



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

**FIRST REPORT
OF
2010**

3 February 2010

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

**FIRST REPORT
OF
2010**

3 February 2010

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

FIRST REPORT OF 2010

The Committee presents its First Report of 2010 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:

Australian Centre for Renewable Energy Bill 2009

Australian Sports Anti-Doping Authority Amendment Act 2009

Australian Wine and Brandy Corporation Amendment Bill 2009

Bankruptcy Legislation Amendment Bill 2009

Crimes Legislation Amendment (Serious and Organised Crime)
Bill (No. 2) 2009

Tax Laws Amendment (Confidentiality of Taxpayer
Information) Bill 2009 *

- * Although this bill has not yet been introduced in the Senate, the Committee may report on the proceedings in relation to this bill, under standing order 24(9).

Australian Centre for Renewable Energy Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 15 of 2009*. The Minister for Resources and Energy responded to the Committee's comments in a letter dated 14 December 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 15 of 2009

Introduced into the House of Representatives on 18 November 2009
Portfolio: Resources, Energy and Tourism

Background

This bill establishes the Australian Centre for Renewable Energy (ACRE) Board and the position of Chief Executive Officer (CEO) of the ACRE.

The ACRE is a component of the Clean Energy Initiative which will complement the Carbon Pollution Reduction Scheme and expanded Renewable Energy Target by supporting the research, development and demonstration of low-emission and renewable energy technologies. The ACRE's objective will be to promote the development, commercialisation and deployment of renewable energy and enabling technologies, and to improve their competitiveness in Australia.

The principal function of the ACRE Board will be to advise the Minister on renewable energy and enabling technologies.

Indeterminate ministerial power

Subclause 17(3)

Clause 17 provides for the termination of appointment of members of the ACRE Board. For example, termination may occur due to: misbehaviour, or physical or mental incapacity (subclause 17(1)); bankruptcy (subparagraph 17(2)(a)(i)); or lack of attendance at meetings without leave of absence (paragraph 17(2)(b)).

Subclause 17(3) provides that the Minister may terminate an appointment ‘if he or she is satisfied that the member’s performance has been unsatisfactory for a significant period of time’. The Committee notes that the types of behaviour that may be considered to constitute unsatisfactory performance are not defined in the bill, thus providing the Minister with an apparent broad discretion to terminate a board member’s appointment pursuant to this criterion. The explanatory memorandum provides no guidance as to the intended interpretation of the words ‘unsatisfactory performance’. The Committee **seeks the Minister’s advice** on whether the explanatory memorandum might be amended to provide guidance or examples in relation to the intended practical operation of subclause 17(3).

Pending the Minister’s advice, the Committee draws Senators’ attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee’s terms of reference.

Relevant extract from the response from the Minister

In the *Alert Digest* the Committee sought my advice on the intended interpretation of ‘unsatisfactory performance’ in the context of the termination of the appointment of members of the Australian Centre for Renewable Energy (ACRE) Board (subclause 17(3) of the Bill refers). The Committee also sought my advice on whether the explanatory memorandum to the Bill might be amended to provide guidance on the intended practical operation of subclause 17(3).

The presence of the unsatisfactory performance power (clause 17(3) refers) in the Bill is to render unnecessary the need to foresee all of the circumstances where it might be appropriate to terminate an appointment. However, from corporations law, examples of the types of unsatisfactory performance that could justify the use of the power include:

- where a member is frequently absent from meetings without leave but misses only every second or third meeting so that three meetings in succession are not missed;
- where a member breaches confidentiality protocols;
- where a member uses Board information for his/her own benefit or to the detriment of ACRE;
- where a member regularly disrupts Board meetings, for example, by vexatiously challenging the Chair;
- where a member regularly fails to exercise care and diligence in contributing to Board decision-making; and
- where a member has problems making decisions that are in the best interests of ACRE.

A decision by the Minister to terminate the appointment of a Board member would be subject to judicial review by the Federal Court of Australia or the Federal Magistrates Court. Such a decision could be defended successfully only if the Minister:

- applied natural justice in making the decision by giving the member notice of the case against him or her and a reasonable opportunity to respond to the allegations;
- applied no bias against the member in making the decision;
- took account of only relevant considerations, and of all relevant considerations, in making the decision;
- did not make the decision in bad faith or for an improper purpose;
- did not act unreasonably in making the decision; and
- personally made up his or her mind about the situation and did not simply rubber stamp a decision effectively made by someone else and did not indiscriminately apply a policy.

If the Minister breaches any of these requirements in terminating a member, the Court may set aside the decision and the Minister would be required to make the decision again in accordance with administrative law and any directions given by the Court.

My Department has informed me that unsatisfactory performance is commonly not defined in the explanatory memoranda of other bills that contain this power, such as the explanatory memoranda that accompanied the *Screen Australia Bill 2008* and the *Australian Crime Commission Establishment Bill 2002*.

In light of the difficulty of foreseeing all possible manifestations of unsatisfactory performance, and in accordance with the precedent set by the accompanying Explanatory Memoranda to existing Acts, I am of the view that there is no need to amend the Explanatory Memorandum to the Bill.

The Committee thanks the Minister for this response.

Australian Sports Anti-Doping Authority Amendment Act 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 13 of 2009*. The Minister for Sport responded to the Committee's comments in a letter dated 22 December 2009. A copy of the letter is attached to this report.

Although this bill has now been passed by both Houses and received Royal Assent on 16 November 2009, the Minister's response may, nevertheless, be of interest to Senators.

Background

This bill amends the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act) and the *Australian Sports Commission Act 1989* to reflect new structural and governance arrangements for the Australian Sports Anti-Doping Authority (ASADA), in response to key recommendations arising from an independent review of the ASADA in 2008. The bill aims to ensure that the efficacy of Australia's anti-doping program is maintained and reinforces Australia's continued commitment to the international anti-doping effort.

In particular, the bill:

- replaces the office of the ASADA Chair with a new ASADA Chief Executive Officer (CEO) position;
- creates an Advisory Group to provide advice to the ASADA CEO on sports doping matters; and
- establishes an Anti-Doping Rule Violation Panel (ADRVP) to make findings on anti-doping rule violations, and recommend follow-up action and sanctions to ASADA.

The bill also includes a number of incidental amendments to ensure that the ASADA Act remains consistent with the World Anti-Doping Code, which was revised on 1 January 2009.

Wide delegation of legislative power

Schedule 1, item 130

Subitem 130(1) provides that if, before commencement of the bill, a thing was done by, or in relation to, the ASADA or the ASADA members, then, for the purposes of the operation of any law after the commencement time, that thing is taken to have been done by, or in relation to, the new ASADA CEO. However, subitem 130(3) enables the Minister to determine that this does not apply in relation to a specified thing done by, or in relation to, the ASADA or its members. Subitem 130(4) provides that '(t)he regulations may provide for a thing specified in a determination [by the Minister] to be taken to have been done by, or in relation to, a person or body other than the CEO, the Commonwealth or the ADRVP'. This is a broad delegation of legislative power, although the regulations would be subject to the usual tabling and disallowance regime.

The explanatory memorandum reiterates (at page 21) that item 130 will allow 'for the Minister to determine that a reference previously relating to the non-executive ASADA members, may now relate to a person or body other than the ASADA CEO or the Commonwealth'. It appears that regulations made under this provision might allow the Commonwealth to avoid responsibility for the previous actions of non-executive ASADA members. Accordingly, the Committee **seeks the Minister's advice** on the need and justification for this broad regulation-making power; and whether examples could be provided of the circumstances in which it is intended to apply.

Relevant extract from the response from the Minister

I am responding as the Minister for Sport. I thank the Standing Committee for the Scrutiny of Bills for its comments in *Alert Digest No. 13 of 2009* (28 October 2009) regarding the Australian Sports Anti-Doping Authority Amendment Bill 2009 (the Bill).

In the *Alert Digest*, the Committee has raised concerns about the provisions contained in item 130 of Schedule 1 of the Bill constituting a broad delegation of legislative power. The intent of item 130 is to provide for continuity of key activities and functions performed by the Australian Sports Anti-Doping Authority (ASADA), following the introduction of changes to ASADA's governance structure upon commencement of the Bill on 1 January 2010.

The provisions of item 130 will be crucial in ensuring that the Anti-Doping Rule Violation Panel (ADRVP), which is being established under the Bill, can exercise the powers and functions required of it under the National Anti-Doping Scheme. Under existing arrangements, these powers and functions are exercised by ASADA.

The primary purpose of the power in subitem 130(1), and that which has the most immediate need, is to provide a convenient mechanism for references in the Australian Sports Anti-Doping Authority Regulations 2006 (the Regulations) to be updated as a result of the transfer of functions and powers brought about by the Bill. There is a need for the Regulations to reflect the fact that functions and powers conferred on ASADA or ASADA members by the Regulations are now to be performed by different persons; such as the ASADA Chief Executive Officer (CEO), the Commonwealth or the ADRVP.

In order to provide for a convenient drafting mechanism for effecting these changes, subitem 130(1) provides for a default position to be established for these references so that the reference is taken to be a reference to the CEO, while subitem 130(3) provides for the situation where the function or power in the Regulations has been conferred on someone other than the CEO. This gives the Minister the facility to make a determination that permits a power or function in the Regulations to be applied to the relevant person; such as the ADRVP.

The combined effect of item 130, regulations made under subitem 130(4) and determinations made under subitem 130(3) will be to ensure that any action taken prior to the commencement of the Bill, and action that needs to be taken after its commencement, is attributed to the person or body upon whom the relevant function or power is conferred by the Bill.

The Department of Health and Ageing is currently preparing a Determination that will allow me, by authority of subitem 130(3)(c) of the Bill, to reallocate relevant anti-doping rule violation powers and tasks from ASADA to the ADRVP. This will ensure that Australia's capacity for dealing with sports doping cases is not adversely affected by the changes occurring at ASADA and that the ADRVP is fully and properly equipped to assume its key role of deliberating and deciding on anti-doping rule violations.

I note that the Committee has sought further advice on the need for the Minister to be able to determine that a 'reference previously relating to the non-executive ASADA members, may now relate to a person or body other than the ASADA CEO, the Commonwealth, or the ADRVP' (subitem 130(4) of the Bill). There were no particular examples in mind that motivated the inclusion of this facility but it was considered prudent to provide for various situations, whether or not they were in contemplation at the time of the Bill's commencement, so that any actions by, or in relation to, the non-executive ASADA members could continue to operate or have effect after the Bill's commencement. The justification for this, in broad terms, is to ensure a seamless transition of the governance arrangements for ASADA that does not jeopardise ASADA's activities and, in particular, the handling of potential anti-doping rule violations.

The Committee thanks the Minister for this response.

Australian Wine and Brandy Corporation Amendment Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2009*. The Minister for Agriculture, Fisheries and Forestry responded to the Committee's comments in a letter dated 21 December 2009. A copy of the letter is attached to this report.

Background

This bill amends the *Australian Wine and Brandy Corporation Act 1980* to allow the Australia-European Community Agreement on Trade in Wine – signed by the Australian Government and the European Community on 1 December 2008 – to enter into force. The bill clarifies the intention of the original 1994 agreement by redefining, expanding and strengthening a number of its provisions; makes changes to the Label Integrity Program; and updates the compliance provisions in the Australian Wine and Brandy Corporation Act.

The bill also amends the *Trade Marks Act 1995* to amend definitions relevant to the agreement; enables the Registrar of Trade Marks to amend the representation of a trade mark or an application to register a trade mark; and ensures that trade marks that include a common English word that coincides with a geographical indication can be registered.

Regulations – incorporating material as in force from time to time Schedule 1, item 42, new paragraph 40M(1C)(b)

Schedule 1 contains amendments relating to the Agreement between Australia and the European Community on trade in wine. For wine originating in a foreign country, any requirement in a national food standard in relation to oenological practices, processes, or compositional requirements may now be governed by regulations.

Proposed new subsection 40M(1C), to be inserted by item 42 of Schedule 1, provides that the regulations may prescribe oenological practices, processes or compositional requirements by applying, adopting or incorporating (with or without modification) a written instrument or other document as in force or existing at a particular time, or as in force or existing from time to time (proposed new paragraph 40M(1C)(b)).

The Committee has, in the past, expressed concern about provisions which allow a change in obligations imposed by regulation without the Parliament's knowledge, or without the opportunity for the Parliament to scrutinise and (if so minded) disallow the variation. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. In this case, the reason for incorporation by reference is not explained in the explanatory memorandum. Therefore, the Committee **seeks the Minister's advice** on the need and justification for including incorporation by reference in the regulation-making power.

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

Relevant extract from the response from the Minister

Section 40M of the *Australian Wine and Brandy Corporation Act 1980* implements obligations from the 1994 Agreement between Australia and the European Community on Trade in Wine by providing circumstances in which the Food Standards Code does not apply to wines produced in an agreement country. In practice, this means wine produced and imported from the European Union (EU) can be made using new oenological practices that are different from those approved for Australian producers.

Australia's most favoured nation obligations under the World Trade Organisation (WTO) Agreement rules require that Australia extends this benefit to other nations. Therefore the Bill extends section 40M to provide for regulations to be made authorising the import of wine using oenological practices not approved for Australian wine and provides for these to be identified by reference to a written instrument or other document.

Minor updates to oenological practices are common. By referencing the foreign laws or codes (as amended) that already apply to international producers we will provide immediate facilitation of trade and WTO compliance. The regulations do not impose any burdens on Australian or international producers. If each update to oenological practices required an amending regulation, this would take substantial time and resources with limited benefits.

The system will not disadvantage Australian producers. At the request of the Winemakers' Federation of Australia the production standard for Australian wine is already more restrictive than the one covering imported wines.

Countries where there are doubts about the health and safety of oenological practices will not be included in the regulations. Section 40M(2) provides that if the minister has concerns about the health and safety of a particular practice, he or she may suspend the section. The new paragraph has the additional benefit of clarifying how Australia already meets its obligations under the World Wine Trade Group Mutual Acceptance Agreement on Oenological Practices (MAA), signed on 18 December 2001. By signing the MAA, Australia is committed to accepting wine imports from other member states regardless of the oenological practices used, unless we have concerns based on health and safety grounds.

Parliament would have the opportunity to approve the countries and documents that are to be listed in the regulations.

The Committee thanks the Minister for this response, noting that there will be no disadvantage to Australian producers.

'Henry VIII' clauses Schedule 1, items 47 and 54

There are two 'Henry VIII' clauses in Schedule 1 which enable regulations to change responsibilities and entitlements conferred by the principal Act.

Proposed new subsection 40PA(3), to be inserted by item 47 of Schedule 1, provides for regulations to 'modify the operation of this Division to remove any inconsistency with the operation of regulations made for the purposes of Division 4B'. This allows 'modification' by regulation to provisions in Division 4 of the Australian Wine and Brandy Corporation Act relating to Australian geographical indications. Proposed new Division 4B, to be inserted by item 55 of Schedule 1, relates to foreign geographical indications and translations determined by the Geographical Indications Committee (established under section 40N of the Australian Wine and Brandy Corporation Act).

Proposed new section 40ZAA, to be inserted by item 54 of Schedule 1, provides for regulations to ‘modify the operation of this Division to remove any inconsistency with the operation of regulations made for the purposes of Division 4B’. This allows ‘modification’ by regulation to provisions in Division 4A relating to omission of Australian registered geographical indications.

In both cases, the explanatory memorandum refers (at pages 33 and 34) to the need to ensure consistency with Australia’s international obligations. Nevertheless, the Committee **seeks the Minister’s advice** on why it is considered necessary to use regulations to amend provisions in Divisions 4 and 4A in the event of any inconsistency with the operation of regulations made for the purposes of Division 4B.

Pending the Minister’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

The committee is also concerned that sections 40PA(3) and 40ZAA introduce 'Henry VIII' clauses that may delegate legislative powers inappropriately.

The two sections referenced by the Committee are procedural in nature. The regulations merely address the process for determining foreign GIs and any impact on the Act would be limited to the process for determining Australian GIs. The rights and obligations of GIs, once protected, are not impacted by the two sections.

The *Australian Wine and Brandy Corporation Act 1980* provides for a system under which the Geographical Indications Committee determines wine geographical indications (GIs) within Australia. Australia's international obligations under the WTO Agreement require that Australia also provide a system to protect wine GIs of foreign countries and translations of wine GIs.

Australia's international obligations include:

- that all foreign country wine GIs be protected no less favourably than the protection given to Australian or agreement country wine GIs; and
- that Australia provides for the protection of wine GIs against their use in translation.

The systems for recognising and protecting wine GIs are relatively new for many countries and are continuing to evolve. Australia's system of protection must be sufficiently flexible to accommodate a variety of circumstances with regard to determining all foreign country wine GIs and, in addition,

to determining translations of those wine GIs. Because of that need for flexibility the authority to amend arrangements is more appropriately placed in regulations.

As noted above Australia's international obligations require that Australia provides treatment for foreign country GIs that is no less favourable than that for Australian GIs. Therefore, if changes need to be made to the process for determining foreign country GIs, Australia may need to change the process for determining Australian GIs. By providing for the regulations to modify the Act, Australia can ensure its international obligations continue to be met and Australian producers are not disadvantaged due to the time involved in amending the primary legislation.

Finally, I note the committee's agreement to include a new section 83A, which will act retrospectively for a small number of registered trade marks that include certain wine terms.

The Committee thanks the Minister for this response, noting that the proposed provisions will ensure that there is no disadvantage to Australian producers.

Bankruptcy Legislation Amendment Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 14 of 2009*. The Attorney-General responded to the Committee's comments in a letter dated 21 December 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 14 of 2009

Introduced into the House of Representatives on 28 October 2009
Portfolio: Attorney-General

Background

This bill amends the *Bankruptcy Act 1966* to modernise the national personal insolvency scheme.

In particular, the bill:

- provides a more streamlined process for fixing trustee remuneration and a more transparent process for reviewing that remuneration;
- strengthens the penalties for some offences and ensures that these are in line with the penalties for other similar offences;
- removes the concept of 'Bankruptcy Districts' in order to provide more flexibility in personal insolvency administration;
- increases the minimum debt to \$10,000 for a creditor's petition to reflect changes in the economic environment;
- increases the stay period that follows a declaration of intent (from seven days to 28 days) to file a debtor's petition (to allow debtors to better assess their options); and

- increases the debt, income and asset tests thresholds for debt agreements by 20% to ensure that the thresholds keep pace with increasing wages and the increasing availability of credit.

Retrospective application Schedule 2, subitem 84(3)

Item 84 of Schedule 2 contains a number of application provisions. Subitem 84(3) provides that the amendment made by item 15 (relating to a new power in section 77C for the Official Receiver to obtain a statement of affairs from a bankrupt) applies to bankruptcies occurring ‘before, on or after the day on which that item commences’.

This gives the provision retrospective application, even though the explanatory memorandum contains a general statement (at paragraph 16) that ‘(a)ll amendments will apply prospectively only’. In relation to subitem 84(3), specifically, the explanatory memorandum explains (at paragraph 100) that the provision is considered appropriate since the obligation to file a statement of affairs already exists and that ‘the new power is simply allowing the Official Receiver to enforce that existing obligation’.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case, the Committee **seeks the Attorney-General’s advice** in relation to the reasons why it is now considered necessary to apply the enforcement mechanism to those who become bankrupt before the commencement of 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

I understand that the Committee is concerned that subitem 84(3) of Schedule 2 of the Bill would give the amendment made by item 15 of Schedule 2 of the Bill retrospective application. Subitem 84(3) provides that the amendment made by item 15 (relating to a new power in section 77C for the Official Receiver to obtain a statement of affairs from a

bankrupt) applies to bankruptcies occurring ‘before, on or after the day on which that item commences’.

Subitem 84(3) would ensure that the proposed new power under section 77CA for the Official Receiver to obtain a statement of affairs applies to all bankruptcies where the bankrupt has not filed a statement of affairs. This is an important function, as a debtor’s failure to comply with this obligation can significantly frustrate the trustee’s ability to commence administering the bankrupt’s estate. The obligation for a debtor to file a statement of affairs is an obligation that already exists under the *Bankruptcy Act 1966*.

I do not believe that the provision in question trespasses unduly on personal rights and liberties. While the provision may be retrospective in application, it does not create any retrospective criminal liability. The power of the Official Receiver to issue a notice to obtain a statement of affairs can only be utilised after the commencement of the provision. Therefore, the offence of non-compliance with such a notice will only apply to non-compliance with notices issued after the date of commencement.

Retrospective application is necessary to allow the Official Receiver to issue a notice to obtain a statement of affairs for bankruptcies that may have occurred prior to or on the commencement of the provision, so that these bankrupts are not able to avoid examination of their affairs.

The Committee thanks the Attorney-General for this response, noting that the proposed provision will not create retrospective criminal liability.

Omission in explanatory memorandum Schedules 3 and 4

The Committee notes that the explanatory memorandum does not provide a detailed explanation of Schedule 3 (Removal of Bankruptcy Districts) and Schedule 4 (Other amendments), although the General Outline in the explanatory memorandum does contain a brief description of these Schedules. The consideration of bills by the Committee and by the Parliament is assisted if they are accompanied by a detailed explanation of the intent and operation of proposed amendments. The Committee **draws to the attention of the Attorney-General** the lack of detailed explanation of Schedules 3 and 4.

Relevant extract from the response from the Attorney-General

I understand that the Committee noted an apparent omission in the explanatory memorandum. Unfortunately, a printing error led to the last five pages of the explanatory memorandum being omitted from the printed version of the document. For your information, I have now enclosed a complete version of the explanatory memorandum.

The Committee thanks the Attorney-General for this response, and notes that a complete version of the explanatory memorandum has been provided.

Crimes Legislation Amendment (Serious and Organised Crime) Bill (No. 2) 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 13 of 2009*. The Attorney-General responded to the Committee's comments in a letter dated 1 December 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 13 of 2009

Introduced into the House of Representatives on 16 September 2009
Portfolio: Attorney-General

Background

In April 2009, the Standing Committee of Attorneys-General (SCAG) agreed to a set of resolutions for a comprehensive national response to combat organised crime. In June 2009, the Federal Government introduced the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, which implements the Commonwealth's commitment at the April SCAG meeting to enhance its legislation in this regard. In August 2009, SCAG agreed to further legislative and operational arrangements to support the national response to organised crime.

This bill amends several Acts (including the *Proceeds of Crime Act 2002*, the *Administrative Decisions (Judicial Review) Act 1977*, the *Crimes Act 1914*, the *Witness Protection Act 1994*, the *Criminal Code Act 1995*, the *Telecommunications (Interception and Access) Act 1979*, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and the *Australian Crime Commission Act 2002*) to implement legislative aspects of the national response to organised crime that were not contained in the first bill; and to further strengthen existing laws to more effectively prevent, investigate and prosecute organised crime activity, and target the proceeds of organised criminal groups.

In particular, the bill:

- strengthens criminal asset confiscation and anti-money laundering laws (Schedule 1 and Part 2 of Schedule 5);
- enhances search and seizure powers and the ability of law enforcement agencies to access data from electronic equipment (Schedule 2);
- improves the operation of the National Witness Protection Program, including by increasing protection for current and former participants and officers involved in its operation (Schedule 3);
- introduces new offences that would target persons involved in organised crime, and facilitates greater access to telecommunications interception for the investigation of new serious and organised crime offences (Schedule 4);
- improves the operation and accountability of the Australian Crime Commission (Schedule 7);
- improves money laundering, bribery, and drug importation offences (Part 1 of Schedule 5, and Schedules 8 and 9);
- makes minor and consequential amendments to correct references to provisions dealing with the extension of criminal liability (Schedules 10 and 11); and
- makes an urgent amendment to preserve the ability of federal defendants in Victoria to appeal a finding that they are unfit to plead (Schedule 6).

Retrospective application

Various provisions

The Committee's approach is to draw attention to bills that seek to have an impact on a matter that has occurred prior to their enactment. Several of the bill's application provisions provide that certain amendments apply 'whether the conduct constituting the offence concerned occurred or occurs before, on or after', or 'before, on or after', the commencement of other relevant provisions.

The provisions with retrospective application are: Schedule 1, items 19, 35, 65, 67, 77, 81, 98, 94, 102, 104, 107, 113, 128, 140, 146, 158, 161, 164, 166, 168, 175, 178, 181, 184, 187, 192, 197 and 205; Schedule 2, items 11 and 25; Schedule 5, item 36; Schedule 6, item 2; and Schedule 7, items 27 and 29.

Where proposed legislation has a clear retrospective application, the Committee considers that the explanatory memorandum should set out in detail the reasons for that retrospectivity. In cases, where retrospectivity *appears* to apply – although this may be illusory in practice – and particularly when criminal liability is to be imposed, it is desirable that an explanation for the retrospectivity be provided as well as an indication as to whether the retrospectivity will have an adverse impact on any individual. In relation to most of the provisions listed above, the explanatory memorandum merely repeats the terms of the provision without providing any additional explanation or contextual information.

The Committee **seeks the Attorney-General's advice** as to the reason for the retrospective application in each case where an explanation has not been given in the explanatory memorandum; and **requests that the explanatory memorandum be amended** to include this information for the benefit of readers.

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 refer to the Committee Secretary's letter of 29 October 2009 to my Office, seeking my advice as to the reason for the retrospective application of various provisions in the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No. 2) 2009, where an explanation has not been given in the Explanatory Memorandum.

My response is set out below. Where it would assist readers, I agree that the reasons provided below for the use of retrospective application in the Bill should be included in the Explanatory Memorandum and have instructed my Department to arrange this.

Schedule 1

Items 19, 35 and 65 of Schedule 1

While these provisions are retrospective in application, they do not create any retrospective criminal liability. Rather, these provisions impose a firm system for calculating whether the

proposed amendments to the exclusion, compensation and recovery provisions apply to a proceeds of crime proceeding. Depending on the provision, the changes will apply if a proceeding relates to either an application for a restraining order or forfeiture order that is made on or after commencement. This is regardless of when the conduct constituting the criminal offence that led to the proceeds of crime proceedings occurred. As the conduct constituting a criminal offence may continue over several years or may not be discovered immediately, these items will give certainty to persons whose property is subject to proceeds of crime action and legal practitioners who work with the *Proceeds of Crime Act 2002* (the POCA).

Were items 19, 35 and 65 not made retrospective in their application, it could create a considerable burden for the courts and the Commonwealth Director of Public Prosecutions (CDPP), which would effectively be required to apply two schemes under the POCA in relation to exclusion, compensation and recovery. It could also create considerable confusion about which provisions should apply where proceeds are derived from multiple offences that occurred both before and after the commencement of the provision, or where the conduct constituting a single offence runs for several years covering the period before and after commencement.

Some of the changes benefit persons whose rights are affected by proceedings under the Act, including by:

- removing the time limit on applying for exclusion of property prior to a restraining order being made (item 15)
- removing the requirement that a person must be notified of a restraining order, in order to exclude property from that restraining order (item 16)
- including a test for exclusion of property from forfeiture that applies equally to suspects and third parties (items 22 and 51)
- requiring the CDPP to notify certain people of the date of automatic forfeiture (item 40), and
- allowing for compensation where an interest in property has been, or will be, automatically forfeited (item 57).

It would be unfair to restrict a person's ability to access the amended provisions based on the time at which the conduct constituting the crime was committed.

Item 67

This provision is retrospective in application, but does not create any retrospective criminal liability. Rather, it allows a new, more precise definition of the term 'conviction day' to apply to a person who is sentenced on or after commencement. The new definition will provide certainty for a person whose property is being forfeited and assist the CDPP to meet its new obligations under the POCA to notify relevant people that property is being forfeited on a certain day.

If this definition did not apply retrospectively, the existing definition in paragraph 333(1)(a) of the POCA could continue to cause confusion and uncertainty for

those involved in confiscation proceedings that are based on offences committed prior to commencement.

Items 77 and 81

These provisions are retrospective in application, but do not create any retrospective criminal liability. Rather, they strengthen the provisions relating to pecuniary penalty orders by closing loopholes and addressing drafting errors in relation to the current provisions. For example, they will correct provisions that refer to how a pecuniary penalty is calculated, allow for a pecuniary penalty to be adjusted in certain circumstances, and enable the CDPP to apply for pecuniary penalty orders outside of the normal time limits if it is in the interests of justice to do so.

The amendments will apply in relation to applications made for a pecuniary penalty order on or after the commencement of this item, regardless of when the conduct constituting the offence that led to the pecuniary penalty order occurred. Retrospective application is necessary to ensure the integrity of the pecuniary penalty order provisions. Without retrospective application, a person who committed their offences prior to commencement could use the existing loopholes in the POCA to avoid having to account for the full value of their offences.

Item 94

This provision is retrospective in application, but does not create any retrospective criminal liability. Rather, it will allow a court to reduce a pecuniary penalty order that relates to more than one offence where a person has some (but not all) of his or her convictions quashed, and the conduct constituting those offences occurred prior to the commencement of Division 3 of Part 2-4 of the POCA.

Currently under the POCA, a pecuniary penalty order that relates to multiple offences is discharged if some of those offences are quashed (unless the order relates to a serious offence and the CDPP successfully applies for it to be confirmed under section 149). This occurs even if the conviction that is quashed accounts only for a small proportion of the benefits that a person has derived from their offences. Retrospective application is necessary to ensure that a pecuniary penalty order can still be enforced when some of the convictions to which the order relates are quashed, and the conduct constituting those offences occurred prior to the changes to the pecuniary penalty provisions.

Without retrospective application, pecuniary penalty orders will not be able to be enforced against the category of persons referred to above, thus allowing them to retain the proceeds of their crimes.

Item 98

This provision is retrospective in application, but does not create any retrospective criminal liability. It allows a magistrate to determine conviction-based pecuniary penalty and forfeiture orders if the conviction to which those orders relate was dealt with after commencement by a magistrate of the same court and the conduct that constituted the

offences was committed prior to commencement of the changes to subsection 335(6) of the POCA.

Retrospective application is necessary to ensure that applications for conviction-based pecuniary penalty and forfeiture orders can be dealt with efficiently and expediently by magistrates. Without retrospective application, magistrates will not have the jurisdiction to determine an application for a conviction-based pecuniary penalty order or, if they did not convict the person, a conviction-based forfeiture order, where the conduct that constituted the relevant offence occurred before commencement. This will lead to unnecessary delays for parties, who will be required to wait to have their conviction-based forfeiture order listed before the actual magistrate who convicted the person or, in the case of a conviction-based pecuniary penalty order, for fresh proceedings to be commenced in a superior court.

Item 102

This provision is retrospective in application, but does not create any retrospective criminal liability. Rather, it will apply the new definition of ‘affairs’ where an examination order relates to a restraining order applied for after the commencement of the changes to section 180, and the conduct constituting the offence occurred prior to commencement. It also applies a minor change to the wording of paragraph 180(1)(b) so that it refers to ‘a person who is a suspect in relation to the restraining order’ instead of ‘a person whom the restraining order states to be a suspect.’

Retrospective application is necessary to ensure that the term ‘affairs’ is defined consistently. Without retrospective application, the common law (with its diverging definitions) would continue to apply to examination orders for offences that occurred prior to commencement of the changes to the examination order provisions.

Retrospective application is also necessary to ensure that the amended wording in paragraph 180(1)(b), which more accurately reflects what appears in a restraining order in practice, applies regardless of when the unlawful conduct occurred.

Item 104

This provision is retrospective in application, but does not create any retrospective criminal liability. Rather, it provides that the new examination order provisions in sections 180A–180E of the POCA will apply to various proceedings, regardless of when the conduct constituting the offence which led to the previous restraining order or confiscation action, occurred.

Retrospective application is necessary to ensure that a person who claims an interest in property is not able to avoid examination about their affairs. Without retrospective application, the court could not make an examination order in respect of applications for exclusion, compensation or recovery, or a confiscation that has not been satisfied, when there is no restraining order in place and the conduct constituting the offence occurred before the commencement of sections 180A–180E.

Item 107

This provision is retrospective in application, but does not create any retrospective criminal liability. Rather, it will apply the new definition of ‘affairs’ where an examination order is made on the basis of the quashing of a person’s convictions after commencement of the changes to section 181 and the conduct that constituted the offence occurred prior to commencement.

It is necessary for the amendment to have retrospective effect to ensure that the term ‘affairs’ is defined consistently. Without retrospective application, the common law (with its diverging definitions) would continue to apply to examination orders for offences that occurred prior to commencement of the changes to the examination order provisions.

Item 113

This provision is retrospective in application, but does not create any retrospective criminal liability. Rather, it will allow a court to consider an application for an examination order *ex parte*, where the conduct constituting the offence occurred before the commencement of the proposed amendments to section 82. It will also expand subsections 187(4) and (5) to determine the scope of examinations, and apply the new definition of ‘affairs’.

It is necessary to apply the proposed amendments to section 182 retrospectively to ensure that examination orders can be obtained as soon as possible in proceedings. This will ensure that property can be identified and located before it can be dissipated or moved outside of the reach of law enforcement.

The need for the amendments to subsections 187(4) and (5) to have retrospective effect is a consequence of the insertions of sections 180A-180E, which allow for examination orders to be made in a broader range of circumstances (discussed in relation to item 104 above). The amendments are necessary to ensure that an examiner can ask questions that are relevant to the affairs of a person who is the subject of the new examination order provisions. It will also protect people from having their affairs examined where those affairs can no longer be subject to examination under the new provisions.

Items 128, 140 and 146

These provisions are retrospective in application, but do not create any retrospective criminal liability. They allow a court or an authorised officer to issue a production order, monitoring order or notice to a financial institution using the proposed amended provisions, regardless of when the conduct constituting the offence occurred.

Without retrospective application, access to these improved investigative tools would be limited to where the conduct constituting the offence occurred after the commencement of the changes to Parts 3-2, 3-3 and 3-4 of the POCA. It would also create a considerable burden for courts and authorised officers who would have to administer two schemes for the issuing of orders and notices, potentially for several years.

Item 158

This provision is retrospective in application, but does not create any retrospective criminal liability. Rather, it will allow the CDPP to apply for ancillary orders *ex parte*, where the ancillary order relates to a restraining order applied for after commencement of the changes to Division 5 of Part 2-1 and the conduct constituting the offence concerned occurred before commencement. It will also enable a court to make a broader range of ancillary orders.

Retrospective application is necessary to ensure the effectiveness of the ancillary order provisions. Without retrospective application, the court would not be able to grant an ancillary order *ex parte* or make an ancillary order under the grounds in proposed paragraphs 39(1)(ca), (d) and (da), where the unlawful conduct occurred prior to the commencement of the proposed amendments to section 39. These provisions will ensure that property can be identified and located before it can be dissipated or moved outside of the reach of law enforcement. It will also save the court time by allowing ancillary orders to be made at the same time as *ex parte* restraining orders.

Item 158 will also apply a number of safeguards when an ancillary order is made and the conduct constituting the offence was committed prior to the commencement of the changes to the ancillary order provisions. For example, a person who is affected by an *ex parte* ancillary order will be able to apply to the court to revoke the order. A sworn statement made under paragraphs 39(1)(ca), (d) or (da) will also not be admissible in civil or criminal proceedings against the person except in certain limited circumstances.

Items 161 and 164

These provisions are retrospective in application but do not create any retrospective criminal liability. Rather, the provisions allow a court that is hearing an application for a forfeiture order or pecuniary penalty order to have regard to the transcript of any proceeding against the person for an offence that constitutes unlawful activity, including where the conduct constituting the offence occurred before the commencement of these provisions.

Retrospective application is necessary to ensure that a court can have regard to the relevant transcripts when hearing a forfeiture order or a pecuniary penalty order. For example, without retrospective application, a court hearing an application for a forfeiture order or pecuniary penalty order on the basis that the person's guilt was proven to a civil standard may not be able to have regard to the transcript of a person's previous criminal trial. Similarly, a court that was hearing an application for a forfeiture order or pecuniary penalty order on the basis that a person had committed a serious offence may not be able to have regard to other transcripts relating to a person's unlawful activity, even though the person would be liable to forfeit the proceeds of that other unlawful activity.

Item 166

This provision is retrospective in application but does not create any retrospective criminal liability. Rather, it allows statements made at examinations to be admissible as evidence in proceedings under the Act in certain circumstances where the maker of those statements is absent or unavailable to appear as a witness.

Retrospective application is necessary to avoid confusion in identifying when a statement made at an examination is admissible, the rules that apply to a statement that is admitted and on what grounds a person can object to the admissibility of a statement. Without retrospective application, the current uncertainty as to the admissibility of these statements will continue to exist in proceedings where the unlawful conduct occurred prior to commencement of the new sections 318A and 318E of the POCA.

Item 168

This provision has retrospective application but does not create any retrospective criminal liability. Rather, it clarifies that, in making a restraining order under section 19, a court must be satisfied that there are reasonable grounds to suspect that property is the proceeds or instrument of one of the types of offences listed, but that need not be based on a finding as to the commission of a particular offence.

Retrospective application is necessary to ensure that the operation of section 19 is clear.

Items 175, 178 and 181

These provisions have retrospective application but do not create any retrospective criminal liability. Rather, they allow the application of updated definitions for the terms ‘foreign indictable offence’, ‘evidential material’ and ‘tainted property’.

Retrospective application of the definition of ‘foreign indictable offence’ is necessary to ensure that law enforcement authorities can access production orders and search warrants before a restraining order is obtained. Amendment of the definitions of ‘evidential material’ and ‘tainted property’ is necessary to ensure search warrants can operate effectively in relation to proceeds of a foreign indictable offence and indictable offences of Commonwealth concern.

Applying these definitions retrospectively will ensure that law enforcement agencies have access to the same techniques to investigate these matters, regardless of when the criminal conduct occurred.

Item 184

This provision has retrospective application but does not create any retrospective criminal liability. Rather, it allows a restraining order to remain in force where that order was applied for after the commencement of the proposed amendments to section 45 of the POCA, and an appeal against a conviction has been successful but a new trial has been ordered. The restraining order will remain in force regardless of when the criminal conduct (to which the restraining order relates) occurred.

Retrospective application of this provision is necessary to ensure that restraining orders do not lapse where a retrial is ordered, thus potentially allowing for the criminal proceeds to be dissipated or put outside of the reach of law enforcement.

Items 187 and 192

These provisions have retrospective application but do not create any retrospective criminal liability. Rather, they provide that the technical requirements in paragraphs 47(1)(b) and 49(1)(b) of the POCA are taken to be satisfied for an order to confirm the confiscation of criminal assets following a person's conviction being quashed or overturned on appeal. This provision will apply regardless of when the conduct constituting the offence occurred.

Without the amendments, confirmation orders could not be obtained unless the property had been subject to a restraining order that was capable of satisfying the technical requirements in sections 47 and 49. Retrospective application is necessary to ensure that the confiscation provisions can operate effectively. It will ensure that criminals are not able to benefit from their crimes, regardless of when they occurred.

Item 197

This provision has retrospective application but does not create any retrospective criminal liability. Rather, it amends the consent provisions to provide that consent must be obtained from the applicant for the consent order and all people who are likely to be affected by an order, regardless of when the proceedings under Chapter 2 of the POCA were commenced. It also removes the current anomaly in the Act, whereby a restraining order under section 19 must have been in place for at least six months for a consent order to be made in relation to a section 49 forfeiture order.

Retrospective application is necessary to ensure that the system for granting consent orders is efficient and effective. It would be anomalous if an agreement reached between all persons that would be affected by a section 49 forfeiture order could not be given effect because proceedings began before the commencement of these changes and a restraining order under section 19 had not been in place for six months. The changes will also ensure that consent orders that have been agreed to by the applicant for the order and all people who will be affected by the order, are not frustrated by people who only have a 'technical' interest in the property.

The effect of item 197 is that where proceedings under Chapter 2 began prior to commencement of the changes to the consent order provisions, parties will be able to make an agreement under the more effective new provisions.

Item 205

This provision is retrospective in application but does not create any retrospective criminal liability. Rather, it clarifies that money paid to the Commonwealth in settlement of proceeding must be credited to the Confiscated Assets Account, regardless of when the settlement occurred. Retrospective application is necessary to ensure that the legislation accurately reflects the source of funds that have been paid into the Confiscated Assets Account.

Schedule 2

Item 11

This provision is retrospective in application but does not create retrospective criminal liability. It provides that the amendments in Part 1 of Schedule 2, which allow material seized under Part IAA of the *Crimes Act 1914* to be used by and shared between Commonwealth, State and Territory law enforcement agencies, will apply in relation to things seized, or documents produced before, on or after the commencement of the proposed amendments..

In order to enable police to properly perform their duties, it is important that things or documents that are lawfully acquired are able to be used or shared for any necessary purpose connected with, or related to, law enforcement functions and activities.

This provision is necessary to allow law enforcement agencies to deal appropriately with evidence that they have lawfully acquired prior to the commencement of the amendments. In the absence of such a provision, law enforcement agencies would be required to separate material seized pre-amendment and material seized post-amendment, which would impose a considerable and impractical burden on the storage of evidence.

Item 25

Sub-item 25(1) does not apply with retrospective effect. It provides that the amendments in Part 2 of Schedule 2, which enable law enforcement agencies to effectively access and search electronic equipment under warrant, will apply only in relation to warrants issued on or after the commencement of the Part.

Sub-item 25(2) is retrospective in application, but does not create retrospective criminal liability. It provides that section 3LA of the *Crimes Act 1914* as amended will apply in relation to orders for assistance made after the commencement of the Part, even if the data storage device or computer which is the subject of the order was seized or moved from the warrant premises before, on or after the commencement of these provisions. This provision is necessary to allow law enforcement agencies to deal appropriately with evidence that they have lawfully acquired prior to the commencement of the amendments.

Schedule 5

Item 36

Item 36 does not create retrospective criminal liability. Rather, it provides that the proposed prohibition on disclosure by reporting entities that are or have been required to provide information or produce a document under subsection 49(1) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) applies where that requirement arose before, on or after the commencement of the provision.

Subsection 123(3) (as amended by item 35) will address gaps in the existing ‘tipping off’ offence in subsection 123 of the AML/CTF Act. In particular, it will prohibit a reporting entity that has been notified of a requirement to provide further information or produce

documents from disclosing the fact that they have been required to do so, where they have not yet provided the information or produced the document.

While item 36 provides that the expanded prohibition in subsection 123(3) applies where the requirement to provide information or produce documents arose before the commencement of the amendments, the ‘tipping off’ offence will still only apply to conduct engaged in after the commencement of item 35.

Schedule 6

Item 2

Item 2 is retrospective in application but does not create retrospective criminal liability. Rather, item 2 will assist individuals by clarifying that new section 20BI of the Crimes Act (inserted by item 1) will apply to findings made before, on or after the commencement of that section. This will ensure that all federal defendants will retain the ability to appeal a finding that they are unfit to plead, regardless of whether that finding was made before or after the commencement of the amendments.

Schedule 7

Item 27

Item 27 is retrospective in application but does not create any retrospective criminal liability. It clarifies that item 4 will apply to operations that began before, on or after the commencement of the item.

Item 4 will amend the definition of intelligence operation in subsection 4(1) of the *Australian Crime Commission Act 2002* (ACC Act) to clarify that it may involve the investigation of federally relevant criminal activity. This amendment will recognise that a specific investigation can be part of an intelligence operation and will allow the Australian Crime Commission (ACC) to undertake actions which may otherwise be reserved for ‘an investigation’. For example, a search warrant under section 3E of the *Crimes Act 1914* can only be obtained for the investigation of an offence, not for an intelligence operation or intelligence gathering in general. This amendment will mean that while conducting an intelligence operation, the ACC will be able to obtain a search warrant under the Crimes Act if it is conducting an investigation into an offence which is a necessary part of the operation.

It is appropriate for this amended definition to apply to operations which began before the commencement of the item, as it will allow the ACC to make immediate use of the changes. The ACC Board would otherwise be required to issue new authorisations for all current intelligence operations in order for the new definition to apply to them.

Item 29

This item is retrospective in application but does not impose any retrospective criminal liability. This item clarifies that the amendments made by items 24 and 25 will apply to

information obtained under the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979* before, on or after the commencement of this item.

Item 24 will amend the definition of relevant proceedings in the Surveillance Devices Act to include a contempt proceeding under proposed provision 34B(1) of the ACC Act. This would have the effect of permitting protected information (as defined in section 44 of the Surveillance Devices Act) in the contempt proceedings.

Item 25 will amend the definition of an exempt proceeding in section 5B(1) of the Telecommunications (Interception and Access) Act to include a contempt proceeding under proposed provision 34B(1) of the ACC Act. This would have the effect of permitting lawfully accessed or intercepted information in the contempt proceeding.

It is appropriate that these provisions apply to information obtained before the commencement of items 24 and 25. It would undermine the effect of the provisions if they could not be applied to information already lawfully obtained. In the case of current investigations, the amount of information already obtained would be substantial.

The Committee thanks the Attorney-General for this comprehensive response, and notes that he has instructed the Department to include relevant information in the explanatory memorandum which explains the reasons for the use of retrospective application in the bill.

Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 15 of 2009*. The Assistant Treasurer responded to the Committee's comments in a letter dated 5 January 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No. 15 of 2009

Introduced into the House of Representatives on 19 November 2009
Portfolio: Treasury

Background

This bill amends the secrecy and disclosure provisions applying to taxation information – currently found across 18 taxation Acts – by consolidating and standardising the various enactments into a single new framework. This framework will be contained in Schedule 1 to the *Taxation Administration Act 1953*.

The new framework is designed to provide clarity and certainty to taxpayers, the Australian Taxation Office, and users of taxpayer information; and to provide guiding principles to assist in framing any future additions or changes. The primary objective of the new framework is to protect the confidentiality of taxpayer information.

Insufficient parliamentary scrutiny

Schedule 1, item 1

The proposed framework gives effect to its primary objective by placing a general prohibition on the disclosure of taxpayer information, except in certain specified circumstances. The guiding principle is that disclosures are permitted where privacy concerns are clearly outweighed by the public benefit of the disclosure.

The bill contains provisions regulating disclosure of protected information by taxation officers (proposed new Subdivision 355-B, to be inserted by item 1 of Schedule 1) and the ‘on-disclosure’ of protected information by other people (proposed new Subdivision 355-C, also to be inserted by item 1 of Schedule 1).

Disclosure by taxation officers to Ministers, a House of the Parliament or a committee of one or both Houses of the Parliament is limited by new section 355-60 of Subdivision 355-B to the disclosure of publicly available information (see proposed new section 355-45) and information that is explicitly permitted to be disclosed for certain purposes under proposed new section 355-55. For example, if a parliamentary committee has requested a taxation officer to provide protected information in writing, such information would be treated as evidence in-camera and made available to the committee (proposed new subsection 355-55(2)).

However, the Committee notes that the provisions relating to ‘on-disclosure’ to the Parliament, by people other than taxation officers, are different. The limits on non-disclosure to Ministers and the Parliament are contained in proposed new section 355-210 which provides that, if an entity has acquired ‘protected information’ (defined in proposed new section 355-30) and makes a record of it for, or discloses it to, the Parliament, that person may only rely on three exceptions to the prohibition. The exceptions are: on-disclosing information that is already publicly available (proposed new section 355-170); on-disclosure to Ministers in relation to statutory powers or functions (proposed new section 355-180); and on-disclosure to a Royal Commission (proposed new section 355-195).

The explanatory memorandum explains (at paragraph 6.21) that the public interest may permit the on-disclosure of information from non-taxation officers but does not explain why the Parliament itself is not able to receive on-disclosed information from a non-taxation officer. The Committee **seeks the Treasurer’s advice** as to the reasons why different rules apply to taxation officers and non-taxation officers; and whether consideration might be given to applying similar rules to non-taxation officers who are requested by the Parliament to provide on-disclosed information.

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

Relevant extract from the response from the Assistant Treasurer

The Committee has expressed concerns that the provisions relating to 'on-disclosures' by non-taxation officers do not, unlike those applying to taxation officers, specifically facilitate the disclosure of identifiable taxpayer information to Parliament.

As a Senator myself I would like to assure you that it is not the intention of this Bill to limit Parliament's and, in particular, the Senate and its committees' important role in scrutinising the legislative process and the exercise of legislative powers by the Government and its agencies. Nor, in my view, is there any risk of the Bill having this effect.

Parliamentary committees have contributed greatly to the review and development of policy over the years in a broad range of areas. In informing their consideration on various issues, Government agencies are often called upon to provide information to committees on matters such as the manner in which legislation is implemented and the impact of legislation on the Australian community. As you would be aware, the information required by Parliament and provided by agencies would generally not need to identify specific individuals and specific cases. Notably, this Bill in no way limits the disclosure of such non-specific information, either by taxation officers or non-taxation officers.

Of course in some limited circumstances a committee may require information obtained by an agency that identifies a particular individual or entity in order to properly conduct its review or inquiry. In rare circumstances this may even extend to an individual or entity's taxation information which could include, for instance, their income or amount of tax paid.

The approach taken in the Bill is to balance the obvious privacy issues associated with such disclosures with the need to facilitate the important work of parliamentary committees. It does this by allowing the disclosure of identifiable taxpayer information to such committees by taxation officers, so long as the information is provided *in camera*. While the Committee has correctly identified that such information cannot be provided by those agencies that have themselves received the information from the Tax Office, in my view it is entirely appropriate that the information *only* be provided by the Tax Office. In addition to being the agency that has collected the information (and therefore is in the best position to ensure that the information is presented in an appropriate context), the Tax Office will have the greatest awareness of its obligations under this Bill and will likely have in place formal procedures and protocols to ensure that the information is appropriately (and lawfully) presented. Indeed, in relation to disclosures to parliamentary committees that may be made under the existing law, the Tax Office has issued a practice statement (PS LA 2004/9) to guide its staff.

Finally I would note that there has been no attempt to abrogate the powers and privileges of Parliament as it applies to Parliament itself (and its committees). When information is obtained by such committees the limitations imposed by the Bill cease to apply. In addition, Parliament's power to compel the production of information is also unaffected. While the Bill does not allow non-taxation officers that have received taxpayer information from the Tax Office to disclose such information to Parliament, they can still be compelled to do so. However, having regard to the discussion above, I am confident that to the extent that identifiable taxpayer information is required by a committee, such compulsive powers

would not need to be used as the Bill already adequately allows for the provision of such information.

I trust this information will be of assistance to you.

The Committee thanks the Assistant Treasurer for this comprehensive response, noting his view for the need for certain information to be provided to parliamentary committees only by officers of the Tax Office and not by officers of agencies to whom such information has been on-disclosed.

Senator the Hon Helen Coonan
Chair