SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

ELEVENTH REPORT

OF

2009

16 September 2009

SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

ELEVENTH REPORT

OF

2009

16 September 2009

ISSN 0729-6258

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

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

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT OF 2009

The Committee presents its Eleventh Report of 2009 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 *****

Foreign States Immunities Amendment Bill 2009

Personal Property Securities Bill 2009 *****

Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009 *****

***** Although these bills have not yet been introduced in the Senate, the Committee may report on the proceedings in relation to the bills, under Standing Order 24(9).

Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Minister for Financial Services, Superannuation and Corporate Law responded to the Committee's comments in a letter received on 10 September 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the House of Representatives on 25 June 2009
Portfolio: Treasury

Background

This bill amends the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to provide for the national regulation of margin lending and trustee corporations, as agreed by the Council of Australian Governments (COAG) on 26 March 2008. The bill implements the transfer of trustee company regulation from the states and territories to the Commonwealth.

The bill also amends the Corporations Act to require that promissory notes valued at $50,000 or over come under the same regulatory regime as debentures, and to require the Australian Securities and Investments Commission (ASIC) to establish and maintain a publicly available register of debenture trustees.

'Henry VIII' clause
Schedule 1, item 12, new subsection 985K(4)

There are 'Henry VIII' clauses in the bill which provide for regulations to change entitlements, responsibilities and obligations conferred by the principal Act.

Proposed new section 985K of the Corporations Act, to be inserted by item 12 of Schedule 1, provides for requirements regarding unsuitable margin lending facilities. Proposed new subsection 985K(4) provides that regulations may prescribe particular situations in which a margin lending facility is taken not to be unsuitable for a retail client, despite subsection (2). The explanatory memorandum states merely (at paragraph 1.95) that this is to allow 'particular situations to be prescribed'. In light of the lack of explanation for this 'Henry VIII' clause, the Committee **seeks the Treasurer's advice** in relation to the need and justification for the use of such a regulation-making power to amend the principal legislation.

Pending the Treasurer'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

Schedule 1, item 12, subsection 985K(4) enables regulations to be made which may prescribe situations where the unsuitability test in proposed Section 985K of the Corporations Act would not apply.

The unsuitability test in Section 985K creates a new high level responsible lending obligation on providers of a margin lending facility.

As Section 985K uses a principles based approach, the flexibility to prescribe situations where a matter is not unsuitable is important to clarify the intended operation of the law, respond to any changes in the market and consider new or unexpected situations.

This provision, including subsection 985K(4), is analogous to provisions on responsible lending in the National Consumer Credit Protection Bill 2009.

The Committee thanks the Minister for his response and **requests that the explanatory memorandum be amended** to include this information.

Determination of important matters by regulation
Schedule 2, item 3, new subsection 12BAB(1B)

Several provisions in the bill enable the inclusion of definitions of terms and delineation of responsibilities in delegated legislation.

Proposed new subsection 12BAB(1A) of the ASIC Act, to be inserted by item 3 of Schedule 2, amends the meaning of 'financial service' to ensure it includes the provision by a trustee company of a traditional trustee company service. Proposed new subsection 12BAB(1B) provides for regulations to prescribe the person or persons to whom a service of a traditional trustee company service of a particular class is taken to be provided or supplied. Subsection 12BAB(1B) also provides that it does not limit, and is not limited by, subsection (2). The explanatory memorandum merely describes the provision (at paragraph 2.227). In light of the lack of explanation for the delegation, without any accompanying examples, the Committee **seeks the Treasurer's advice** in relation to the need and justification for the use of such a broad regulation-making power in these circumstances.

Pending the Treasurer'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

> In relation to the Committee's more extensive comments on trustee companies, I note that the Government wishes to ensure that the industry is well regulated and that consumers of traditional trustee company services are appropriately protected.
>
> I understand the Committee has raised concerns about the inclusion of regulation making powers to determine important matters, as well as in relation to an apparently wide delegation of power and a clause enabling the Government to amend the principal legislation by regulation.
>
> In general, the Government has endeavoured to ensure that particular client groups can be identified and brought within the protections of the legislation. As with the national consumer credit legislation, such flexibility is necessary to address the likely concerns of consumers once the legislation becomes more widely known.

…

Subsection 12BAB(1B) enables regulations to be made under the *Australian Securities and Investments Commission Act 2001* (ASIC Act) that enable persons to be identified as those to whom a traditional trustee company service is to be provided, so that such persons will be entitled to various consumer protections under the Act.

Given that the deeming of traditional trustee company services as financial services is novel, and that the Government has received limited feedback from consumer groups during the exposure period for the legislation, a power of this type is appropriate to allow for particular client groups to be protected as and when they are identified.

Treasury is currently discussing with the Australian Securities and Investments Commission (ASIC) the possible making of regulations under this provision to mirror proposed regulation 7.1.28A (see below).

Of course, any such regulations would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* and would be subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances.

The Committee thanks the Minister for his response, and notes his advice that deeming traditional trustee company services as financial services is novel and that the Federal Government has received limited feedback from consumer groups. The Committee **requests that the explanatory memorandum be amended** to include this important information.

Determination of important matters by regulation
Schedule 2, item 9, new sections 601RAC and 601SAB

Proposed new section 601RAC of the Corporations Act, to be inserted by item 9 of Schedule 2, provides the meaning of 'traditional trustee company services' and 'estate management functions'. Paragraphs 601RAC(1)(e), (2)(f) and (3)(f) allow regulations to prescribe 'any other services' or persons 'acting in any other capacity' as an extension to the specified services and capacities included in the definitions. The explanatory memorandum fails to explain the need for such broad potential additions to the definitions.

Further, proposed new section 601SAB, also inserted by item 9 of Schedule 2, provides that the regulations may prescribe 'such other powers, functions, liabilities and obligations, and such privileges and immunities' to licensed trustee companies in relation to the provision of traditional trustee company services. The explanatory memorandum also fails to explain the need for this provision.

By contrast, the explanatory memorandum states (at paragraph 2.37) that proposed new subsection 601RAE(4) (also inserted by item 9 of Schedule 2) contains a specific regulation-making power to provide that the trustee company provisions are, or are not, intended to exclude prescribed state or territory laws. Similarly, item 12 of Schedule 1 inserts provisions establishing new requirements for responsible lending conduct for margin lending facilities. Proposed new paragraphs 985G(1)(c) and (d) provide for regulations to prescribe the inquiries and steps that may be taken in inquiring about a retail client ('any inquiries [or steps] prescribed by the regulations about any matter prescribed by the regulations'). The explanatory memorandum provides (at page 25) a comprehensive explanation of the need for flexibility and timeliness in responding to changing needs.

The Committee **seeks the Treasurer's advice** on the need and rationale for the proposed use of delegated legislation in new sections 601RAC and 601SAB; and whether explanations such as those provided in the explanatory memorandum for new subsection 601RAE(4) and new paragraphs 985G(1)(c) and (d) might also be provided in relation to new sections 601RAC and 601SAB.

Pending the Treasurer's advice, the Committee draws Senators' attention to the provisions, as they 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

Paragraphs 601RAC(1)(e), (2)(f) and (3)(c) are included to allow the categories of traditional trustee company services and estate management functions to be added to, or limited, by regulation.

These provisions were included for a number of reasons. Discussions with the trustee company industry suggested that, while the major categories of inclusions and exclusions have been identified, the categories may require some refinement. It is expected that such changes will be refinements rather than major in nature.

Accordingly, it was considered that they could be expeditiously dealt with in regulations.

Section 601SAB was included to, for example, allow regulations to be made to enable licensed trustee companies to take advantage of the new national regime by winding up existing state-based entities and transferring their appointments and businesses to a single licensee. The power under Section 601SAB has been used to make proposed regulation 5D.2.03. At the time of making the primary legislation, the Government and the industry had not agreed upon the exact details of the scheme and it was considered that, to enable the industry to quickly rationalise its operations, the matter could be dealt with in regulations.

Any such regulations would be subject to the usual parliamentary scrutiny and disallowance regime.

The Committee thanks the Minister for this explanation, including the advice that changes to categories are expected to be refinements rather than being major in nature. The Committee **requests that this information be included in the explanatory memorandum**.

Wide delegation of power
Schedule 2, item 9, new subsection 601WAA(2)

Proposed new subsection 601WAA(2), to be inserted by item 9 of Schedule 2, provides that ASIC may authorise 'a person who is a member of ASIC, or of its staff, to perform or exercise the functions or powers of an authorised ASIC officer under a particular provision of this Part'.

The relevant Part relates to cancellation of Australian financial services licences and includes exercise of the Minister's powers. The Committee generally prefers that senior officers exercise any functions and powers of the Minister.

Therefore, the Committee **seeks the Treasurer's advice** in relation to the level, position or qualifications of ASIC staff members who are expected to exercise functions and powers under this Part of the Corporations Act, and whether more specificity might be provided in the bill or the explanatory memorandum in this regard.

Pending the Treasurer's 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 response from the Minister

Section 601WAA empowers ASIC to authorise in writing that a member of ASIC or its staff perform the powers of an authorised ASIC officer under a provision of Part 5D.6. The Part provides that, if ASIC cancels the licence of a trustee company, it may make a compulsory transfer determination. Of its nature, this power would be exercised very rarely.

The Committee has sought advice regarding the level, position and qualifications of ASIC staff members who are expected to exercise functions and powers under this Part. The power under Section 601WAA requires a specific delegation of power, which means that ASIC would consider the nature of the powers to be exercised when deciding to whom such delegation will be made. Currently, under section 102 of the ASIC Act, ASIC may delegate any or all of its functions to staff of the Commission. ASIC has advised that its senior executives would act in circumstances that involved significant matters, such as compulsory transfer determinations. ASIC oversees a wide range of powers which it has delegated to staff members under section 102 of the ASIC Act in an appropriate manner.

The Committee thanks the Minister for this explanation. The advice from ASIC that senior executives would act in circumstances that involved significant matters, such as compulsory transfer determinations, satisfies its concerns.

Henry VIII' clause
Schedule 2, item 9, new subsection 601YAB(1)

Proposed new subsection 601YAB(1) of the Corporations Act, to be inserted by item 9 of Schedule 2, provides for exemption and modification by regulation of all or specified provisions in new Chapter 5D (which relates to licensed trustee companies). The explanatory memorandum states (at paragraph 2.204) that there may be certain situations that may give rise to a need to modify a provision in Chapter 5D, or to exempt a person from a provision of Chapter 5D. Examples are given of exempting persons from fee-charging provisions, and modifying the duties of officers and employees of licensed trustee companies.

While recognising the need for flexibility, the Committee nevertheless **seeks the Treasurer's advice** in relation to the need and justification for the use of a 'Henry VIII' clause to amend the principal legislation in these circumstances (rather than putting forward amendments to the Act itself, if necessary).

Pending the Treasurer'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 asked why this provision has been included, rather than putting forward amendments to the Act itself, if necessary. Often, rather than including detailed rules in the legislation, it is better to include such a scheme in regulations.
>
> For instance, in addition to the examples given, it may be necessary to deal with any future issues involving interactions between the Corporations Act and state and territory laws. For example, Division 2 of Part 7.8 of the Corporations Act governs the obligations of Australian financial services licensees relating to dealing with client monies and loans by clients to licensees. These rules may need detailed interaction provisions so they can operate concurrently with state laws.
>
> I also note that such provisions are not uncommon in the Corporations Act. These provisions have been modelled in part on Chapter 7 and Part 5C of the Corporations Act, including provisions such as section 601QB. For example, Part 5C.11 of the Corporations Regulations contains rules based on section 601QB.

The Committee thanks the Minister for his clarification of the approach taken in the bill, noting that the proposed scheme reflects provisions in the Corporations Act and will enable alignment with state laws.

Determination of important matters by regulation
Schedule 2, item 19, new subsection 766A(1B)

Proposed new subsection 766A(1A) of the Corporations Act, to be inserted by item 19 of Schedule 2, states that a traditional trustee company service provided by a trustee company is a financial service.

Proposed new subsection 766A(1B), also inserted by item 19 of Schedule 2, provides that regulations may prescribe the person or persons to whom a service of a traditional trustee company service of a particular class is taken to be provided or supplied. Subsection 766A(1B) also provides that it does not limit, and is not limited by, subsection (2). The explanatory memorandum does not explain the need for the provision. In light of the lack of explanation for the regulation-making power, and the lack of accompanying examples, the Committee **seeks the Treasurer's advice** in relation to the need and justification for such a broad delegation of legislative power in these circumstances.

Pending the Treasurer'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

> Subsection 766A(1B) enables regulations to be made under the Corporations Act that enable persons to be identified as persons to whom a traditional trustee company service is to be provided, so that such persons will be entitled to various consumer protections under the Act.
>
> Given that the deeming of traditional trustee company services as financial services is novel, and that the Government has received limited feedback from consumer groups during the public exposure process, a power of this type is appropriate to put

beyond doubt that certain persons are 'clients', or are so obviously affected by the traditional activities of trustee companies that they need protection.

This regulation making power has been used to specify persons to whom a trustee company service is taken to be provided: proposed regulation 7.1.28A. Broadly, these include persons to whom an annual information return is provided under proposed regulation 5D.2.01 (other than a beneficiary), and persons who effectively purchase certain services. Any future regulations would be subject to the usual parliamentary scrutiny and disallowance regime.

The Committee thanks the Minister for this response, and notes his advice that deeming traditional trustee company services as financial services is novel, that the Federal Government has received limited feedback from consumer groups, and that certain persons are to be deemed as clients. The Committee **requests that this information be included in the explanatory memorandum** to provide assistance to readers.

Foreign States Immunities Amendment Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2009*. The Attorney-General responded to the Committee's comments in a letter received on 11 September 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 11 of 2009

Introduced into the House of Representatives on 19 August 2009
Portfolio: Attorney-General

Background

This bill amends the *Foreign States Immunities Act 1985* to enable, by way of regulations, a foreign state and its emergency management personnel to be immune in tort proceedings under the Act for acts and omissions that occur in the course of the foreign state providing emergency management assistance to Australia. The exception would not apply to negligence by foreign officials outside of their duties and would also not apply in any criminal proceedings.

'Henry VIII' clause
Schedule 1, item 2, new subsection 42A(2)

Proposed new subsection 42A(1), to be inserted by item 2 of Schedule 1, extends immunity if the Minister is satisfied that a foreign state (or its entity) is providing assistance or facilities to the Australian government(s) for the purposes of preparing for, preventing or managing emergencies or disasters. Under proposed new subsection 42A(2), immunity is achieved by excluding or modifying the application of section 13 of the Act by regulation. The Committee notes that current section 13 provides that a foreign state is *not* immune in a proceeding insofar as the proceeding concerns: the death of, or personal injury to, a person caused by an act or omission done, or omitted to be done, in Australia; or loss of, or damage to, tangible property caused by a similar act or omission.

Proposed new subsection 42A(2) is a 'Henry VIII' clause. The explanatory memorandum explains (at paragraph 10) that '(t)he scope of the regulation making power is limited to emergencies or disasters which occur, or which may occur, in Australia'. An example is given (at paragraph 13) of the use of regulations to exclude the application of section 13 in whole, or in part, to a foreign state with respect to personnel assisting in bushfire prevention or management. However, it is possible that the regulation-making power could have such broad application so as to apply to 'non-natural' emergencies.

The Committee **seeks the Attorney-General's advice** as to whether it might be appropriate for the Act itself to confine the scope of the regulations by listing specific circumstances in which it is envisaged that this regulation-making power will be used. The Committee also **seeks the Attorney-General's clarification** in relation to how the scope of the proposed exception will be practically confined so that it applies only to foreign officials acting in the course of their duties, noting that emergency situations may necessarily involve the legitimate performance of a wide range of unforeseen or unusual duties.

Pending the Attorney-General'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 Attorney-General

As the Committee is aware, the primary purpose of the Bill is to allow regulations to be made that would exclude or modify the application of section 13 of the *Foreign States Immunities Act 1985* with respect to the acts or omissions of a foreign State in providing assistance or facilities for the purposes of preparing for, preventing or managing emergencies or disasters in Australia.

Section 13 of the Act provides an exemption to the general immunity of foreign States from the jurisdiction of Australian courts provided by section 9 of the Act. This exemption applies with respect to proceedings concerning (a) the death of, or personal injury to, a person, or (b) loss of or damage to tangible property. The exemption only applies with respect to acts or omissions done or omitted to be done in Australia.

The Committee has sought my advice 'as to whether it might be appropriate for the Act itself to confine the scope of the regulations by listing specific circumstances in which it is envisaged that this regulation-making power will be used'.

I would note at the outset that the application of the provision is already carefully prescribed. It applies only where the foreign State is providing, or is to provide, assistance or facilities to an Australian, State or Territory Government for the purposes of preparing for, preventing or managing emergencies or disasters in Australia. The Governor-General is only empowered to make regulations excluding or modifying the application of section 13 of the Act in relation to acts or omissions done in the course of providing such assistance or facilities. In other words, the operation of section 13 of the Act to emergency personnel from a foreign State may only be excluded or modified with respect to acts or omissions in the course of their duties. Further, the Bill would not in any way affect the responsibility of any person for criminal acts.

While the Bill was developed in response to a very particular set of circumstances – the need to conclude a cooperative agreement with the United States of America with respect to the exchange of fire suppression personnel and equipment – in my view it was important not to simply legislate for this set of circumstances but rather to provide the flexibility to respond to emergencies and disasters as yet unforeseen.

While it may have been possible to identify a confined set of emergencies or disasters to which the provision would apply – for example bushfires, floods, cyclones, shipping disasters etc – my view is that the Australian public would not thank us if the Government were unable to facilitate the provision of assistance to Australia by a foreign State in an emergency that was not included on that list.

I understand, of course, the Committee's general concerns about this type of power. However, I believe that the limited application of the Bill should allay this concern. Of course, the Parliament would also have the power to disallow a regulation laid before it that has been made under proposed section 42A.

Finally, on this point, I would note that the Bill does not in any way affect the liability of the Australian Government or State and Territory Governments for actions taken in their name. In my view, the provision as drafted, achieves an appropriate balance between ensuring the Government can respond quickly and flexibly to emergency and disaster situations as they arise and safeguarding against the potential abuse of such a power.

The Committee also seeks my clarification as to how the 'scope of the proposed exception will be practically confined so that it applies only to foreign officials acting in the course of their duties, noting that emergency situations may necessarily involve the legitimate performance of a wide range of unforeseen and unusual duties'.

As I have already noted, any regulation made under proposed section 42A can only exclude or modify the application of section 13 of the Act in relation to acts or omissions done in the course of the provision of assistance or facilities for the purposes of preparing for, preventing or managing emergencies or disasters. Any regulation that goes beyond this scope would be of no effect.

In the vast majority of cases, as a matter of practical application, I believe it will be very clear what acts or omissions are or are not done in the course of preparing for, preventing or managing emergencies or disasters.

I hope this information is of assistance in concluding your consideration of this Bill. I thank you for the opportunity to respond to these important issues.

The Committee thanks the Attorney-General for this comprehensive response, which addresses its concerns.

Personal Property Securities Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Attorney-General responded to the Committee's comments in a letter dated 3 September 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the House of Representatives on 24 June 2009
Portfolio: Attorney-General

Background

This bill establishes a single national law governing security interests in personal property (which includes motor vehicles, contractual rights and uncertificated shares), supported by a public Register of Personal Property Securities (Register) to be maintained by a Registrar of Personal Property Securities (Registrar).

In particular, the bill:

- specifies the circumstances when personal property would be able to be acquired free of a security interest;
- includes default rules for determining priority between competing security interests in the same property;
- includes special priority rules for specific transactions, including 'purchase money security interests', accounts, authorised deposit-taking institution (ADI) accounts, crops, livestock, accessions and commingled goods;
- provides rules for determining priority between security interests and other interests, such as repairers' liens and the interests of an execution creditor;
- provides a process for enforcing security agreements following default by debtors; and

- establishes the Register which will contain, among other things, details of registered security interests in personal property (financing statements), details of the grantor and the secured party, and an address for service of notice on the secured party.

'Henry VIII' clause
General commentary

There are several 'Henry VIII' clauses in the bill which enable regulations to change responsibilities and entitlements conferred by the principal Act. The Committee reiterates the general concerns it expressed earlier in this *Alert Digest*, in relation to the National Consumer Credit Protection Bill 2009, about the increasing occurrence of such clauses in legislation. The Committee **leaves to the Senate as a whole** any consideration of this matter.

'Henry VIII' clause
Subclause 8(3)

Particular interests are to be included on the Register and subclauses 8(1) and (2) provide for interests which are not proposed to be covered. Under subclause 8(3), '(t)he regulations may provide that, despite subsection (1), th[e] Act applies in relation to a kind of interest prescribed by the regulations'. This means that regulations can provide for an interest to be excluded from the bill's coverage. The explanatory memorandum does not explain why this provision is needed. The Committee **seeks the Attorney-General's advice** in relation to why such a regulation-making power is considered necessary in these circumstances.

Pending the Attorney-General'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 Attorney-General

Subclause 8(1) provides that the Bill will not apply to certain kinds of security interests. The kinds of property that the Bill will not apply to are set out in broad

terms. However, the Bill will operate in complex and dynamic financial markets. As a general rule, it is intended that the regulation making power in subclause 8(3) will be used to bring into and out of the Act complex financial market transactions that are created over time, and whose nature changes over time. The regulation making power in subclause 8(3) is intended to make it possible to more closely align at the margins the exclusions established by subclause 8(1) with the needs of the financial markets.

Where it is appropriate to do so, the regulation making power may also be used to apply the Bill to some matters that would be excluded because of the general nature of the exclusions in subclause 8(1). It may also be necessary to provide greater certainty about whether particular kinds of security interests are covered by an exclusion in subclause 8(1).

The Committee thanks the Attorney-General for his response, and **requests that this information be included in the explanatory memorandum.**

'Henry VIII' clause
Subclause 118(5)

Clause 118 provides for the enforcement of security interests in accordance with land law decisions. Subclause 118(4) provides that the law, in the same terms as that of the land law, applies under the bill for the purposes of the enforcement of the security interest. However, subclause 118(5) provides that regulations may modify the law that applies by virtue of subclause 118(4) in order to facilitate its application to the enforcement of security interests in personal property. The explanatory memorandum does not provide any explanation for the provision. The Committee considers that this may create uncertainty in the enforcement of security interests and **seeks the Attorney-General's advice** in relation to the justification for this use of the regulation-making power.

Pending the Attorney-General'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 Attorney-General

An obligation may be secured by both a security interest in personal property and an interest in land. Under the existing law, upon default by the debtor, the secured party would apply the law relating to security interests to enforce the security interest against the personal property, and the land law to enforce against the interest in the land. This would result in two distinct processes being used.

Clauses 117 and 118 provide a mechanism that will allow the secured party to enforce against the personal property using the land law of a State or Territory as a single process. The intention is that when a security interest has attached to both real property and personal property, the secured party will be able to apply the land law of the State or Territory to enforce the security interest against the personal property. This will result in the same enforcement process being applied against both the real property and the personal property. This should reduce the cost of enforcing the security interests and increase the amount payable to the secured creditor or the grantor.

However, the land law of the State or Territory may not be perfectly adapted to the enforcement of security interests against personal property.

To meet this concern, subclause 118(5) will allow regulations to be made modifying how the State or Territory land law applies to the enforcement of security interests in personal property. The regulations will not modify the Bill. Rather, they will modify the State or Territory land law and provide a mechanism for the Commonwealth to control how the State or Territory land law applies to the enforcement of security interests in personal property.

The Bill has been developed in consultation with the States and Territories and they endorse the option to use land laws to enforce a security interest in personal property where the security interest also covers land. Prior to its introduction the States and Territories approved the text of the Bill – including clauses 117 and 118 which provide this mechanism.

The Committee thanks the Attorney-General for this comprehensive explanation, which satisfies its concerns. The Committee **requests that this information be included in the explanatory memorandum,** to provide context, and to assist readers and those potentially affected by the bill's operation.

Wide discretion
Wide delegation of powers
Clauses 147 and 197

The Register is to be established and maintained by the Registrar (subclause 147(1)) who may keep the register 'in any form that he or she considers appropriate' (subclause 147(3)), subject to ensuring certain data requirements are contained in the register (clause 148). The explanatory memorandum states (at paragraph 5.9) that the intention is 'to implement a fully electronic register'.

Under clause 197, the Registrar may delegate 'all or any of his or her functions or powers' to any public servant or another person determined by the Registrar (that is, a non-public servant). The explanatory memorandum states (at paragraph 5.145) that the ability to delegate to non-public servants is necessary in the event that functions under the bill are outsourced by the Registrar (such as to those engaged in a contact centre).

However, the explanatory memorandum does not include an explanation as to why such a wide power of delegation to public servants is considered necessary. Generally, the Committee prefers to see a limit set on the sorts of powers that might be delegated, or on the categories of people to whom these powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

The Committee **seeks the Attorney-General's advice** as to the justification for such a wide discretion, and whether the discretion might be limited in some way to particular categories of persons. The Committee also **seeks the Attorney-General's advice** in relation to why the Registrar has been given such a broad power to keep the Register in any form that he or she considers appropriate, and whether more specific guidance on this matter might be included in the bill.

Pending the Attorney-General's advice, the Committee draws Senators' attention to the provisions, as they 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 response from the Attorney-General

Subclause 147(3) allows the Registrar to keep the Personal Property Securities Register in any form that he or she considers appropriate. It is based on section 1274(1) of the *Corporations Act 2001*, which allows ASIC to 'keep such registers as it considers necessary in such form as it thinks fit'. Subclause 147(3) is intended to make it clear that the Bill focuses on the outcomes that the Registrar must deliver, rather than the manner in which the obligations are discharged. It is intended to make the Bill technology neutral, so that it will not constrain the Registrar as to the kind of technology he or she may employ to discharge his or her obligations under the Bill. For example, it will allow the Registrar to accept documents in hard copy form, over the internet through a web browser, or over the internet using XML messaging technologies.

Clause 197 allows the Registrar to delegate his or her powers to persons who may, or may not, be engaged under the *Public Service Act 1999*. A delegate may be required to exercise their powers under the direction or supervision of the Registrar, Deputy Registrar or a person engaged under the Public Service Act.

The powers conferred on the Registrar under the Bill fall into three broad classes.

First, the powers required to operate the register. It is expected that the Registrar will ordinarily exercise these powers through automated systems without delegation to any person. It is nevertheless preferable for the Registrar to have a power of delegation to cover those circumstances requiring manual processes. The volume of transactions processed by the register would make it impractical for the Registrar to exercise all of his or her powers personally.

Second, the power to undertake investigations or commence or intervene in legal proceedings (see clauses 173(5), 218 and 219). It is expected that the Registrar would ordinarily exercise these powers personally. When the powers are delegated, it is expected that the delegation would be in relation to a particular matter, and under the supervision of the Registrar. This power of delegation is necessary to provide the Registrar with flexibility in the administration of the register, so that the Registrar will have the capacity to exercise the power personally in relation to significant matters and to delegate to a junior officer (who need not be an SES officer) in relation to less significant matters.

Third, the power to make a range of routine decisions, such as:

(a) in relation to applications made to the Registrar for a report (see clause 176);

(b) in relation to the amendment demand process (see clause 180(2));

(c) approve arrangements for the payment of fees (see clause 190(4)).

It is expected that matters within this third class would ordinarily be exercisable by junior officers working at a telephone contact centre, under the direction and

supervision of more senior officers. The volume and nature of these matters will make it inappropriate for these discretions to be exercisable by SES officers.

The Committee thanks the Attorney-General for this very comprehensive response, which addresses the Committee's concerns. The Committee notes that it would have been helpful if the explanatory memorandum had included this information and **requests that the explanatory memorandum be amended accordingly**.

'Henry VIII' clause
Clause 255

Clause 255 provides that the regulations may resolve inconsistencies where there is concurrent operation of the bill and, for example, another Commonwealth law or the law of a state or territory. Among other things, the regulations may specify a person, body or circumstances to which the bill does not apply (paragraph 255(2)(a)). While the explanatory memorandum assists in explaining the effect of the provision to resolve inconsistencies (at page 111), it does not explain why the provision itself is required. Therefore, the Committee **seeks the Attorney-General's advice** in relation to the need for such a broad use of the regulation-making power in these circumstances.

Pending the Attorney-General'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.

'Henry VIII' clause
Subclause 258(4)

Clause 258 provides for the relationship between the bill and other laws, including state and territory laws, and sets out when other laws prevail. Subclause 258(1) limits the effect of the bill where there is inconsistency but subclause 258(4) provides that subclause 258(1) does not apply to an effect of a law to the extent (if any) prescribed by the regulations.

That is, the regulations may change or extend the scope of the bill. The explanatory memorandum provides no explanation for this provision. Therefore, the Committee **seeks the Attorney-General's advice** as to the need and justification for this use of the regulation-making power.

Pending the Attorney-General'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 Attorney-General

Clause 255 and subclause 258(4) of the Bill are intended to provide certainty about the concurrent operation of the Bill with other Commonwealth, State and Territory laws.

Clause 255 is consistent with clause 3.2.4 of the intergovernmental agreement on PPS reform, which states:

> Where there is direct inconsistency between State or Territory legislation and the [PPS] Act, or subordinate legislation made under the Act, that State or Territory legislation will prevail over the Act or subordinate legislation where:
>
> (a) subordinate legislation made under the Act provides that the State or Territory legislation prevails; or
>
> (b) subject to clause 3.2.5, the State or Territory legislation expressly derogates from the Act or subordinate legislation.

Clause 255 will allow inconsistencies between the Bill and other Commonwealth, State or Territory legislation to be resolved by the making of a regulation which will displace a provision of the Bill or modify its operation so that no inconsistency arises. It provides a mechanism to resolve inconsistencies that would otherwise affect the regulatory responsibilities of participants in the national PPS scheme. A similar mechanism is included in the *Corporations Act 2001* and Corporations Agreement 2002.

Clause 258 provides that the Bill is subordinate to inconsistent legislation of the Commonwealth, a referring State or a Territory which prohibits or limits a person creating, acquiring or dealing with personal property or a security interest in it. The regulation-making power in subclause 258(4) could be used to remove the subordination so that the Bill prevailed. Such a regulation could be necessary, for example, where a State or Territory law purporting to limit the ability of a person to

deal with a security interest in personal property would unintentionally undermine the operation of the national scheme.

The Committee thanks the Attorney-General for this response, which satisfies its concerns. The Committee **requests that this information be included in the explanatory memorandum** to provide an explanation of the proposed use of the regulation-making powers to overcome inconsistencies between the bill and other laws.

Shifting onus of proof
Subclause 299(2)

Clause 299 provides for actual or constructive knowledge in relation to certain property transfers, unless there is proof to the contrary beyond a reasonable doubt (the criminal standard). Subclause 299(2) provides that, where personal property is transferred between members of the same household, related companies, or a company and a company director or officer of that company, there is a presumption, unless the contrary is shown beyond reasonable doubt, that the transferee had actual or constructive knowledge: of the security interest in the collateral; that the transaction was a breach of the security agreement; and that value was not given by the transferee for the interest acquired.

The explanatory memorandum states (at page 120) that this provision is based on similar provisions in NSW and Victorian legislation and 'is intended to address the risk of fraud in property transfers between related entities'. Further: '(t)he civil standard of proof would not afford sufficient protection or deterrent in these circumstances. Imposing the criminal standard of proof would better protect financiers holding security interests in personal property and deter fraudulent transactions which are a clear risk where related entities trade with one other'.

The Committee notes the explanation provided in the explanatory memorandum and is mindful that the bill provides for a national scheme. Nevertheless, the Committee considers that this is an unusual provision in Commonwealth legislation. The Committee **seeks the Attorney-General's advice** as to whether further background information might be provided relating to the need and justification for the use of such a provision in the bill.

Pending the Attorney-General'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 Attorney-General

A number of the provisions in the Bill (particularly those in Part 2.5) allow a person to acquire property free of a security interest provided certain conditions are satisfied. The Bill provides that the person may not take the property free of the security interest if:

- the purchaser had actual or constructive knowledge that the acquisition constituted a breach of the security agreement that provides for a security interest in the personal property;
- the purchaser had actual or constructive knowledge of a security interest in the personal property; or
- value was not given by the transferee for the interest acquired.

The onus of proving that the security interest is extinguished is on the person claiming that they have taken the property free of the security interest (clause 296).

Clause 299 of the Bill has the effect that the buyer must prove these matters beyond reasonable doubt when the seller and buyer are members of the same household, associated corporate entities, or a corporation and one of its directors. This standard of proof is used in current State and Territory legislation dealing with security interests, which the PPS Bill would replace.

A number of referring States requested that the higher standard should be retained so as to continue to offer the same level of protection for finance companies against fraudulent transactions as their current legislative schemes. In their view, the higher standard of proof is necessary to maintain the reputation and integrity of the loan market. The civil standard of proof ('on the balance of probabilities') would not give lenders sufficient incentive to finance ordinary consumers without additional checks. This is because use of the civil standard would make it harder to set aside fraudulent transactions.

The Committee thanks the Attorney-General for this very helpful response, which satisfies its concerns. Again, the Committee **requests that this information be included in the explanatory memorandum** to provide greater background and context to the proposed amendment.

Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009

Introduction

The Committee initially dealt with this bill in *Alert Digest No. 9 of 2009*. The Assistant Treasurer responded to the Committee's comments in a letter dated 26 August 2009.

In its *Tenth Report of 2009*, the Committee sought further advice from the Assistant Treasurer on the issue of judicial review. The Assistant Treasurer responded in a letter received on 15 September 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 9 of 2009

Introduced into the House of Representatives on 24 June 2009
Portfolio: Treasury

Background

This bill makes consequential and transitional amendments to a number of Acts to facilitate the smooth transition from the current law regarding the registration of tax agents to the new regulatory regime provided for in the *Tax Agent Services Act 2009* (which received Royal Assent on 26 March 2009).

Among other things, the bill:

- repeals certain provisions that will no longer have any effect due to the commencement of the Tax Agent Services Act (such as Part VIIA of the *Income Tax Assessment Act 1936* relating to the registration of tax agents);

- amends, repeals or inserts relevant definitions and reference in other Acts to ensure consistency with the Tax Agent Services Act;

- amends certain provisions in the *Taxation Administration Act 1953* to reflect the enhanced independence of the Tax Practitioners Board from the Commissioner of Taxation, as provided for in the Tax Agent Services Act;

- expands the definition of 'taxation law' to include the Tax Agent Services Act, and associated regulations; and

- amends the Tax Agent Services Act to correct typographical errors and to expand the circumstances in which the Tax Practitioners Board can disclose information to the Commissioner of Taxation.

Inappropriate delegation of legislative power
Insufficient parliamentary scrutiny
Schedule 2, items 15 and 16

Items 15 and 16 of Schedule 2 contain transitional provisions providing for references to, and things done by, or in relation to, a Tax Agents' Board. Subitem 15(1) provides for a thing done by a Tax Agents' Board under the old law to be taken to have been done by the new Tax Practitioners Board for the purposes of the operation of any law after commencement.

The explanatory memorandum gives the example (at page 53) that if a state Board had cancelled a tax agent's registration and the decision had been overturned by the Administrative Appeals Tribunal (AAT), then the Board could appeal the AAT's decision to the Federal Court. Subitem 15(2) states that the Minister may, by writing, determine that subitem (1) does not apply in relation to a specified thing done by, or in relation to, a Tax Agents' Board. Such a determination is not a legislative instrument (subitem 15(4)). The explanatory memorandum explains that this 'provides flexibility for the Minister to ensure that the appropriate outcome is achieved in all circumstances'.

Similarly, subitem 16(1) provides that a reference to a Tax Agents' Board in an instrument in force immediately before commencement has effect after commencement, as if the reference were to the Tax Agents' Board. Under subitem 16(2), the Minister may, by writing, determine that subitem (1) does not apply in relation to a specified reference; under subitem 16(3), this is not a legislative instrument.

The Committee considers that, in each case, the Minister is given a very broad discretion. In the example provided in the explanatory memorandum, it appears that the Minister, or his or her delegate, could substitute a less favourable decision without this being subject to scrutiny. Accordingly, the Committee **seeks the Treasurer's advice** in relation to how it is anticipated that the transitional provisions in items 15 and 16 will be accompanied by sufficient scrutiny.

Pending the Treasurer's advice, The Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference; and 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 Assistant Treasurer

I refer to a letter of 13 August 2009 from Ms Julie Dennett, Secretary, Standing Committee for the Scrutiny of Bills, to the Treasurer regarding the Committee's concerns about two provisions contained in the Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009. The letter has been referred to me as I have portfolio responsibility for this matter.

Items 15 and 16 of Schedule 2 to the Bill have been included to ensure continuity in the transfer of responsibility for the regulation of tax agents from the existing state tax agents' boards (the old boards) to the new, national Tax Practitioners Board created by the *Tax Agent Services Act 2009.* Relevantly, item 15 deems things done by, or in relation to, an old board to be things done by, or in relation to, the new board. Similarly, item 16 deems a reference in an instrument to the old board to be a reference to the new board.

Since it is difficult to identify every circumstance where it is appropriate for the new board to be considered to be the old board, these provisions are necessarily phrased in broad terms. To address the *possibility* that this may have an unforeseen and inappropriate outcome, these provisions include a ministerial discretion to determine that they do not apply in particular instances.

In relation to the Committee's concerns, this discretion could not be used by the new board (or a minister) to substitute a less favourable decision (with respect to one originally made by the old boards). Significantly, the other provisions in the Bill ensure that existing decisions of the old board (whether they be to register an entity or terminate that entity's registration) continue to apply under the new regulatory regime administered by the new board. The ministerial discretion under items 15 and 16 cannot alter this.

The example provided in the explanatory memorandum highlights a situation where it is appropriate for the new board to be deemed to 'stand in the shoes of' an old board. It notes that item 15 will allow the new board to appeal a decision of the Administrative Appeals Tribunal (AAT) to overturn a previous decision of an old board (that is, it transfers the appeal rights from the old board to the new board).

Taking this example, if for instance the ministerial discretion was exercised so that item 15 did not operate in this case, then the only result would be that the new board could not appeal the AAT's decision. This would not result in a decision being substituted but, rather, would merely prevent the matter being subject to judicial review.

Thank you for providing me with an opportunity to address the Committee's concerns in relation to this Bill.

The Committee thanks the Assistant Treasurer for his response and considers that this information should also be included in the explanatory memorandum for the benefit of readers.

With respect to the comment that item 15 could 'merely' prevent matters being subject to judicial review, the Committee is concerned that the word 'merely' seems to suggest that the impact and scope of the provision would be insignificant. The Committee recognises, of course, that item 15 is a type of transitional provision designed to ensure flexibility, and that Ministerial discretion is a valid Executive function. However, the prevention of judicial review goes to the heart of the separation of powers and, in this context, the Committee notes that privative clauses are normally used to limit judicial review. Accordingly, the Committee **seeks the Assistant Treasurer's further advice** as to whether specific examples might be provided of the circumstances in which it is envisaged that a decision of the AAT would not be the subject of judicial review but, instead, would be the subject of Ministerial discretion.

Relevant extract from the further response from the Assistant Treasurer

The Committee requested further advice as to whether specific examples might be provided of the circumstances in which it is envisaged that a decision of the AAT would not be the subject of judicial review but, instead, would be the subject of Ministerial discretion.

In response to this request, I would like to clarify that it was not my intention to imply that judicial review was an insignificant matter, nor that the important and deliberative processes afforded by judicial review could be replaced by an exercise of Ministerial discretion. No provision or privative clause has been included in the Bill to in any way abrogate an individual's right to administrative or judicial review with respect to a decision that affects them. Indeed, items 18 and 19 of Schedule 2 of the Transitional Bill were inserted to ensure that individuals, regardless of the transition from the current regulatory regime to the new regime, maintain their right to review.

The exercise of Ministerial discretion under these Regulations could not, in any circumstances, prevent an aggrieved individual who is subject to an adverse decision of the AAT from seeking judicial review of that decision.

I would like to reiterate that item 15 and 16 of Schedule 2 of the Transitional Bill are 'blanket' provisions to facilitate a smooth transition from the current Tax Agents' Boards to the new regulatory regime administered by the Tax Practitioners Board. Provisions allowing Ministerial discretion, such as at sub-item 15(2) of Schedule 2 of the Transitional Bill, allow the Minister to determine that the 'blanket' provision does not apply. This is to ensure that any unintended or inappropriate outcomes that may result from the application of such a 'blanket' transitional provision do not result.

Ministerial discretions are quite commonly used in relation to legislation relating to transitional matters. Similar Ministerial discretions were used in both the *Agricultural and Veterinary Chemicals (Administration) Amendment Bill 2007* (see sub-item 11(3) of Schedule 2), which provided for the transition of the Australian Pesticides and Veterinary Medicines Authority from a board structure to an executive management structure, and the *Maritime Legislation Amendment Bill 2007* (see sub-item 9(4) of Schedule 1), which facilitated the integration of the Australian Maritime College with the University of Tasmania.

Thank you for providing me with an opportunity to address the Committee's concerns in relation to this Bill.

The Committee thanks the Assistant Treasurer for this helpful further response, which satisfies the Committee's concerns.

Senator the Hon Helen Coonan
Chair

RECEIVED
10 SEP 2009
Senate Standing C'ttee for the Scrutiny of Bills

The Hon Chris Bowen MP
Minister for Human Services
Minister for Financial Services, Superannuation and Corporate Law

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

Dear Senator Coonan

I refer to the letter of 13 August 2009 from the Secretary of the Standing Committee for the Scrutiny of Bills (the Committee) to the Senior Adviser to the Treasurer, providing the Committee's comments on the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009. This response relates to the comments on Schedule 1 (Margin Loans) and Schedule 2 (Trustee Companies) of the Bill.

In relation to the Committee's more extensive comments on trustee companies, I note that the Government wishes to ensure that the industry is well regulated and that consumers of traditional trustee company services are appropriately protected.

I understand the Committee has raised concerns about the inclusion of regulation making powers to determine important matters, as well as in relation to an apparently wide delegation of power and a clause enabling the Government to amend the principal legislation by regulation. Specific responses to each of these concerns are provided in the Attachment to this letter.

In general, the Government has endeavoured to ensure that particular client groups can be identified and brought within the protections of the legislation. As with the national consumer credit legislation, such flexibility is necessary to address the likely concerns of consumers once the legislation becomes more widely known.

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

Yours sincerely

CHRIS BOWEN

enc

PO Box 6022
Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7200
Facsimile: 02 6273 4406

Attachment

CORPORATIONS LEGISLATION AMENDMENT (FINANCIAL SERVICES MODERNISATION) BILL 2009: SCHEDULE 1 (MARGIN LOANS)

'Henry VIII' clause – subsection 985K(4)

Schedule 1, item 12, subsection 985K(4) enables regulations to be made which may prescribe situations where the unsuitability test in proposed Section 985K of the Corporations Act would not apply.

The unsuitability test in Section 985K creates a new high level responsible lending obligation on providers of a margin lending facility.

As Section 985K uses a principles based approach, the flexibility to prescribe situations where a matter is not unsuitable is important to clarify the intended operation of the law, respond to any changes in the market and consider new or unexpected situations.

This provision, including subsection 985K(4), is analogous to provisions on responsible lending in the National Consumer Credit Protection Bill 2009.

CORPORATIONS LEGISLATION AMENDMENT (FINANCIAL SERVICES MODERNISATION) BILL 2009: SCHEDULE 2 (TRUSTEE COMPANIES)

Determination of important matters by regulation – subsection 12BAB(1B)

Subsection 12BAB(1B) enables regulations to be made under the *Australian Securities and Investments Commission Act 2001* (ASIC Act) that enable persons to be identified as those to whom a traditional trustee company service is to be provided, so that such persons will be entitled to various consumer protections under the Act.

Given that the deeming of traditional trustee company services as financial services is novel, and that the Government has received limited feedback from consumer groups during the exposure period for the legislation, a power of this type is appropriate to allow for particular client groups to be protected as and when they are identified.

Treasury is currently discussing with the Australian Securities and Investments Commission (ASIC) the possible making of regulations under this provision to mirror proposed regulation 7.1.28A (see below).

Of course, any such regulations would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* and would be subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances.

Determination of important matters by regulation – sections 601RAC and 601SAB

Paragraphs 601RAC(1)(e), (2)(f) and (3)(c) are included to allow the categories of traditional trustee company services and estate management functions to be added to, or limited, by regulation.

These provisions were included for a number of reasons. Discussions with the trustee company industry suggested that, while the major categories of inclusions and exclusions have been identified, the categories may require some refinement. It is expected that such changes will be refinements rather than major in nature. Accordingly, it was considered that they could be expeditiously dealt with in regulations.

Section 601SAB was included to, for example, allow regulations to be made to enable licensed trustee companies to take advantage of the new national regime by winding up existing state-based entities and transferring their appointments and businesses to a single licensee. The power under Section 601SAB has been used to make proposed regulation 5D.2.03. At the time of making the primary legislation, the Government and the industry had not agreed upon the exact details of the scheme and it was considered that, to enable the industry to quickly rationalise its operations, the matter could be dealt with in regulations.

Any such regulations would be subject to the usual parliamentary scrutiny and disallowance regime.

Wide delegation of power – subsection 601WAA(2)

Section 601WAA empowers ASIC to authorise in writing that a member of ASIC or its staff perform the powers of an authorised ASIC officer under a provision of Part 5D.6. The Part provides that, if ASIC cancels the licence of a trustee company, it may make a compulsory transfer determination. Of its nature, this power would be exercised very rarely.

The Committee has sought advice regarding the level, position and qualifications of ASIC staff members who are expected to exercise functions and powers under this Part. The power under Section 601WAA requires a specific delegation of power, which means that ASIC would consider the nature of the powers to be exercised when deciding to whom such delegation will be made. Currently, under section 102 of the ASIC Act, ASIC may delegate any or all of its functions to staff of the Commission. ASIC has advised that its senior executives would act in circumstances that involved significant matters, such as compulsory transfer determinations. ASIC oversees a wide range of powers which it has delegated to staff members under section 102 of the ASIC Act in an appropriate manner.

'Henry VIII' clause – subsection 601YAB(1)

The Committee has asked why this provision has been included, rather than putting forward amendments to the Act itself, if necessary. Often, rather than including detailed rules in the legislation, it is better to include such a scheme in regulations.

For instance, in addition to the examples given, it may be necessary to deal with any future issues involving interactions between the Corporations Act and state and territory laws. For example, Division 2 of Part 7.8 of the Corporations Act governs the obligations of Australian financial services licensees relating to dealing with client monies and loans by clients to licensees. These rules may need detailed interaction provisions so they can operate concurrently with state laws.

I also note that such provisions are not uncommon in the Corporations Act. These provisions have been modelled in part on Chapter 7 and Part 5C of the Corporations Act,

including provisions such as section 601QB. For example, Part 5C.11 of the Corporations Regulations contains rules based on section 601QB.

Determination of important matters by regulation – subsection 766A(1B)

Subsection 766A(1B) enables regulations to be made under the Corporations Act that enable persons to be identified as persons to whom a traditional trustee company service is to be provided, so that such persons will be entitled to various consumer protections under the Act.

Given that the deeming of traditional trustee company services as financial services is novel, and that the Government has received limited feedback from consumer groups during the public exposure process, a power of this type is appropriate to put beyond doubt that certain persons are 'clients', or are so obviously affected by the traditional activities of trustee companies that they need protection.

This regulation making power has been used to specify persons to whom a trustee company service is taken to be provided: proposed regulation 7.1.28A. Broadly, these include persons to whom an annual information return is provided under proposed regulation 5D.2.01 (other than a beneficiary), and persons who effectively purchase certain services. Any future regulations would be subject to the usual parliamentary scrutiny and disallowance regime.

ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

RECEIVED
11 SEP 2009
Senate Standing Committee for the Scrutiny of Bills

09/21172

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

Dear Senator

I refer to the recent consideration by the Standing Committee for the Scrutiny of Bills of the Foreign States Immunities Amendment Bill 2009 (the Bill) and the Committee's invitation to comment on concerns raised by the Committee (see Alert Digest No 11 of 2009, 9 September 2009).

As the Committee is aware, the primary purpose of the Bill is to allow regulations to be made that would exclude or modify the application of section 13 of the *Foreign States Immunities Act 1985* with respect to the acts or omissions of a foreign State in providing assistance or facilities for the purposes of preparing for, preventing or managing emergencies or disasters in Australia.

Section 13 of the Act provides an exemption to the general immunity of foreign States from the jurisdiction of Australian courts provided by section 9 of the Act. This exemption applies with respect to proceedings concerning (a) the death of, or personal injury to, a person, or (b) loss of or damage to tangible property. The exemption only applies with respect to acts or omissions done or omitted to be done in Australia.

The Committee has sought my advice 'as to whether it might be appropriate for the Act itself to confine the scope of the regulations by listing specific circumstances in which it is envisaged that this regulation-making power will be used'.

I would note at the outset that the application of the provision is already carefully prescribed. It applies only where the foreign State is providing, or is to provide, assistance or facilities to an Australian, State or Territory Government for the purposes of preparing for, preventing or managing emergencies or disasters in Australia. The Governor-General is only empowered to make regulations excluding or modifying the application of section 13 of the Act in relation to acts or omissions done in the course of providing such assistance or facilities. In other words, the operation of section 13 of the Act to emergency personnel from a foreign States may only be excluded or modified with respect to acts or omissions in the course of their duties. Further, the Bill would not in any way affect the responsibility of any person for criminal acts.

Parliament House, Canberra ACT 2600 • Telephone (02) 6277 7300 • Fax (02) 6273 4102 www.ag.gov.au

While the Bill was developed in response to a very particular set of circumstances – the need to conclude a cooperative agreement with the United States of America with respect to the exchange of fire suppression personnel and equipment – in my view it was important not to simply legislate for this set of circumstances but rather to provide the flexibility to respond to emergencies and disasters as yet unforseen.

While it may have been possible to identify a confined set of emergencies or disasters to which the provision would apply – for example bushfires, floods, cyclones, shipping disasters etc – my view is that the Australian public would not thank us if the Government were unable to facilitate the provision of assistance to Australia by a foreign State in an emergency that was not included on that list.

I understand, of course, the Committee's general concerns about this type of power. However, I believe that the limited application of the Bill should allay this concern. Of course, the Parliament would also have the power to disallow a regulation laid before it that has been made under proposed section 42A.

Finally, on this point, I would note that the Bill does not in any way affect the liability of the Australian Government or State and Territory Governments for actions taken in their name. In my view, the provision as drafted, achieves an appropriate balance between ensuring the Government can respond quickly and flexibly to emergency and disaster situations as they arise and safeguarding against the potential abuse of such a power.

The Committee also seeks my clarification as to how the 'scope of the proposed exception will be practically confined so that it applies only to foreign officials acting in the course of their duties, noting that emergency situations may necessarily involve the legitimate performance of a wide range of unforseen and unusual duties'.

As I have already noted, any regulation made under proposed section 42A can only exclude or modify the application of section 13 of the Act in relation to acts or omissions done in the course of the provision of assistance or facilities for the purposes of preparing for, preventing or managing emergencies or disasters. Any regulation that goes beyond this scope would be of no effect.

In the vast majority of cases, as a matter of practical application, I believe it will be very clear what acts or omissions are or are not done in the course of preparing for, preventing or managing emergencies or disasters.

I hope this information is of assistance in concluding your consideration of this Bill. I thank you for the opportunity to respond to these important issues.

Yours sincerely

Robert McClelland

ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

RECEIVED
15 SEP 2009
Senate Standing C'ttee
for the Scrutiny of Bills

09/12269-02, MC09/12001

3 SEP 2009

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

Dear Senator Coonan

The Secretary of the Standing Committee for the Scrutiny of Bills wrote on 13 August 2009 inviting my response to comments on the Personal Property Securities Bill 2009 in the Scrutiny of Bills *Alert Digest No 9 of 2009*.

I provide the following comments against each of the clauses of the Bill mentioned in the Alert Digest.

Subclause 8(3)

Subclause 8(1) provides that the Bill will not apply to certain kinds of security interests. The kinds of property that the Bill will not apply to are set out in broad terms. However, the Bill will operate in complex and dynamic financial markets. As a general rule, it is intended that the regulation making power in subclause 8(3) will be used to bring into and out of the Act complex financial market transactions that are created over time, and whose nature changes over time. The regulation making power in subclause 8(3) is intended to make it possible to more closely align at the margins the exclusions established by subclause 8(1) with the needs of the financial markets.

Where it is appropriate to do so, the regulation making power may also be used to apply the Bill to some matters that would be excluded because of the general nature of the exclusions in subclause 8(1). It may also be necessary to provide greater certainty about whether particular kinds of security interests are covered by an exclusion in subclause 8(1).

Subclause 118(5)

An obligation may be secured by both a security interest in personal property and an interest in land. Under the existing law, upon default by the debtor, the secured party would apply the law relating to security interests to enforce the security interest against the personal property, and the land law to enforce against the interest in the land. This would result in two distinct processes being used.

Parliament House, Canberra ACT 2600 • Telephone (02) 6277 7300 • Fax (02) 6273 4102 www.ag.gov.au

Clauses 117 and 118 provide a mechanism that will allow the secured party to enforce against the personal property using the land law of a State or Territory as a single process. The intention is that when a security interest has attached to both real property and personal property, the secured party will be able to apply the land law of the State or Territory to enforce the security interest against the personal property. This will result in the same enforcement process being applied against both the real property and the personal property. This should reduce the cost of enforcing the security interests and increase the amount payable to the secured creditor or the grantor.

However, the land law of the State or Territory may not be perfectly adapted to the enforcement of security interests against personal property.

To meet this concern, subclause 118(5) will allow regulations to be made modifying how the State or Territory land law applies to the enforcement of security interests in personal property. The regulations will not modify the Bill. Rather, they will modify the State or Territory land law and provide a mechanism for the Commonwealth to control how the State or Territory land law applies to the enforcement of security interests in personal property.

The Bill has been developed in consultation with the States and Territories and they endorse the option to use land laws to enforce a security interest in personal property where the security interest also covers land. Prior to its introduction the States and Territories approved the text of the Bill – including clauses 117 and 118 which provide this mechanism.

Clauses 147 and 197

Subclause 147(3) allows the Registrar to keep the Personal Property Securities Register in any form that he or she considers appropriate. It is based on section 1274(1) of the *Corporations Act 2001*, which allows ASIC to 'keep such registers as it considers necessary in such form as it thinks fit'. Subclause 147(3) is intended to make it clear that the Bill focuses on the outcomes that the Registrar must deliver, rather than the manner in which the obligations are discharged. It is intended to make the Bill technology neutral, so that it will not constrain the Registrar as to the kind of technology he or she may employ to discharge his or her obligations under the Bill. For example, it will allow the Registrar to accept documents in hard copy form, over the internet through a web browser, or over the internet using XML messaging technologies.

Clause 197 allows the Registrar to delegate his or her powers to persons who may, or may not, be engaged under the *Public Service Act 1999*. A delegate may be required to exercise their powers under the direction or supervision of the Registrar, Deputy Registrar or a person engaged under the Public Service Act.

The powers conferred on the Registrar under the Bill fall into three broad classes.

First, the powers required to operate the register. It is expected that the Registrar will ordinarily exercise these powers through automated systems without delegation to any person. It is nevertheless preferable for the Registrar to have a power of delegation to cover those circumstances requiring manual processes. The volume of transactions processed by the register would make it impractical for the Registrar to exercise all of his or her powers personally.

Second, the power to undertake investigations or commence or intervene in legal proceedings (see clauses 173(5), 218 and 219). It is expected that the Registrar would ordinarily exercise these powers personally. When the powers are delegated, it is expected that the delegation

would be in relation to a particular matter, and under the supervision of the Registrar. This power of delegation is necessary to provide the Registrar with flexibility in the administration of the register, so that the Registrar will have the capacity to exercise the power personally in relation to significant matters and to delegate to a junior officer (who need not be an SES officer) in relation to less significant matters.

Third, the power to make a range of routine decisions, such as:

(a) in relation to applications made to the Registrar for a report (see clause 176);

(b) in relation to the amendment demand process (see clause 180(2));

(c) approve arrangements for the payment of fees (see clause 190(4)).

It is expected that matters within this third class would ordinarily be exercisable by junior officers working at a telephone contact centre, under the direction and supervision of more senior officers. The volume and nature of these matters will make it inappropriate for these discretions to be exercisable by SES officers.

Clause 255 and subclause 258(4)

Clause 255 and subclause 258(4) of the Bill are intended to provide certainty about the concurrent operation of the Bill with other Commonwealth, State and Territory laws.

Clause 255 is consistent with clause 3.2.4 of the intergovernmental agreement on PPS reform, which states:

> Where there is direct inconsistency between State or Territory legislation and the [PPS] Act, or subordinate legislation made under the Act, that State or Territory legislation will prevail over the Act or subordinate legislation where:
>
> (a) subordinate legislation made under the Act provides that the State or Territory legislation prevails; or
>
> (b) subject to clause 3.2.5, the State or Territory legislation expressly derogates from the Act or subordinate legislation.

Clause 255 will allow inconsistencies between the Bill and other Commonwealth, State or Territory legislation to be resolved by the making of a regulation which will displace a provision of the Bill or modify its operation so that no inconsistency arises. It provides a mechanism to resolve inconsistencies that would otherwise affect the regulatory responsibilities of participants in the national PPS scheme. A similar mechanism is included in the *Corporations Act 2001* and Corporations Agreement 2002.

Clause 258 provides that the Bill is subordinate to inconsistent legislation of the Commonwealth, a referring State or a Territory which prohibits or limits a person creating, acquiring or dealing with personal property or a security interest in it. The regulation-making power in subclause 258(4) could be used to remove the subordination so that the Bill prevailed. Such a regulation could be necessary, for example, where a State or Territory law purporting to limit the ability of a person to deal with a security interest in personal property would unintentionally undermine the operation of the national scheme.

Subclause 299(2)

A number of the provisions in the Bill (particularly those in Part 2.5) allow a person to acquire property free of a security interest provided certain conditions are satisfied. The Bill provides that the person may not take the property free of the security interest if:

- the purchaser had actual or constructive knowledge that the acquisition constituted a breach of the security agreement that provides for a security interest in the personal property;
- the purchaser had actual or constructive knowledge of a security interest in the personal property; or
- value was not given by the transferee for the interest acquired.

The onus of proving that the security interest is extinguished is on the person claiming that they have taken the property free of the security interest (clause 296).

Clause 299 of the Bill has the effect that the buyer must prove these matters beyond reasonable doubt when the seller and buyer are members of the same household, associated corporate entities, or a corporation and one of its directors. This standard of proof is used in current State and Territory legislation dealing with security interests, which the PPS Bill would replace.

A number of referring States requested that the higher standard should be retained so as to continue to offer the same level of protection for finance companies against fraudulent transactions as their current legislative schemes. In their view, the higher standard of proof is necessary to maintain the reputation and integrity of the loan market. The civil standard of proof ('on the balance of probabilities') would not give lenders sufficient incentive to finance ordinary consumers without additional checks. This is because use of the civil standard would make it harder to set aside fraudulent transactions.

The action officer for this matter in my Department is Wayne Bobbin who can be contacted on (02) 6141 3619.

Yours sincerely

Robert McClelland

ASSISTANT TREASURER
SENATOR THE HON NICK SHERRY

RECEIVED
15 SEP 2009
Senate Standing Ctte
for the Scrutiny of Bills

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

Dear Senator Coonan

I refer to a letter of 10 September 2009 from Ms Julie Dennett, Secretary, Standing Committee for the Scrutiny of Bills, regarding the Committee's request for further information relating to the *Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009* (Transitional Bill).

The Committee requested further advice as to whether specific examples might be provided of the circumstances in which it is envisaged that a decision of the AAT would not be the subject of judicial review but, instead, would be the subject of Ministerial discretion.

In response to this request, I would like to clarify that it was not my intention to imply that judicial review was an insignificant matter, nor that the important and deliberative processes afforded by judicial review could be replaced by an exercise of Ministerial discretion. No provision or private clause has been included in the Bill to in any way abrogate an individual's right to administrative or judicial review with respect to a decision that affects them. Indeed, items 18 and 19 of Schedule 2 of the Transitional Bill were inserted to ensure that individuals, regardless of the transition from the current regulatory regime to the new regime, maintain their right to review.

The exercise of Ministerial discretion under these Regulations could not, in any circumstances, prevent an aggrieved individual who is subject to an adverse decision of the AAT from seeking judicial review of that decision.

I would like to reiterate that item 15 and 16 of Schedule 2 of the Transitional Bill are 'blanket' provisions to facilitate a smooth transition from the current Tax Agents' Boards to the new regulatory regime administered by the Tax Practitioners Board. Provisions allowing Ministerial discretion, such as at sub-item 15(2) of Schedule 2 of the Transitional Bill, allow the Minister to determine that the 'blanket' provision does not apply. This is to ensure that any unintended or inappropriate outcomes that may result from the application of such a 'blanket' transitional provision do not result.

PO Box 6022
Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7360
Facsimile: 02 6273 4125
http://assistant.treasurer.gov.au

Ministerial discretions are quite commonly used in relation to legislation relating to transitional matters. Similar Ministerial discretions were used in both the *Agricultural and Veterinary Chemicals (Administration) Amendment Bill 2007* (see sub-item 11(3) of Schedule 2), which provided for the transition of the Australian Pesticides and Veterinary Medicines Authority from a board structure to an executive management structure, and the *Maritime Legislation Amendment Bill 2007* (see sub-item 9(4) of Schedule 1), which facilitated the integration of the Australian Maritime College with the University of Tasmania.

Thank you for providing me with an opportunity to address the Committee's concerns in relation to this Bill.

Yours sincerely

NICK SHERRY