending Deeds that deal with the PSSAP as a sub plan of the PSS.

The 20th Amending Deed was developed after extensive consultation and agreement with stakeholders, including the PSS Board and the Community and Public Sector Union and similar consultation will be undertaken for any subsequent Deed relating to the PSSAP. The 20th Amending Deed was tabled in Parliament as a disallowable instrument on 24 March 2004 and was not subject to a motion of disallowance. The Deed to be made under section 10 of the Bill is being developed in consultation with the above stakeholders.

It is intended that the Bill will commence no later than 30 June 2005 in order for the relevant Deed to be made and have effect by 1 July 2005 after agreement is received from relevant stakeholders. The details of the PSSAP are to be provided for in the Trust Deed. If the Deed was then to be disallowed by the Parliament when it next sits Australian Government employees who are subjected to the new Act would not have the superannuation arrangements that have been agreed with trustees and employee representatives and that have previously been accepted by the Parliament.

The *Legislative Instruments Act 2003* (LIA) provides that instruments, other than regulations, relating to superannuation are not subject to disallowance unless otherwise provided. It is entirely consistent with the LIA for the initial deed not to be subject to disallowance and is supportable because of the stakeholder agreement and parliamentary scrutiny referred to earlier. Although the initial Deed is not to be subject to disallowance, it was considered appropriate for any subsequent Amending Deeds to be subject to disallowance by the Parliament, as provided for in subclause 11(3) of the Bill. This would continue the arrangements that apply to amending Deeds for the PSS made under the 1990 Act and would allow the Parliament to scrutinise any future changes to superannuation for Australian Government employees.

The Committee thanks the Minister for this detailed response. The Committee notes especially the assurance that '[a]s far as practicable, it is intended that the Trust Deed to be made under the Bill would provide the same superannuation arrangements as are currently reflected in the 20th Amending Deed.' The Committee also notes that the 20th Amending Deed has been the subject of the usual tabling and disallowance regime.

In the circumstances, the Committee makes no further comment on these provisions.

'Henry VIII' clause
Clause 22

A Henry VIII clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to Henry VIII clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee.

Clause 22 contains such a clause. The effect of subclause 22(2) is to permit the amendment of subclause (1) by regulation. Any such regulation would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* and to scrutiny by the Regulations and Ordinances Committee. This level of scrutiny would often meet this Committee's concerns. In this case, however, the effect of such a regulation would be to expose the Board of the PSSAP, and the Fund itself, to some form of taxation from which subclause 22(1) provides exemption. In effect, subclause 22(2) allows for the imposition of taxation by regulation.

One concern which the Committee has regularly raised in relation to the imposition of any form of taxation or levy by regulation is that the regulation takes effect as soon as it is made, and might not be disallowed for many sitting days after it has been made. Were a regulation under subclause 22(2) to be made, for instance, soon after the Parliament rose for the usual winter recess, the relevant tax could have effect for a number of months before a disallowance motion was considered by the Senate. In the meantime, the tax would have been validly levied, and could not be refunded without further Parliamentary intervention.

The Committee notes that similar provisions exist in relation to other superannuation schemes, for instance in section 26 of the *Superannuation Act 1990*. Nonetheless, the Committee **seeks the Minister's advice** as to whether it is appropriate to provide for the imposition of taxation through delegated legislation in this manner.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, 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 also commented on clause 22 of the Bill, which allows subclause 22(1) to be amended by regulation. This allows regulations to be made to remove an exemption of the PSS Board, in respect of its role in relation to the PSSAP, or the PSSAP Fund from certain taxation.
>
> As the Committee recognises, subclause 22(2) replicates equivalent provisions in the 1990 Act. This is to ensure that the taxation arrangements applying to the PSS Board, in respect of the PSSAP, and the PSSAP Fund are the same as would have applied had the PSSAP otherwise commenced as a sub plan of the PSS. The

equivalent power in the 1990 Act has been used once since 1990 in a circumstance where it was not possible for the Act to be amended in time to ensure that the Goods and Services Tax would apply to the Board and Fund on the same basis as it was to apply to other superannuation trustees and funds.

However, I have noted the Committee's concerns that regulations could alter the taxation arrangements of the Fund before the Parliament has had time to consider the instrument. As a result, I propose that any regulations made under subsection 22(2) of the Bill would have a commencement date no earlier than the end of the period for which the instrument is subject to disallowance.

The Committee thanks the Minister for this response. The Committee particularly thanks the Minister for proposing that regulations made under this subsection not commence until the relevant disallowance period expires. This approach adds a measure of certainty and meets the Committee's concerns.

The Committee makes no further comment on this provision.

Robert Ray
Chair

THE HON KEVIN ANDREWS MP
Minister for Employment and Workplace Relations
Minister Assisting the Prime Minister for the Public Service
Member for Menzies

Senator R Ray
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

Thank you for the "Alert Digest" of 1 June 2005 which was forwarded to my office by the Secretary of the Standing Committee for the Scrutiny of Bills, Richard Pye. The "Alert Digest" invites me to address the inclusion of a special appropriation provision in the *Asbestos-related Claims (Management of Commonwealth Liabilities) Bill 2005*.

Funding for asbestos settlements is currently met through a number of mechanisms including the operation of trust accounts and by inclusion in annual appropriations. In most cases, no specific provision is made in appropriations that would currently allow for scrutiny of asbestos related liabilities. The transfer of all liabilities to Comcare and the creation of specific outcomes and outputs will increase the level of scrutiny available.

The two agencies which do have funds set aside for asbestos claims are the Department of Finance and Administration and the Stevedoring Industry Finance Committee, which is in the Transport portfolio. The Finance portfolio will return its trust account funds to Consolidated Revenue, and does not have any associated legislation. The remaining funds of the SIFC will be returned to the Commonwealth when the asbestos legislation has commenced. The SIFC legislation will be repealed by the *Asbestos Related Claims (Management of Commonwealth Liabilities) (Consequential and Transitional Provisions) Bill 2005* following the commencement of the asbestos legislation.

Until recently, actuarial assessments of asbestos liabilities have not been made. Regular actuarial assessment will be undertaken as part of the centralisation of asbestos claims management and policy responsibilities. This practice is consistent with Comcare's $1.6 billion workers' compensation claims management activities. An improved measure of accountability is the comparison, over time, of estimates to actual expenditure.

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The nature of asbestos related diseases is such that expenditure on settlements in a given year cannot be predicted with a high degree of accuracy. This makes it difficult to determine a level of appropriation necessary settle claims. It is important that funding arrangements do not limit or delay claimant access to entitlements.

Comcare participated in the Australian National Audit Office (ANAO) audit of the Financial Management of Special Appropriations (Audit report No.15 2004-05). In this audit there was only one minor finding for Comcare, which related to disclosure. In all other respects, the ANAO found that Comcare's management of Special Appropriations was appropriate.

Yours sincerely

KEVIN ANDREWS

MINISTER FOR REVENUE AND ASSISTANT TREASURER
The Hon Mal Brough MP

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31 MAY 2005
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for the Scrutiny of Bills

30 MAY 2005

Senator the Hon Robert Ray
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

New International Tax Arrangements

I refer to the letter of 12 May 2005 from Mr Richard Pye, Secretary, Senate Standing Committee for the Scrutiny of Bills to the Treasurer, concerning amendments contained in the New International Tax Arrangements (Foreign-owned Branches and Other Measures) Bill 2005.

In his letter, the Secretary seeks an assurance from the Government that the retrospective application of particular amendments in the Bill that were identified in the Scrutiny of Bills Alert Digest (No. 4) 2005 do not disadvantage taxpayers.

The amendments referred to correct a technical deficiency in the law relating to the definition of 'adjusted distributable profits', a concept relevant to the operation of Australia's international taxation laws. Although the amendments apply retrospectively, they correct an unintended consequence and, as a result, have no financial impact nor do they disadvantage taxpayers.

I trust this information will be of assistance to the Committee.

Yours sincerely

MAL BROUGH

THE HONOURABLE CHRIS PEARCE MP

Parliamentary Secretary to the Treasurer
Federal Member for Aston

- 6 APR 2005

Senator the Hon Robert Ray
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

I refer to the letter of 17 March 2005 from Mr Richard Pye, Secretary of the Senate Standing Committee for the Scrutiny of Bills, to the Treasurer, concerning the Payment Systems (Regulation) Amendment Bill 2005. The Treasurer has asked me to respond on his behalf.

I can confirm that the Reserve Bank standards made under section 18 of the *Payment Systems (Regulation) Act 1998* (PSRA) are legislative instruments for the purposes of section 5 of the *Legislative Instruments Act 2003* (LIA) and are required to be tabled in accordance with section 38 of the LIA.

The Reserve Bank may, however, set standards under section 18 of the PSRA without Parliament having the ability to overturn or limit the period of their operation. Sections 44 and 54 of the LIA provide that 'standards determined, or instruments varying or evoking such standards, under section 18 ... of the Payment Systems (Regulation) Act 1998' are legislative instruments that are not subject to disallowance or 'sunsetting'. Such standards include the Reserve Bank's interchange fee standards.

I do not consider that the application of the proposed legislative amendments to Reserve Bank interchange fee standards made under section 18 of the PSRA 'as amended or in force from time to time' should be a matter of concern for the Committee.

The PSRA was enacted by Parliament in accordance with the recommendations of the Financial System Inquiry, with the fundamental goals of increasing competition and improving efficiency in the financial system, while preserving its integrity, security and fairness. As a means of achieving those objectives, the Reserve Bank was given the authority to designate a payment system (where it considered this to be in the public interest). The Reserve Bank may set an access regime, determine standards, give enforceable directions and arbitrate on disputes in relation to designated payment systems.

The Reserve Bank is currently pursuing a broad reform agenda for the Australian payments system to provide consumers with a cheaper, more transparent and more competitive market for these services. To date, this has included the establishment of interchange fee standards for participants in 'four-party' credit card schemes (i.e. Bankcard, MasterCard and Visa). The Reserve Bank has also

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designated the EFTPOS and Visa Debit payment systems and has gazetted proposals for interchange fee standards for those systems.

The amendments contained in the Payment Systems (Regulation) Amendment Bill 2005 merely address an unintended effect that flows from the interaction of the standard setting powers conferred on the Reserve Bank under the PSRA and the restrictive trade practices provisions contained in Part IV of the *Trade Practices Act 1974*. A temporary measure to address this conflict has been adopted under the Payment Systems (Regulation) Regulations 2003 but is due to expire on 30 June 2005.

I note that the Explanatory Memorandum to the Legislative Instruments Bill 2003 indicates that a number of potential rationales exist for the exclusion of such standards from disallowance. These include 'where there is an alternate parliamentary role in relation to that type of instrument' and 'where the rule-making process has been appropriately depoliticised'.

The Reserve Bank is the independent regulator of the payments system.

The Payments System Board (PSB) is responsible for ensuring that the Reserve Bank regulates the payments system in accordance with its charter; balancing efficiency, competition and stability objectives (see subsection 10B(3) of the *Reserve Bank Act 1959* attached). The PSB is also required to make regular, detailed public reports on its operations and is answerable to the Parliament through the Treasurer as responsible Minister. This provides accountability of the Reserve Bank and allows for scrutiny on the effectiveness and continued relevance of its regulatory approach.

In light of the nature of the proposed amendments, the Government considers that the level of parliamentary scrutiny of Reserve Bank interchange fee standards should not affect the passage of the Payment Systems (Regulation) Amendment Bill 2005. Further, given the independence of the Reserve Bank, the accountability measures provided by the operation of the PSB, and the determination of Parliament that Reserve Bank standards should not be subject to disallowance (or 'sunsetting'), the Government also considers that the level of parliamentary scrutiny that currently applies to Reserve Bank interchange fee standards is sufficient.

I trust this information will be of assistance to the Committee.

Yours sincerely

CHRIS PEARCE

enc

ATTACHMENT

RESERVE BANK ACT 1959

SECTION 10B - Functions of Payments System Board

(1) The Payments System Board has power to determine the Bank's payments system policy.

(2) The Payments System Board has power to take whatever action is necessary to ensure that the Bank gives effect to the policy it determines.

(3) It is the duty of the Payments System Board to ensure, within the limits of its powers, that:

(a) the Bank's payments system policy is directed to the greatest advantage of the people of Australia; and

(b) the powers of the Bank under the *Payment Systems (Regulation) Act 1998* and the *Payment Systems and Netting Act 1998* are exercised in a way that, in the Board's opinion, will best contribute to:

(i) controlling risk in the financial system; and

(ii) promoting the efficiency of the payments system; and

(iii) promoting competition in the market for payment services, consistent with the overall stability of the financial system; and

(c) the powers and functions of the Bank under Part 7.3 of the *Corporations Act 2001* are exercised in a way that, in the Board's opinion, will best contribute to the overall stability of the financial system.

SENATOR THE HON NICK MINCHIN

Minister for Finance and Administration
Deputy Leader of the Government in the Senate

14 JUN 2005

Senator the Hon Robert Ray
Chair of the Committee
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Robert,

I refer to the Secretary of your Committee's letter of 1 June 2005 inviting me to comment on the matters raised in the Committee's Alert Digest No. 5 of 2005 in relation to the Superannuation Bill 2005 (the Bill).

The Committee has noted that the Trust Deed and Rules to be established under section 10 of the Bill would not be subject to disallowance by the Parliament. It is intended that the Bill and the Trust Deed made under the Bill will replicate the *Superannuation Act 1990* (the 1990 Act), the 20th Amending Deed and any subsequent Amending Deed under that Act, which will establish the PSS Accumulation Plan (PSSAP) as a sub plan of the Public Sector Superannuation Scheme (PSS) from 1 July 2005.

The Bill will provide that the PSSAP is to be established by Trust Deed as a scheme separate from the PSS. As far as practicable, it is intended that the Trust Deed to be made under the Bill would provide the same superannuation arrangements as are currently reflected in the 20th Amending Deed made under the 1990 Act and any subsequent Amending Deeds that deal with the PSSAP as a sub plan of the PSS.

The 20th Amending Deed was developed after extensive consultation and agreement with stakeholders, including the PSS Board and the Community and Public Sector Union and similar consultation will be undertaken for any subsequent Deed relating to the PSSAP. The 20th Amending Deed was

tabled in Parliament as a disallowable instrument on 24 March 2004 and was not subject to a motion of disallowance. The Deed to be made under section 10 of the Bill is being developed in consultation with the above stakeholders.

It is intended that the Bill will commence no later than 30 June 2005 in order for the relevant Deed to be made and have effect by 1 July 2005 after agreement is received from relevant stakeholders. The details of the PSSAP are to be provided for in the Trust Deed. If the Deed was then to be disallowed by the Parliament when it next sits Australian Government employees who are subjected to the new Act would not have the superannuation arrangements that have been agreed with trustees and employee representatives and that have previously been accepted by the Parliament.

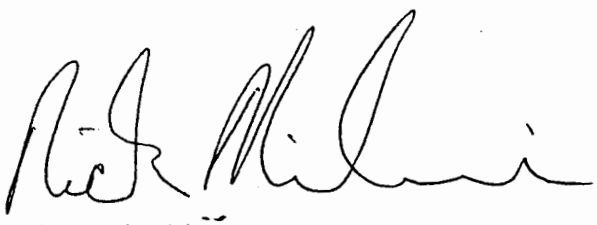
The *Legislative Instruments Act 2003* (LIA) provides that instruments, other than regulations, relating to superannuation are not subject to disallowance unless otherwise provided. It is entirely consistent with the LIA for the initial deed not to be subject to disallowance and is supportable because of the stakeholder agreement and parliamentary scrutiny referred to earlier. Although the initial Deed is not to be subject to disallowance, it was considered appropriate for any subsequent Amending Deeds to be subject to disallowance by the Parliament, as provided for in subclause 11(3) of the Bill. This would continue the arrangements that apply to amending Deeds for the PSS made under the 1990 Act and would allow the Parliament to scrutinise any future changes to superannuation for Australian Government employees.

The Committee has also commented on clause 22 of the Bill, which allows subclause 22(1) to be amended by regulation. This allows regulations to be made to remove an exemption of the PSS Board, in respect of its role in relation to the PSSAP, or the PSSAP Fund from certain taxation.

As the Committee recognises, subclause 22(2) replicates equivalent provisions in the 1990 Act. This is to ensure that the taxation arrangements applying to the PSS Board, in respect of the PSSAP, and the PSSAP Fund are the same as would have applied had the PSSAP otherwise commenced as a sub plan of the PSS. The equivalent power in the 1990 Act has been used once since 1990 in a circumstance where it was not possible for the Act to be amended in time to ensure that the Goods and Services Tax would apply to the Board and Fund on the same basis as it was to apply to other superannuation trustees and funds.

However, I have noted the Committee's concerns that regulations could alter the taxation arrangements of the Fund before the Parliament has had time to consider the instrument. As a result, I propose that any regulations made under subsection 22(2) of the Bill would have a commencement date no earlier than the end of the period for which the instrument is subject to disallowance.

Yours sincerely



Nick Minchin