SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRD REPORT

OF

2007

21 March 2007

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MEMBERS OF THE COMMITTEE

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

THIRD REPORT OF 2007

The Committee presents its Third Report of 2007 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:

ACIS Administration Amendment (Unearned Credit Liability) Bill 2007

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2007

Aviation Transport Security Amendment (Additional Screening Measures) Bill 2007

Bankruptcy Legislation Amendment (Debt Agreements) Bill 2007

Employment and Workplace Relations Legislation Amendment (Welfare to Work and Vocational Rehabilitation Services) Bill 2006

Tax Laws Amendment (2006 Measures No. 7) Bill 2006

ACIS Administration Amendment (Unearned Credit Liability) Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2007*. The Minister for Industry, Tourism and Resources responded to the Committee's comments in a letter dated 20 March 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 2 of 2007

Introduced into the House of Representatives on 7 February 2007
Portfolio: Industry, Tourism and Resources

Background

This bill amends the *ACIS Administration Act 1999* to provide the Commonwealth with the power to issue an Unearned Credit Liability (UCL) in circumstances where a registered Automotive Competitiveness and Investment Scheme (ACIS) participant has received credits to which it is not entitled.

Retrospective application
Schedule 1, item 4

Item 4 of Schedule 1 provides that the amendments made by the Schedule apply 'in relation to duty credits in respect of a quarter after the final quarter for ACIS Stage 1'. The purpose of the bill is to give the Commonwealth the power to claw back from an ACIS participant credits to which the participant was not entitled. Although there is no mention in the explanatory memorandum or the second reading speech of the date of termination of Stage 1 of ACIS, reference to subsection 4(1A) of the *ACIS Administration Act 1999* reveals that it ended on 31 December 2005. It therefore appears that this bill will operate retrospectively in relation to duty credits received since 1 January 2006.

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 **seeks the Minister's advice** as to whether this bill will operate retrospectively in relation to duty credits received since 1 January 2006 and, if so, whether it trespasses *unduly* on personal rights and liberties.

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

In response to the queries raised in the letter regarding the retrospectivity of the Bill, it is intended that the Bill apply in relation to duty credits in respect of a quarter after the final quarter for the Automotive Competitiveness and Investment Scheme (ACIS) Stage 1, that is from the beginning of ACIS Stage 2, commencing on 1 January 2006.

ACIS delivers assistance to eligible recipients in the automotive industry by way of duty credits on a quarterly basis. Claims are lodged by ACIS participants and these are paid through AusIndustry upon receipt of those claims, with a subsequent rigorous audit process employed to verify their validity. This arrangement was put in place at the request of the automotive industry to ensure the timely delivery of assistance to industry members.

Retrospective application of the amendment is necessary to ensure equity in the way in which credits are issued and that ACIS continues to operate in line with its original policy intent. In particular, retrospectivity is required to ensure that any credits issued for ineligible activities since the commencement of Stage 2 can be recovered by the Commonwealth. Given that ACIS is a capped Scheme, it is important for equity that ineligible claims be recovered and redistributed to participants submitting eligible claims.

Retrospectivity also ensures that ACIS assistance remains consistent with the objective of the *ACIS Administration Act 1999.* That is, to provide transitional assistance to encourage competitive investment and innovation in the Australian automotive industry in order to achieve sustainable growth, both in the Australian market and internationally, in the context of trade liberalisation.

Consequently, the retrospective nature of the Bill will provide certainty in the administration of ACIS for the participants and prevent delays in providing assistance. The Bill will in no way trespass on personal rights and liberties.

The Committee thanks the Minister for this response and notes that it would have been helpful if the date of application of the amendments made by Schedule 1 had been included in the explanatory memorandum to the bill, along with an explanation for the retrospectivity.

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2007*. The Minister for Justice and Customs responded to the Committee's comments in a letter dated 13 March 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 2 of 2007

Introduced into the House of Representatives on 15 February 2007
Portfolio: Justice and Customs

Background

This bill makes a number of technical amendments to the *Administrative Decisions (Judicial Review) Act 1977*, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the *Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006*, the *Commonwealth Electoral Act 1918*, the *Financial Transactions Reports Act 1988*, the *Inspector-General of Intelligence and Security Act 1986* and the *Surveillance Devices Act 2004* to ensure the effective operation of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and to address concerns raised by the Legal and Constitutional Affairs Committee and the Scrutiny of Bills Committee.

Retrospective commencement
Schedule 1

Item 7 in the table to subclause 2(1) of this bill provides that items 59 to 61 of Schedule 1 would commence retrospectively on 13 December 2006. 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, however, that these amendments are technical only, amending references in the *Financial Transactions Reports Act 1988* from the former title of Director of AUSTRAC to the current title of AUSTRAC CEO. It therefore appears that the amendments do not make any change in the substantive law.

The Committee further notes, however, that the explanatory memorandum makes no reference to the fact of the retrospective commencement, nor does it indicate the reason for 13 December 2006 being chosen as the date of that commencement. It is only by independent reference to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* that the reader discovers that the relevant provisions of that Act commenced on 13 December 2006. The Committee **seeks the Minister's advice** as to whether a better explanation of the retrospective commencement provisions, outlined at item 7 in the table to subclause 2(1), could be included in the explanatory memorandum.

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 Committee notes that item 7 in the table in subclause 2(1) of the Bill provides that items 59 to 61 of Schedule 1 of the Bill would commence retrospectively on 13 December 2006 and may breach principle 1(a)(i) of the Committee's terms of reference. The Committee seeks my advice on whether a better explanation of the retrospective commencement of items 59, 60 and 61 could be included in the explanatory memorandum.

The *Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006* contained a number of items changing references to the Director of AUSTRAC to AUSTRAC CEO in the *Financial Transaction Reports Act 1988* (FTR Act). Through a drafting oversight references to 'the Director' in paragraph 28(1)(a), subsection 29(1) and section 30(1) of the FTR Act were not changed. Items 59-61 correct that oversight.

I agree that it is appropriate that some additional wording be included in the explanatory memorandum on item 7 in the table in subclause 2(1) and during the Second Reading debate of the Bill in the Senate I propose to table a supplementary explanatory memorandum which would include some additional wording. The

additional wording that will be inserted at the end of the second paragraph under the heading **Clause 2** will be as follows:

> Items 59 to 61 inclusive of Schedule 1 of the Bill which are referred to in item 7 of the table are expressed to commence on 13 December 2006 because that is the date on which all other references in the *Financial Transaction Reports Act 1988* to the former title of Director of AUSTRAC were amended to the current title of AUSTRAC CEO. Items 59 to 61 inclusive are technical amendments which do not make any change in the substantive law.

I also propose that the supplementary explanatory memorandum insert some additional wording in the explanatory memorandum at the end of the current wording under the heading **Items 59, 60 and 61** along the following lines:

> Items 59, 60 and 61 commence on 13 December 2006 (see the explanatory memorandum on clause 2).

Thank you for drawing this matter to my attention.

The Committee thanks the Minister for this response and for undertaking to make corrections to the explanatory memorandum to address the Committee's concerns.

Aviation Transport Security Amendment (Additional Screening Measures) Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2007*. The Minister for Transport and Regional Services responded to the Committee's comments in a letter dated 16 March 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 2 of 2007

Introduced into the House of Representatives on 14 February 2007
Portfolio: Transport and Regional Services

Background

This bill amends the *Aviation Transport Security Act 2004* in order to implement recommendations of the International Civil Aviation Organization to enhance security screening measures at international airports.

The bill allows for the making of regulations to determine 'things that must not pass through a screening point', allowing for limits to be placed on the amount of liquids, aerosols and gels that can be taken through an international screening point by people flying to or from Australia. The bill also allows for screening officers to conduct frisk searches if necessary and with consent.

Strict liability
Schedule 1, item 5

Proposed new subsection 95C(5) of the *Aviation Transport Security Act 2004*, to be inserted by item 5 of Schedule 1, would render the offence created by proposed new subsection 95(3) an offence of strict liability.

The only person who is capable of committing the proposed offence to be created by new subsection 95(3) is a screening officer at an airport, and the offence consists of requiring a passenger to undergo a frisk search, or conducting a frisk search without the consent of the subject, or conducting a frisk search to an extent greater than is necessary in the circumstances.

However, the explanatory memorandum makes no mention of proposed new subsection 95C(5), and there is consequently no indication of whether the Minister considered the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in considering whether strict criminal liability was necessary in these circumstances. The Committee **seeks the Minister's advice** as to whether an explanation could be included in the explanatory memorandum outlining why the offence created by proposed new subsection 95(3) is an offence of strict liability.

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 Committee raised two matters about the content of the explanatory memorandum in the Alert Digest No. 2 of 2007.

Screening officers at airports perform an essential role in ensuring that prohibited items are not carried into the secure areas of airports and onto aircraft. Screening officers are required to be trained to operate within a clearly defined legal framework that balances the rights and legitimate expectations of the public against the need to protect civil aviation. In maintaining this balance, it is appropriate for the legislation to provide screening officers with a strong incentive to refrain from acting in a capricious and unlawful manner. Proposed subsection 95C(5) achieves this objective by making the offence at s95C(3) a strict liability offence for a screening officer to require a person to undergo a frisk search, conduct a frisk search of a person or conduct the search beyond what is necessary to complete the proper screening of the person.

In practice, a screening officer should always have received appropriate training and so should never be able to claim that they were unaware of their obligations to people who are being screened. In cases where it can be shown that the screening officer had not been given the required training, compliance action would normally be taken against the employer instead of the screening officer.

My Department followed the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* and consulted with the Criminal Justice Division of the Attorney-General's Department for the proposed strict liability offence in 95C(5). The Attorney-General's Department approved the introduction of a strict liability offence in s95C(5) on the basis that it mirrors the existing legislation in ss 95(3), 95(5), 95B(3) and 95B(5).

I trust this information is of assistance to the Committee.

The Committee thanks the Minister for this response and notes that it would have been helpful if an explanation had been included in the explanatory memorandum to the bill.

Bankruptcy Legislation Amendment (Debt Agreements) Bill 2007

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2007*. The Attorney-General responded to the Committee's comments in a letter dated 14 March 2007. A copy of the letter is attached to this report.

Extract from Alert Digest No. 2 of 2007

Introduced into the House of Representatives on 15 February 2007
Portfolio: Attorney-General

Background

This bill amends the *Bankruptcy Act 1966* to introduce a registration system for debt agreement administrators. The bill:

- provides for increased regulation of debt agreement administrators and specifies their duties;
- requires the provision of certain information to both debtors and creditors to assist them to make decisions;
- provides procedures for varying, ending and terminating debt agreements, including in the event of default by the debtor; and
- clarifies and streamlines a number of provisions to improve the operation of the Act.

The bill also contains application and transitional provisions.

Strict liability
Schedule 1, item 19

Proposed new subsection 186N(7) of the *Bankruptcy Act 1966*, to be inserted by item 19 of Schedule 1, would make the offences created by proposed new subsections 186N(1), (3) and (5) offences of strict liability. The explanatory memorandum does not acknowledge the existence of new subsection (7), and there is consequently no indication of whether the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* was consulted when this provision was drafted. The Committee **seeks the Attorney-General's advice** as to whether an explanation could be included in the explanatory memorandum outlining why the offences created by proposed new subsections 186N(1), (3) and (5) are offences of strict liability.

Pending the Attorney-General's advice, 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.

Relevant extract from the response from the Attorney-General

I note the Committee's concerns about the lack of detail in the Explanatory Memorandum to that Bill in relation to the amendment contained in Schedule 1, item 19.

The amendment in question is part of the new regulatory regime for debt agreement administrators. The Bill will insert new section 186N in the *Bankruptcy Act 1966* (the Act) which will require an administrator who becomes deregistered to return his or her certificate of registration to the Inspector-General in Bankruptcy. There will be offences for failing to comply with this requirement and, pursuant to proposed subsection 186N(7), these will be offences of strict liability.

The registration regime for debt agreement administrators is largely based on the existing regime for bankruptcy trustees. It is appropriate that administrators be subject to requirements similar to those applying to trustees and section 186N will replicate the requirement for a deregistered trustee to return his or her certificate of registration. That requirement currently appears in section 155J of the Act and provides that failure to comply is an offence of strict liability. It is important that a trustee or administrator who is no longer registered, perhaps because they have been deregistered for failing to properly perform their duties, cannot use the certificate to hold themselves out to be still registered. The registration regime is important to instil confidence that practitioners acting for the benefit of debtors and creditors have the necessary knowledge, skills and experience to perform their duties.

I have approved a correction to the Explanatory Memorandum adding an explanation of this provision which will be circulated when the Bill is introduced in the Senate.

The Criminal Justice Division of the Attorney-General's Department, which is responsible for the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers,* was consulted in the course of drafting the Bill and raised no concerns about the provisions.

The Committee thanks the Attorney-General for this response and for undertaking to add a correction to the explanatory memorandum when the bill is introduced into the Senate.

Employment and Workplace Relations Legislation Amendment (Welfare to Work and Vocational Rehabilitation Services) Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2007*. The Minister for Workforce Participation responded to the Committee's comments in a letter dated 22 February 2007.

In its *Second Report of 2007*, the Committee sought further advice from the Minister. The Minister responded to the Committee in a letter dated 15 March 2007. A copy of the letter is attached to this report.

Extract from the Second Report of 2007

Introduced into the House of Representatives on 7 December 2006
Portfolio: Employment and Workplace Relations

Background

This bill amends the *Disability Services Act 1986* to provide for the staged introduction of contestability in the provision of vocational rehabilitation services. The bill broadens the range of non-departmental organisations to which the Secretary may delegate powers under Part III of the Disability Services Act in relation to the provision of rehabilitation services by the Commonwealth.

The bill makes changes to the income test arrangements where a CDEP Scheme payment is payable and allows for financial case management debts to be deducted from social security payments.

The bill also contains application provisions and makes minor and technical amendments to the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* in relation to the application of Welfare to Work measures which commenced on 1 July 2006.

Insufficiently defined administrative power – wide discretion
Schedule 1, items 2 and 16

Proposed new paragraph 34(1)(a) of the *Disability Services Act 1986*, to be inserted by item 16 of Schedule 1, would permit the Secretary to the Department to 'delegate to an officer all or any of the powers of the Secretary under Part III' of that Act. Item 2 of Schedule 1 would amend section 4 of the *Disability Services Act 1986* to define **officer** as including a person or company who or which 'performs services on behalf of the Department under a contract made between [the person or company] and the Commonwealth' or an employee of such a person or company. The Secretary will therefore be given the power to delegate all or any of his or her powers to any employee of a company to which the Department has outsourced the provision of services, without reference to the capabilities or qualifications of such an employee. The Committee **seeks the Minister's advice** as to whether the very wide discretion given to the Secretary to the Department under this proposed new paragraph should not be limited in some way.

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)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

In broadening the ability of the Secretary to delegate his powers under Part III of the *Disability Services Act 1986* (DSA), a range of legislative and contractual safeguards will be put in place.

These include: (a) legislative guidelines which will be formulated to guide the Secretary in the administration of Part III of the DSA. Parliament will continue to have the ability to disallow these guidelines, consistent with the *Legislative Instruments Act 2003*; (b) a specific legislative safeguard in the Bill to ensure that in exercising any delegated powers, the delegate must comply with directions of the Secretary. Any decision made under Part III of the DSA will continue to be subject to the current review mechanisms including review by the Administrative Appeals Tribunal; and (c) contractual arrangements and programme procedures that will govern the day-to-day administration and decision-making of any person delegated the Secretary's powers.

The contractual requirements will set out in detail the manner in which any delegations are to be exercised and will also specify the standards of services to be observed; these include a Service Guarantee, Code of Practice and Performance

Reviews. In addition, Star Ratings (which provide a relative measure of the performance of the provider against key performance indicators) will be developed. Legislative Disability Services Standards must also be met in the provision of a rehabilitation program. Compliance with these standards is independently assessed.

I note the Committee's concerns about the Department outsourcing the provision of services 'without reference to the capabilities or qualifications' of providers. In assessing Vocational Rehabilitation Services tenders, organisations were asked to provide details of the qualifications and experience of their staff. This will be taken into account in assessing successful tenders.

Failure to meet these contractual or legislative standards can result in a range of penalties being applied, including termination of the contract, in whole or part; suspension of referrals of clients to providers; and reduction in, or suspension of business that is allocated to providers.

I can reassure the Committee that the Secretary's powers of delegation will be sufficiently limited by a range of legislative and contractual safeguards for any powers that the Secretary may delegate.

I trust this information is of assistance.

The Committee thanks the Minister for this response. The Committee notes the Minister's assurance that legislative guidelines will be formulated to guide the Secretary in the administration of part III of the *Disability Services Act 1986* and that these guidelines will be disallowable instruments under the *Legislative Instruments Act 2003*. However the Committee remains concerned about the contractual safeguards outlined by the Minister as neither the Committee nor the Senate as a whole will have any knowledge of the content of these contracts nor, possibly, how successful they are in ensuring that the delegations are kept within proper bounds.

The Committee therefore **seeks the Minister's further advice** regarding whether the legislative guidelines will include information on the proposed contractual safeguards, thus making them subject to the scrutiny of the parliament, or, if not, whether the Minister might give further consideration to limiting in some other way the very wide discretion given to the Secretary under proposed new paragraph 34(1)(a).

Pending the Minister's further advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the further response from the Minister

The exercise of any of the Secretary's powers under Part III of the *Disability Services Act 1986* (the DSA), including powers delegated (if any) to providers of Vocational Rehabilitation Services (VRS), will be guided and limited by a range of legislative and contractual safeguards.

It is worth noting that, in entering into arrangements for the provision of VRS in a contestable market, the Secretary is bound by the DSA to ensure that the objects of the DSA will be furthered (s. 3). These objects include the following:

(i) to promote services provided to persons with disabilities that:
   a. assist persons with disabilities to integrate in the community, and complement services available generally to persons in the community;
   b. assist persons with disabilities to achieve positive outcomes, such as increased independence, employment opportunities and integration in the community; and
   c. are provided in ways that promote in the community a positive image of persons with disabilities and enhance their self-esteem;

(ii) to ensure that the outcomes achieved by persons with disabilities by the provision of services for them are taken into account in the granting of financial assistance for the provision of such services;

(iii) to encourage innovation in the provision of services for persons with disabilities; and

(iv) to assist in achieving positive outcomes, such as increased independence, employment opportunities and integration in the community, for persons with disabilities who are of working age by the provision of comprehensive rehabilitation services.

It is also worth noting that the ability of the Secretary to delegate his powers under Part III of the DSA is similar in scope to his power to delegate under the *Social Security Act 1991*.

A key safeguard is that VRS providers must comply with the Disability Services Standards, which set out a range of standards that must be met in the provision of a rehabilitation programme. The Standards are a legislative instrument under s. 5A of the DSA, and are themselves disallowable under the *Legislative Instruments Act 2003*. The requirement to comply with the Standards will be included in the contract with VRS providers. Compliance with the Standards is independently assessed.

There is also an independent complaints mechanism for participants dissatisfied with any aspect of the services they are receiving (the Complaints, Resolution and Referral Service). Access to this service is included in the VRS Service Guarantee, which will also form part of the contract with providers.

The s.5 Guidelines will be developed in consultation with community organisations, people with disability and their advocates, and will be subject to disallowance by parliament. The detailed requirements of VRS providers will be set out in the

contract. It would be impractical to include this level of detail in the s.5 Guidelines. This approach is consistent with the Disability Employment Network. It should be noted that extensive consultations on the draft VRS contract took place during the tender process.

Finally, it is important to note that these guidelines are one element of a package of legislative and contractual safeguards. As outlined to the Committee in my letter of 22 February 2007, I consider this package of safeguards will sufficiently guide and limit the exercise of any of the Secretary's powers under Part III of the DSA.

I trust this information is of assistance.

The Committee thanks the Minister for this further response. The Minister's assurance that the contracts under which Vocational Rehabilitation Service providers will operate will oblige these providers to comply with the Disability Services Standards, and that this compliance is independently assessed, addresses the Committee's concerns.

Tax Laws Amendment (2006 Measures No. 7) Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 1 of 2007*. The Minister for Revenue and Assistant Treasurer responded to the Committee's comments in a letter dated 26 February 2007.

In its *Second Report of 2007*, the Committee sought further advice from the Minister in relation to retrospective application – legislation by press release. The Minister responded to the Committee in a letter dated 13 March 2007. A copy of the letter is attached to this report.

Extract from the Second Report of 2007

Introduced into the House of Representatives on 7 December 2006
Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Tax Administration Act 1953*, the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* and the *Income Tax (Transitional Provisions) Act 1997*.

Schedule 1 reduces compliance costs for small business and increases the availability of capital gains tax concessions.

Schedule 2 exempts eligible non-debenture debt interests from interest withholding tax.

Schedule 3 streamlines the deductible gift recipients (DGR) integrity arrangements and reduces compliance requirements.

Schedule 4 extends the time period for which certain entities can receive tax deductible donations.

Schedule 5 preserves the current depreciation arrangements that apply to tractors and harvesters used in the primary production sector.

Schedule 6 increases the non-primary production income threshold and the total deposit limit for farm management deposits.

Schedule 7 ensures equivalent taxation treatment is given to capital protection on a capital protected borrowing whether the capital protection is provided explicitly or implicitly.

The bill also contains application, consequential and transitional provisions.

Retrospective application - legislation by press release
Schedule 7, item 5

Item 5 of Schedule 7 provides that the amendments proposed in that Schedule apply retrospectively 'to arrangements, or extensions of arrangements, entered into at or after 9.30 am by legal time in the Australian Capital Territory on 16 April 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 states, in paragraphs 7.5 to 7.11, that the purpose of these amendments is to overcome the effect of a decision of the Federal Court in *Commissioner of Taxation v Firth*, decided in 2002, which allows some borrowers to obtain an income tax deduction for what may in fact be, in substance, a capital cost. The amendments are to apply from the date (and time) of the Treasurer's original press release on 16 April 2003, even though the actual methodology used to overcome the effect of *Firth's* case was not promulgated until a later press release, issued by the Minister for Revenue on 30 May 2003. This retrospective application is therefore an instance of 'legislation by press release', upon which the Committee has always commented unfavourably.

The Committee has, in the past, been prepared to accept legislation by press release, so long as the legislation is introduced within six months of the press release. In this case the legislation has not been introduced until some three and a half years after the press release.

In this context, the Committee notes that in 1988 the Senate passed a declaratory resolution to the effect that if more than six months elapses between a government announcement of a taxation proposal and the introduction or publication of a bill, the Senate will amend the bill to reduce the period of retrospectivity to the time since the introduction or publication of the bill. The Committee **seeks the Treasurer's advice** as to the reason for the delay in introducing this Schedule.

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 Assistant Treasurer

The Committee sought advice as to the reason for the delay in introducing Schedule 7 to Tax Laws Amendment (2006 Measures No. 7) Bill 2006, which contains the amendments in respect of the taxation of capital protected borrowings (CPB).

Although the Committee has characterised this delay as 'an instance of legislation by press release', it is important to note that the retrospective aspect of the CPB measures is giving legislative effect to a pre-existing Australian Taxation Office (ATO) interpretation and administrative practice that applied prior to *Firth's case*, rather than the implementation of a 'new' taxation treatment.

The ATO's interpretation of the law as it applied to CPBs was rejected by the Federal Court of Australia in *Firth's case* in November 2002. The ATO's administrative practice following *Firth's case* was consistent with the 'interim apportionment methodology' the details of which were provided in the former Minister for Revenue and Assistant Treasurer, the Hon Helen Coonan's press release No. C046 of 30 May 2003.

The transitional provisions of the CPB measures ensure that the tax treatment of CPBs entered into on or after 16 April 2003 is consistent with that for CPBs entered into prior to *Firth's case*. The 'interim apportionment methodology' has a 16 April 2003 start date as the amendment is an integrity measure directed at protecting the revenue base. A later start date would put the revenue at risk.

The proposed CPB measures, which reflect an extensive consultation process with industry, ensure that part of the cost of a CPB is attributed to the capital protection feature of the arrangement. Broadly, there were two pragmatic approaches that could have been use to calculate the cost of capital protection for a CPB. The first approach was to use options pricing methodologies to determine the cost of capital protection. The second approach was to use a 'benchmark' interest rate as a cap on the amount of interest deductible by the investor.

Consultations were held in 2003 and 2004, with industry indicating a preference for the cost of capital protection for CPBs to be determined by reference to a benchmark interest rate.

In 2005, a consultant was engaged to undertake an independent report as to the best way to estimate the cost of capital of a CPB. This report was provided on a confidential basis to industry as part of the consultation process. At industry's request, there were further discussions regarding the report. Allowing for this, the appropriate level of the benchmark interest rate was not settled until July 2006.

During consultation, industry requested that there be sufficient lead time after the introduction date of the CPB measures to allow industry to comply with the measures. Industry representatives also stated that the market would be disrupted should the legislation be introduced during the last quarter of the financial year. The timing of the introduction of the proposed CPB measures also takes into account these concerns.

As this provision is effectively restoring a pre-existing taxation treatment for CPB investors it is not considered to adversely affect personal rights and liberties.

The Committee thanks the Assistant Treasurer for this response, but reiterates its view that this amendment is 'legislation by press release'. Regardless of what the Australian Tax Office's interpretation and administrative practice was in relation to capital protected borrowings prior to the *Firth's case*, the Federal Court, when handing down its decision in that case, declared the true position in relation to such borrowings. This bill seeks to change that position.

The Committee notes the reasons provided by the Assistant Treasurer for the delay in implementing the changes announced by the Treasurer on 16 April 2003. The Committee questions, however, the Assistant Treasurer's assertion that 'as the provision is effectively restoring a pre-existing taxation treatment for CPB [capital protected borrowings] investors it is not considered to adversely affect personal rights and liberties.' It is clear from the Assistant Treasurer's letter that this change will have adverse consequences for those taxpayers who have entered into capital protected borrowings as it will retrospectively impose greater tax liabilities on these investors.

The Committee **seeks the further advice of the Assistant Treasurer** as to why the Committee should not recommend that the Senate amend this aspect of the bill so that it applies from the date the bill was introduced, consistent with the declaratory resolution of the Senate, of 8 November 1988, as referred to in *Alert Digest No. 1 of 2007.*

Pending the Assistant Treasurer's further 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 further response from the Assistant Treasurer

The Committee sought further advice from me as to why it should not recommend that the Senate amend the Bill so that the measures in Schedule 7, which apportion the cost of a capital protected borrowing (CPB) arrangement between interest cost and capital protection cost, apply from the date of introduction of the Bill (7 December 2006).

The Government generally supports the prospective application of tax legislation. However, in deciding whether or not a prospective start date should apply in a particular case it is necessary to take into account matters such as the integrity of the tax system, sufficient certainty of tax treatment and not unduly interrupting relevant markets or industries.

As noted by the Treasurer in his Press Release of 16 April 2003, the CPB 'amendment is an integrity measure directed at protecting the revenue base'.

It was also recognised that a delay in reaching a final position on how to apportion the interest on a CPB could adversely affect taxpayers and the CPB market. To avoid these adverse affects the 'interim approach', for apportioning the cost of a CPB, was announced by the former Minister for Revenue and Assistant Treasurer, the Hon. Senator Helen Coonan (Senator Coonan's Press Release No. C046 of 30 May 2003).

At the same time as announcing the interim approach the Government called for submissions on the methodology for apportioning the cost which would apply over the longer term. As mentioned in my earlier letter to you, the longer term methodology which will apply from 1 July 2007 reflects an extensive consultation process with industry.

The proposed amendment is primarily an integrity measure, which has been developed following extensive industry consultation. Further the Government (through Senator Coonan's Press Release of 30 May 2003) has acted to provide certainty for taxpayers and the market as to the tax treatment of CPB arrangements. Accordingly, the Government considers it is appropriate that the measure apply from the date of the Treasurer's announcement, that is 16 March 2003.

The Committee thanks the Assistant Treasurer for this further response and notes that, in the special circumstances of this case, retrospective commencement appears to be unavoidable.

Robert Ray
Chair

The Hon Ian Macfarlane MP
Minister for Industry, Tourism and Resources

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CANBERRA ACT 2600

20 MAR 2007

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

Dear Senator Ray Robert

I am writing to respond to a letter sent to my Office on 1 March 2007 by the Secretary of the Senate Standing Committee for the Scrutiny of Bills, Ms Cheryl Wilson, concerning the ACIS Administration Amendment (Unearned Credit Liability) Bill 2007.

In response to the queries raised in the letter regarding the retrospectivity of the Bill, it is intended that the Bill apply in relation to duty credits in respect of a quarter after the final quarter for the Automotive Competitiveness and Investment Scheme (ACIS) Stage 1, that is from the beginning of ACIS Stage 2, commencing on 1 January 2006.

ACIS delivers assistance to eligible recipients in the automotive industry by way of duty credits on a quarterly basis. Claims are lodged by ACIS participants and these are paid through AusIndustry upon receipt of those claims, with a subsequent rigorous audit process employed to verify their validity. This arrangement was put in place at the request of the automotive industry to ensure the timely delivery of assistance to industry members.

Retrospective application of the amendment is necessary to ensure equity in the way in which credits are issued and that ACIS continues to operate in line with its original policy intent. In particular, retrospectivity is required to ensure that any credits issued for ineligible activities since the commencement of Stage 2 can be recovered by the Commonwealth. Given that ACIS is a capped Scheme, it is important for equity that ineligible claims be recovered and redistributed to participants submitting eligible claims.

Retrospectivity also ensures that ACIS assistance remains consistent with the objective of the *ACIS Administration Act 1999*. That is, to provide transitional assistance to encourage competitive investment and innovation in the Australian automotive industry in order to achieve sustainable growth, both in the Australian market and internationally, in the context of trade liberalisation.

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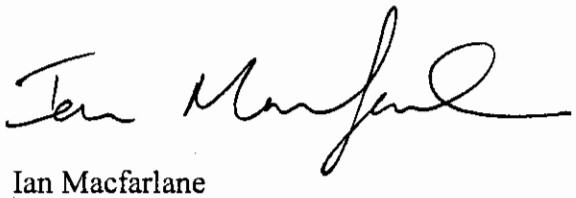
Consequently, the retrospective nature of the Bill will provide certainty in the administration of ACIS for the participants and prevent delays in providing assistance. The Bill will in no way trespass on personal rights and liberties.

Yours sincerely



Ian Macfarlane

SENATOR THE HON. DAVID JOHNSTON
Minister for Justice and Customs
Senator for Western Australia

RECEIVED
16 MAR 2007
Senate Standing C'ttee
for the Scrutiny of Bills

File No: 07/4315

13 MAR 2007

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

Dear Senator Ray,

I am writing in response to the Scrutiny of Bills Alert Digest 2 of 2007, dated 28 February 2007, regarding the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2007.

The Committee notes that item 7 in the table in subclause 2(1) of the Bill provides that items 59 to 61 of Schedule 1 of the Bill would commence retrospectively on 13 December 2006 and may breach principle 1(a)(i) of the Committee's terms of reference. The Committee seeks my advice on whether a better explanation of the retrospective commencement of items 59, 60 and 61 could be included in the explanatory memorandum.

The *Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006* contained a number of items changing references to the Director of AUSTRAC to AUSTRAC CEO in the *Financial Transaction Reports Act 1988* (FTR Act). Through a drafting oversight references to 'the Director' in paragraph 28(1)(a), subsection 29(1) and section 30(1) of the FTR Act were not changed. Items 59-61 correct that oversight.

I agree that it is appropriate that some additional wording be included in the explanatory memorandum on item 7 in the table in subclause 2(1) and during the Second Reading debate of the Bill in the Senate I propose to table a supplementary explanatory memorandum which would include some additional wording. The additional wording that will be inserted at the end of the second paragraph under the heading **Clause 2** will be as follows:

> Items 59 to 61 inclusive of Schedule 1 of the Bill which are referred to in item 7 of the table are expressed to commence on 13 December 2006 because that is the date on which all other references in the *Financial Transaction Reports Act 1988* to the former title of Director of AUSTRAC were amended to the current

title of AUSTRAC CEO. Items 59 to 61 inclusive are technical amendments which do not make any change in the substantive law.

I also propose that the supplementary explanatory memorandum insert some additional wording in the explanatory memorandum at the end of the current wording under the heading **Items 59, 60 and 61** along the following lines:

Items 59, 60 and 61 commence on 13 December 2006 (see the explanatory memorandum on clause 2).

Thank you for drawing this matter to my attention.

Yours sincerely

David Johnston
Minister for Justice and Customs
Senator for Western Australia

The Hon Mark Vaile MP

Deputy Prime Minister
Minister for Transport and Regional Services
Leader of The Nationals

Reference: 02062-2007

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

16 MAR 2007

Dear Senator Ray

Thank you for your letter dated 1 March 2007 concerning the Aviation Transport Security Amendment (Additional Screening Measures) Bill 2007. The Committee raised two matters about the content of the explanatory memorandum in the Alert Digest No. 2 of 2007.

Screening officers at airports perform an essential role in ensuring that prohibited items are not carried into the secure areas of airports and onto aircraft. Screening officers are required to be trained to operate within a clearly defined legal framework that balances the rights and legitimate expectations of the public against the need to protect civil aviation. In maintaining this balance, it is appropriate for the legislation to provide screening officers with a strong incentive to refrain from acting in a capricious and unlawful manner. Proposed subsection 95C(5) achieves this objective by making the offence at s95C(3) a strict liability offence for a screening officer to require a person to undergo a frisk search, conduct a frisk search of a person or conduct the search beyond what is necessary to complete the proper screening of the person.

In practice, a screening officer should always have received appropriate training and so should never be able to claim that they were unaware of their obligations to people who are being screened. In cases where it can be shown that the screening officer had not been given the required training, compliance action would normally be taken against the employer instead of the screening officer.

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My Department followed the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* and consulted with the Criminal Justice Division of the Attorney-General's Department for the proposed strict liability offence in 95C(5). The Attorney-General's Department approved the introduction of a strict liability offence in s95C(5) on the basis that it mirrors the existing legislation in ss 95(3), 95(5), 95B(3) and 95B(5).

I trust this information is of assistance to the Committee.

Yours sincerely

MARK VAILE

ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

06/048 ITSA
MC07/5933

14 MAR 2007

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

Dear Senator

I refer to your letter of 1 March 2007 relating to the Bankruptcy Legislation Amendment (Debt Agreements) Bill 2007. I note the Committee's concerns about the lack of detail in the Explanatory Memorandum to that Bill in relation to the amendment contained in Schedule 1, item 19.

The amendment in question is part of the new regulatory regime for debt agreement administrators. The Bill will insert new section 186N in the *Bankruptcy Act 1966* (the Act) which will require an administrator who becomes deregistered to return his or her certificate of registration to the Inspector-General in Bankruptcy. There will be offences for failing to comply with this requirement and, pursuant to proposed subsection 186N(7), these will be offences of strict liability.

The registration regime for debt agreement administrators is largely based on the existing regime for bankruptcy trustees. It is appropriate that administrators be subject to requirements similar to those applying to trustees and section 186N will replicate the requirement for a deregistered trustee to return his or her certificate of registration. That requirement currently appears in section 155J of the Act and provides that failure to comply is an offence of strict liability. It is important that a trustee or administrator who is no longer registered, perhaps because they have been deregistered for failing to properly perform their duties, cannot use the certificate to hold themselves out to be still registered. The registration regime is important to instil confidence that practitioners acting for the benefit of debtors and creditors have the necessary knowledge, skills and experience to perform their duties.

I have approved a correction to the Explanatory Memorandum adding an explanation of this provision which will be circulated when the Bill is introduced in the Senate.

The Criminal Justice Division of the Attorney-General's Department, which is responsible for the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, was consulted in the course of drafting the Bill and raised no concerns about the provisions.

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The action officer for this matter in my Department is David Bergman who can be contacted on (02) 6270 3434.

Yours sincerely

Philip Ruddock

RECEIVED
15 MAR 2007
Senate Standing C'ttee for the Scrutiny of Bills

The Hon Dr Sharman Stone MP
Minister for Workforce Participation

15 MAR 2007

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

Dear Senator

I am writing in response to Ms Cheryl Wilson's letter of 1 March 2007 to my office concerning the Employment and Workplace Relations Legislation Amendment (Welfare to Work and Vocational Rehabilitation Services) Bill 2006.

The exercise of any of the Secretary's powers under Part III of the *Disability Services Act 1986* (the DSA), including powers delegated (if any) to providers of Vocational Rehabilitation Services (VRS), will be guided and limited by a range of legislative and contractual safeguards.

It is worth noting that, in entering into arrangements for the provision of VRS in a contestable market, the Secretary is bound by the DSA to ensure that the objects of the DSA will be furthered (s. 3). These objects include the following:

(i) to promote services provided to persons with disabilities that:
   a. assist persons with disabilities to integrate in the community, and complement services available generally to persons in the community;
   b. assist persons with disabilities to achieve positive outcomes, such as increased independence, employment opportunities and integration in the community; and
   c. are provided in ways that promote in the community a positive image of persons with disabilities and enhance their self-esteem;

(ii) to ensure that the outcomes achieved by persons with disabilities by the provision of services for them are taken into account in the granting of financial assistance for the provision of such services;

(iii) to encourage innovation in the provision of services for persons with disabilities; and

(iv) to assist in achieving positive outcomes, such as increased independence, employment opportunities and integration in the community, for persons with disabilities who are of working age by the provision of comprehensive rehabilitation services.

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It is also worth noting that the ability of the Secretary to delegate his powers under Part III of the DSA is similar in scope to his power to delegate under the *Social Security Act 1991*.

A key safeguard is that VRS providers must comply with the Disability Services Standards, which set out a range of standards that must be met in the provision of a rehabilitation programme. The Standards are a legislative instrument under s. 5A of the DSA, and are themselves disallowable under the *Legislative Instruments Act 2003*. The requirement to comply with the Standards will be included in the contract with VRS providers. Compliance with the Standards is independently assessed.

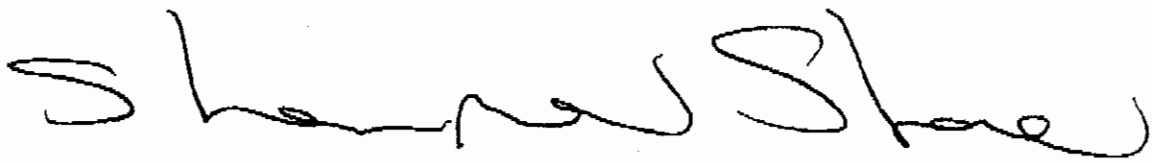
There is also an independent complaints mechanism for participants dissatisfied with any aspect of the services they are receiving (the Complaints, Resolution and Referral Service). Access to this service is included in the VRS Service Guarantee, which will also form part of the contract with providers.

The s. 5 Guidelines will be developed in consultation with community organisations, people with disability and their advocates, and will be subject to disallowance by parliament. The detailed requirements of VRS providers will be set out in the contract. It would be impractical to include this level of detail in the s. 5 Guidelines. This approach is consistent with the Disability Employment Network. It should be noted that extensive consultations on the draft VRS contract took place during the tender process.

Finally, it is important to note that these guidelines are one element of a package of legislative and contractual safeguards. As outlined to the Committee in my letter of 22 February 2007, I consider this package of safeguards will sufficiently guide and limit the exercise of any of the Secretary's powers under Part III of the DSA.

I trust this information is of assistance.

Yours sincerely



Dr Sharman Stone

THE HON PETER DUTTON MP

MINISTER FOR REVENUE AND ASSISTANT TREASURER

13 MAR 2007

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

Dear Senator Ray

I am writing in response to the issue raised in the Senate Standing Committee for the Scrutiny of Bills' Second Report of 2007 (28 February 2007) relating to Schedule 7, item 5 of the Tax Laws Amendment (2006 Measures No. 7) Bill 2006.

The Committee sought further advice from me as to why it should not recommend that the Senate amend the Bill so that the measures in Schedule 7, which apportion the cost of a capital protected borrowing (CPB) arrangement between interest cost and capital protection cost, apply from the date of introduction of the Bill (7 December 2006).

The Government generally supports the prospective application of tax legislation. However, in deciding whether or not a prospective start date should apply in a particular case it is necessary to take into account matters such as the integrity of the tax system, sufficient certainty of tax treatment and not unduly interrupting relevant markets or industries.

As noted by the Treasurer in his Press Release of 16 April 2003, the CPB 'amendment is an integrity measure directed at protecting the revenue base'.

It was also recognised that a delay in reaching a final position on how to apportion the interest on a CPB could adversely affect taxpayers and the CPB market. To avoid these adverse affects the 'interim approach', for apportioning the cost of a CPB, was announced by the former Minister for Revenue and Assistant Treasurer, the Hon. Senator Helen Coonan (Senator Coonan's Press Release No. C046 of 30 May 2003).

At the same time as announcing the interim approach the Government called for submissions on the methodology for apportioning the cost which would apply over the longer term. As mentioned in my earlier letter to you, the longer term methodology which will apply from 1 July 2007 reflects an extensive consultation process with industry.

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The proposed amendment is primarily an integrity measure, which has been developed following extensive industry consultation. Further the Government (through Senator Coonan's Press Release of 30 May 2003) has acted to provide certainty for taxpayers and the market as to the tax treatment of CPB arrangements. Accordingly, the Government considers it is appropriate that the measure apply from the date of the Treasurer's announcement, that is 16 March 2003.

Yours sincerely

PETER DUTTON