SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SEVENTH REPORT

OF

2000

7 June 2000

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MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT OF 2000

The Committee presents its Seventh Report of 2000 to the Senate.

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

Broadcasting Services Amendment Act (No. 3) 2000

Products Grants and Benefits Administration Bill 2000

Taxation Laws Amendment Bill (No. 11) 1999

Broadcasting Services Amendment Act (No. 3) 1999

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No 1 of 2000*, in which it made various comments. The Minister for Communications, Information Technology and the Arts has responded to those comments (as well as comments in relation to the Broadcasting Services Amendment Bill (No. 4) 1999) in a letter dated 3 May 2000.

Although this bill has now been passed by both houses of Parliament (and received Royal Assent on 23 December 1999), the response from the Minister may, nevertheless, be of interest to Senators.

A copy of an extract of the relevant part of the Minister's letter is attached to this report. The complete letter will be attached to the Committee's Report on the Broadcasting Services Amendment Bill (No. 4) 1999 when that bill is introduced into the Senate. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 1 of 2000

This bill was introduced into the House of Representatives on 6 December 1999 by the Minister for the Arts and the Centenary of Federation. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to amend the following Acts:

Broadcasting Services Act 1992 to:

- impose licence conditions on subscription television broadcasting licensees in relation to expenditure on drama programs on subscription TV drama services;
- limit the scope of international obligations applicable to the Australian Broadcasting Authority (ABA); and
- provide a scheme for the regulation of international broadcasting services transmitted from Australia which requires the Minister for Foreign Affairs to make a national interest assessment of whether a service is likely to be contrary to the national interest;

- *Administrative Decisions (Judicial Review) Act 1977* to provide that decisions of the Minister for Foreign Affairs in relation to the proposed international broadcasting scheme are not subject to a requirement under the Act to provide a statement of reasons; and

- *Radiocommunications Act 1992* to provide that only persons who have an international broadcasting licence allocated by the ABA under the Broadcasting Act may be issued with a transmitter licence authorising operation of a transmitter for transmitting an international broadcasting service by the Australian Communications Authority.

No reasons for decision
Schedule 3, Part 1, Item 1

Schedule 3 to this bill contains a scheme for the regulation of international broadcasting services transmitted from Australia. This Schedule inserts proposed new Part 8B in the *Broadcasting Services Act 1992*. Under Part 8B, an Australian company wishing to provide an international broadcasting service must first apply to the Australian Broadcasting Authority (ABA) for a licence. If the ABA determines that the applicant is suitable, it must then refer the application to the Minister for Foreign Affairs, who is to assess whether the proposed international broadcasting service is likely to be contrary to the national interest. In making such an assessment, the Minister must have regard to the likely effect of the proposed service on Australia's international relations. The national interest criterion also applies after the grant of a licence.

The decisions open to the Minister under proposed Part 8B are, in effect:

- to refuse an application because the proposed service is likely to be contrary to Australia's national interest;

- to formally warn a licensee because a service is contrary to Australia's national interest;

- to suspend a licence because a service is contrary to Australia's national interest; or

- to cancel a licence because a service is contrary to Australia's interest.

Item 1 of Part 1 of Schedule 3 to the bill proposes to amend the *Administrative Decisions (Judicial Review) Act 1977* so that these decisions are not subject to the requirement in that Act that a statement of reasons be provided. The Explanatory Memorandum observes that "the nature of these decisions is such that exposure of the reasons for the decisions could itself be contrary to Australia's national interest".

While noting this explanation, the Committee is concerned at the apparent finality of such decisions by the Minister. For example, the Minister may direct the ABA to cancel a licence because he or she is of the opinion that the international broadcasting service is contrary to "Australia's national interest". If there is no obligation to provide reasons under the *Administrative Decisions (Judicial Review) Act 1977*, it is not clear what other rights of review or appeal (if any) are available to such a licensee.

Under proposed subsection 121FL(6), the licensee must be given a reasonable opportunity to send a submission to the ABA in relation to the cancellation, and the ABA must forward this submission to the Minister, but there seems to be no obligation on the Minister to actually consider the submission, and no similar procedure for making a submission where a licence is suspended rather than cancelled.

Where a licence is refused, suspended or cancelled, it is also not clear whether there is any right of appeal to the courts, and whether any such right of appeal extends to a consideration of the merits of the Minister's decision. The Committee, therefore, **seeks the Minister's advice** as to these matters.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Committee's Alert Digest 1/00 commented on the Broadcasting Services Amendment Bill (No. 3) 1999 and Broadcasting Services Amendment Bill (No. 4) 1999 (BSAB 4). In the second reading debate on Broadcasting Services Amendment Bill (No. 3) 1999 in the House of Representatives on 7 December 1999, the Government moved an amendment to the Bill to remove Schedule 3 - International Broadcasting Services from the Bill. On 9 December 1999 the Government introduced BSAB 4 into the House. BSAB 4 contains the proposed amendments to the *Broadcasting Services Act 1992* (BSA) the *Radiocommunications Act 1992* and the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act) in relation to international broadcasting services.

The Committee thanks the Minister for this response, which indicates that the matters of concern to the Committee were removed from this particular bill.

Product Grants and Benefits Administration Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No 6 of 2000*, in which it made various comments. The Assistant Treasurer has responded to those comments in a letter received on 5 June 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's response are discussed below.

Extract from Alert Digest No. 6 of 2000

This bill was introduced into the House of Representatives on 12 April 2000 by the Treasurer. [Portfolio responsibility: Treasury]

Part of a package of three bills to implement the fuel sales grants scheme, this bill proposes a framework for assessing and paying fuel sales grants and benefits to be administered by the Commissioner of Taxation.

Specifically, the bill provides for matters including the registration of claimants; the claiming and assessment of grants; the making and advance of payments; the record-keeping obligations of claimants; and measures to promote compliance with the grants and benefits of law.

Abrogation of the privilege against self-incrimination
Clause 43

Part 9 of this bill deals with the information-gathering powers of the Commissioner of Taxation. Clause 42 provides that the Commissioner may require a person to provide information, produce documents or give evidence relevant to the operation of the Act. Clause 43 abrogates the privilege against self-incrimination. However, subclause 43(2) limits the circumstances in which the information so provided, or any information document or thing obtained as a direct or indirect consequence, may be used in evidence.

The Committee has always expressed concern at the loss of the privilege against self incrimination. In its *Report on the operation of the Senate Standing Committee for the Scrutiny of Bills during the 36th Parliament (May 1990-February 1993)* the Committee observed that it was "reluctant to see the use of provisions abrogating the privilege – even with a use/derivative use indemnity – being used as a matter of course."

The Committee, therefore, **seeks the Treasurer's advice** as to the reasons for diminishing the rights of defendants in this manner.

Pending the Treasurer's response, the Committee draws Senators' attention to these 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 Assistant Treasurer

Clause 43 is contained in Part 9 which deals with the information-gathering powers of the Commissioner of Taxation. Clause 42 provides that the Commissioner may require a person to provide information, produce documents or give evidence relevant to the operation of the Act or of an Act under which the entitlement to a grant or benefit arises.

The Committee has expressed concern at "the loss of the privilege against self incrimination" in section 43. However, the Committee also noted that clause 43(2) limits the circumstances in which the information so provided, or any information document of thing obtained as a direct or indirect consequence, may be used in evidence.

The Committee has requested advice as to "the reasons for diminishing the rights of defendants in this manner".

Clause 42 of the bill under consideration confers on the Commissioner the same information-gathering powers powers as are currently conferred by section 264 *Income Tax Assessment Act 1936,* section *128 Fringe Benefits Tax Assessment Act 1986,* section 39 of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* and section 108 *Sales Tax Assessment Act 1992* among others administered by the Commissioner of Taxation.

These statutes listed in the above paragraph do not contain provisions specifically abrogating the privilege against self incrimination. However, the courts have consistently held that, having regard to the purpose for which the Commissioner's information gathering powers are conferred, the person who is required to furnish information or answer any question will not be entitled to refuse to furnish that information or answer that question on the grounds that to do so might tend to incriminate him or her: *Stergis v Federal Commissioner of Taxation* 88 ATC 4442; *Donovan v Deputy Federal Commissioner of Taxation* 92 ATC 4114; *Deputy Federal Commissioner of Taxation v De Vonk 95* ATC 4820.

The policy objective underlying these powers is reinforced by sections 8C and 8D *Taxation Administration Act 1953* which make it an offence for a person to refuse or fail to furnish information to the Commissioner and to fail to answer questions when attending before the Commissioner.

If the privilege against self incrimination were not abrogated in these circumstances, it would be impossible for the Commissioner to ascertain the liability or entitlement

(in the case of a grant or benefit) of a person where the answers are crucial to determining the person's liability or entitlement.

The terms of clause 43 therefore accord with the existing information-gathering powers of the Commissioner. Clause 43(2) limits the extent of the abrogation of the privilege against self-incrimination by making it clear that the abrogation does not apply in criminal proceedings unless those proceedings relate to specific offences under the *Taxation Administration Act 1953*. Moreover, documents produced pursuant to the information-gathering power cannot be the subject of a prosecution for making a false or misleading statement by virtue of section 8J(2) of the *Taxation Administration Act 1953* - as proposed to be amended by item 2 of Schedule 1 to the Fuel Sales Grants (Consequential Amendments) Bill 2000.

Guidelines for the exercise of information-gathering powers are contained in the ATO's *Access and Information Gathering Manual*. The Taxpayers' Charter sets out guidelines in relation to the use of information gathering powers. Relevantly, taxpayers are given reasonable opportunity at any time to consult with their advisers. The taxpayer's right to claim legal professional privilege in relation to certain communications is also acknowledged. In certain circumstances, advice given to a taxpayer by a professional accounting adviser is not required to be disclosed.

The information-gathering powers of the Commissioner are necessary as one of the safeguards in the Bill to prevent abuse of grants and benefits schemes and to protect public funds.

The Committee thanks the Assistant Treasurer for this response, which indicates that the privilege against self-incrimination has been effectively abrogated by the conferring of many statutory information-gathering powers. The Assistant Treasurer observes that the exercise of these powers by the Australian Taxation Office is subject to Guidelines. Given the importance of these Guidelines, perhaps it is appropriate that they should now have statutory force and be subject to Parliamentary scrutiny. Given that powers to gather information are a creation of statute, they should similarly be protected by statute.

Search and entry without judicial warrant
Clause 48

Where an authorised officer has reason to believe that documents or goods relevant to the operation of the Act are on any premises, clause 48 provides that that officer may enter those premises and is entitled to full and free access at all reasonable times to any documents, goods or other property on those premises. No provision is made requiring that a warrant be obtained from an independent judicial officer.

In its *Fourth Report of 2000*, this Committee examined the fairness, purpose, effectiveness and consistency of right of entry provisions in Commonwealth legislation. Among other things, the Committee recommended that all such provisions should accord with a set of fundamental principles. One of these principles is that legislation should authorise entry onto, and search of, premises only with an occupier's genuine and informed consent, or under warrant or equivalent statutory instrument, or by providing for a penalty determined by a court for failure to comply. The Committee considered it important that there be independent judicial oversight of the use of an intrusive power.

This provision, which is in similar terms to the other 'access' powers exercisable by the Commissioner of Taxation, does not accord with this principle. Accordingly, the Committee **seeks the Treasurer's advice** as to why clause 48 makes no provision for independent judicial oversight of the power of entry or access.

Pending the Treasurer's response, the Committee draws Senators' attention to these 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 Assistant Treasurer

Clause 48 is contained Part 11 of the Bill which deals with access to premises for purposes relevant to the operation of a product grant or benefit scheme. Broadly speaking, the clause allows an authorised officer to have access to premises and to inspect relevant documents and goods on those premises.

The Committee has expressed concern that the access provisions contained in clause 48 may trespass unduly on personal rights and liberties. The Committee has previously recommended that all such provisions in Commonwealth legislation should accord with the set of fundamental principles which the Committee has stated in its *Fourth Report of 2000.* The Government has not yet responded to the Committee's recommendations.

Clause 48 is consistent with the access provisions contained in section 263 *Income Tax Assessment Act 1936,* section 109 *Sales Tax Assessment Act 1992,* section 127 *Fringe Benefits Tax Assessment Act* 1986, and section *38 Superannuation Contributions Tax (Assessment and Collection) Act 1997* among others administered by the Commissioner of Taxation.

The Australian Taxation Office has developed a compliance model based on leverage, education and intelligence for all activities. It advocates a partnership approach and self assessment. The model seeks to maximise voluntary compliance.

The Australian Taxation Office has published guidelines for the use of the access powers. The Taxpayers' Charter and Access and Information Gathering Manual governs the conduct of ATO officers, who are bound to act in a fair and professional manner. The guidelines emphasise a cooperative approach whereby access to records is sought with the consent of the occupier. The access power is exercised only in

exceptional circumstances, such as where there is reason to suspect that the existence or integrity of relevant information is under threat. The ATO also controls the use of these powers through a system of delegation and authorisation. Those officers who are authorised to exercise the access power receive appropriate training in accordance with the ATO guidelines.

As currently framed, the access powers provide ATO officers with flexibility in managing the conduct of their activities according to the degree of cooperation they receive. The proposed requirement for judicial oversight would produce an unnecessarily adversarial climate and would not be conducive to a relationship of mutual cooperation between ATO officers and taxpayers. It may undermine the promotion within the community of voluntary compliance with laws administered by the Commissioner.

As the emphasis is on a cooperative approach, ATO officers seeking access to records usually provide advance notice and request the taxpayer's cooperation. The guidelines require the approval of a senior officer where urgent access is contemplated. Taxpayers are given a reasonable time and opportunity to consult with their advisers.

When entering premises or seeking documents, ATO officers are required to produce their identification and explain the purpose of their visit.

The access power is one of the compliance provisions in the Bill which are necessary to prevent abuse of the scheme and to protect public funds.

I trust that the above information assists the Committee in its deliberations.

The Committee thanks the Assistant Treasurer for this response. The Committee notes that in its *Fourth Report for 2000*, it recommended that the search and entry powers exercisable by the Australian Taxation Office should be reviewed and amended so that they were consistent with the principles set out in that Report. The Committee reaffirms this view.

Taxation Laws Amendment Bill (No. 11) 1999

Introduction

The Committee dealt with this bill in *Alert Digest No 1 of 2000*, in which it made various comments. The Assistant Treasurer responded to those comments in a letter dated 28 March 2000.

In its *Alert Digest No. 2 of 2000*, the Committee made further comments regarding issues raised in a submission received from the Corporate Tax Association, which were supported in further correspondence from the Institute of Chartered Accountants in Australia. The Assistant Treasurer has responded to those comments in a letter dated 3 April 2000.

Copies of both letters are attached to this report. An extract from the *Alert Digest* and relevant parts of the Assistant Treasurer's responses are discussed below.

Extract from Alert Digest No. 1 of 2000

This bill was introduced into the House of Representatives on 9 December 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

International Tax Agreements Act 1953 to ensure that the taxing right afforded to Australia under the relevant provision of a double taxation agreement over income, profits or gains arising from the alienation of Australian real property, including mining rights, is fully effective;

Income Tax Assessment Act 1997 to extend the period of time within which gifts to the Australian National Korean War Memorial Trust Fund, the St Patrick's Cathedral Parramatta Rebuilding Fund and the Shrine of Remembrance Restoration and Development Trust are tax deductible;

Income Tax Assessment Act 1936 to remove exemptions, from income tax, available to certain sportspersons and sporting clubs or associations; and

Income Tax Assessment Act 1936, the *Income Tax Assessment Act 1997* and the *Income Tax (Transitional Provisions) Act 1997* to make minor technical amendments.

Retrospective commencement
Subclause 2(2) and Schedule 4, items 43 and 44

Subclause 2(2) of this bill states that the amendments proposed in items 43 and 44 of Schedule 4 are to be taken to have commenced on 1 July 1998. The amendment proposed in Item 44 is clearly a technical amendment designed to replace a reference to an ITAA 1936 provision with a reference to the ITAA 1997 provision. This will make no retrospective change to the substantive law.

However, the effect of the change proposed by Item 43 is less clear. The Explanatory Memorandum states that this item "maintains the position in the ITAA 1936 by excluding partnerships from the definition of entity for the purposes of the section. The effect is that a partner's assets are used for the threshold rather than the assets of the partnership."

Subitem 82(1) of Schedule 4 states that this amendment, among others, applies to assessments for the 1998-99 income year and later years. Given this subitem, it is unclear why a specific provision has been included to cover the commencement of the amendment proposed in Item 43. The Committee, therefore, **seeks the Treasurer's advice** on the need for a specific retrospective commencement date for this provision.

Pending the Treasurer's advice, the Committee draws Senators' attention to this provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Assistant Treasurer dated 28 March 2000

Retrospective commencement
Subclause 2(2) and Schedule 4, items 43 and 44

The amendment proposed by item 43 of Schedule 4 (like that proposed by item 44) relates to the former capital gains tax (CGT) goodwill exemption conferred by Subdivision 118-C of the *Income Tax Assessment Act 1997*. Subdivision 118-C corresponded to section 160ZZR of the *Income Tax Assessment Act 1936* (the 1936 Act).

Subdivision 118-C allowed a 50% exemption on a capital gain arising from the disposal of goodwill by a small business with net assets under the 'business exemption threshold'. The threshold was $2 248 000 for the 1998-99 income year and $2 275 000 for the 1999-2000 income year until 21 September 1999.

Subdivision 118-C was repealed by item 45 of Schedule 1 of the *New Business Tax System (Capital Gains Tax) Act 1999* (Act No. 165 of 1999). The repeal was effective from 11.45 am eastern standard time on 21 September 1999 when the goodwill exemption was subsumed within the new small business 50% reduction for all active assets (including goodwill) disposed of by small business taxpayers with net CGT assets of $5 million or less.

The amendment proposed by item 43 of Schedule 4 is a measure favouring taxpayers that would reinstate the position in section 160ZZR of the 1936 Act. It would ensure that the business exemption threshold applies to a partner's assets rather than those of the whole partnership.

Given the repeal of Subdivision 118-C from 21 September 1999, there was some doubt whether the amendments proposed by items 43 and 44 of Schedule 4 could apply from the beginning of the 1998-99 income year as contemplated by subitem 82(1) of Schedule 4. Subclause 2(2) (which provides that items 43 and 44 of Schedule 4 are taken to have commenced on 1 July 1998) was included to put beyond doubt that the technical corrections to Subdivision 118-C were effective during the relevant period before 11.45 am on 21 September 1999.

The Committee thanks the Assistant Treasurer for this response.

Legislation by press release
Schedule 1

Schedule 1 to this bill amends the *International Tax Agreements Act 1953* to overcome the 1997 Federal Court decision in *Commissioner of Taxation v Lamesa Holdings BV* (1997) 77 FCR 597. The Explanatory Memorandum states that the purpose of the amendment is "to ensure that Australia is able to maintain its taxing right over alienations of Australian real property in situations where it is owned by non-residents either directly or through a chain of interposed entities and it is one of these entities which is alienated, rather than the real property being directly alienated".

Item 2 of Schedule 1 states that this amendment affects any income, profits or gains from the alienation of shares or interests occurring after 27 April 1998 – the date of a Press Release issued by the Treasurer.

In these circumstances, the Committee frequently refers to the Senate Resolution of 8 November 1988. This resolution, which deals specifically with tax legislation states that "where the Government has announced, by press release, its intention to introduce a Bill to amend taxation law, and that Bill has not been introduced into the Parliament or made available by way of publication of a draft Bill within 6 calendar months after the date of the announcement, the Senate shall, subject to any further resolution, amend the Bill to provide that the commencement date of the Bill shall be a date that is no earlier than either the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill".

As more than 6 months have elapsed between the date of the announcement and the introduction of this bill, and as the Committee is not aware of any publication of a draft bill within that period, the Committee draws these provisions to the attention of Senators and **seeks the Treasurer's advice** on the matter.

Pending the Treasurer's advice, the Committee draws Senators' attention to this provision, as it may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Assistant Treasurer dated 28 March 2000

Legislation by press release
Schedule 1 - Alienation of property through interposed entities

The proposed legislation was delayed for a number of reasons, most notably the federal election in 1998 and the amount of time required for the Commissioner of Taxation to consult and discuss the proposals with representatives of the 32 affected double taxation agreement partners.

The Commissioner wrote to the affected treaty partners on 28 April 1998 notifying them of the proposed legislation. As in all treaty matters, such consultation takes time, and is often subject to the domestic concerns of the treaty partner in question. As such, a delay was justified in awaiting and fully evaluating the responses. The proposed legislation was also the topic of numerous meetings at international forums at which the ATO delegates attended and explained Australia's position.

The feedback from these consultations and meetings were factored into the form of the legislation, as was our experience of developments in the OECD and UN fora.

I trust that the above information is useful in the Committee's deliberations in relation to these matters.

The Committee thanks the Assistant Treasurer for this response.

Issues raised by Corporate Tax Association

Extract from Alert Digest No. 2 of 2000

Retrospectivity, certainty and Australia's double taxation treaties Schedule 1

Introduction

As noted in *Alert Digest No 1 of 2000*, Schedule 1 to this bill proposes to amend the *International Tax Agreements Act 1953* to overcome the 1997 Full Federal Court decision in *Commissioner of Taxation v Lamesa Holdings BV* (1997) 77 FCR 597. In that decision, the Court considered a situation in which a Dutch resident company disposed of shares in an Australian company which owned a subsidiary company which owned land in Australia.

In that case, the Court held that the Alienation of Property Article in the Australia/Netherlands Double Tax Agreement (DTA) entitled Australia to tax a Dutch resident which sold land in Australia, or a Dutch resident which sold shares in an Australian company where that company's assets consisted principally of land in Australia, but did not extend to the disposal of land owned through a chain of companies.

Schedule 1 to this bill proposes to overcome this decision by inserting a new section 3A in the *International Tax Agreements Act 1953*. This section will amend the Australia/Netherlands DTA (and 30 other such Agreements) to enable Australia to tax alienations or dispositions of shares or comparable interests in companies the value of whose assets is wholly or principally attributable (whether directly or indirectly) to land in Australia.

These amendments are to apply to gains from alienations or dispositions after 12 noon on 27 April 1998 – the date of a Press Release issued by the Treasurer.

In *Alert Digest No 1 of 2000* the Committee raised the issue of the '6 month rule'. The Corporate Tax Association (CTA) has since raised three further issues:

- the retrospective effect of the provision on transactions commenced before 27 April 1998, but completed after that date;
- the unilateral abrogation of Australia's treaty obligations by amending domestic law; and
- the lack of certainty which may result from leaving the term "alienation or disposition" undefined.

Retrospectivity and transactions in progress

The CTA notes that transactions involving the disposal of shares in a company are negotiated and implemented over a lengthy period of time. Such transactions may not have been completed by the date of a press release, but may have been well under way (and may have become commercially irrevocable) by that date.

The importance of including adequate transitional provisions to ensure that such transactions were not penalised by retrospective legislation has been recognised in other taxation legislation (for example, in relation to share buy-backs in Taxation Laws Amendment Bill (No 1) 1996 and in relation to debt forgiveness rules in Taxation Laws Amendment Bill (No 2) 1996). The CTA suggests that the established concept of an 'excluded transitional arrangement' should also be applied in the case of this bill where there is objective evidence that a relevant transaction was under way at the date of the press release.

If the six month rule were to be applied to alter the bill's commencement date, then this would also alter the relevant date for such 'excluded transitional arrangements'.

Australia's international obligations

The CTA expresses concern at the use of 'legislation by press release' to unilaterally alter Australia's treaty obligations, and its possible effect on Australia's international reputation. It notes that the Vienna Convention on the Law of Treaties (to which Australia is a Party) states that a party may not evoke the provisions of its internal law as justification for its failure to perform a treaty.

The CTA submits that the changes announced on 27 April 1998 should be effected not in this bill, but by way of bilaterally agreed amendments to Australia's DTAs – a course recently adopted in relation to other DTAs.

Uncertainty

Finally, the CTA states that the term "alienation or disposition" is not defined either in the DTA or in Australia's domestic tax legislation. This entails a risk that the lack of certainty regarding these words may lead to ambiguity in the application of proposed new section 3A. Given that this section will be operative from 27 April 1998 until such time as an 'alienation of property article' in a relevant DTA is amended, unless taxpayers know precisely when an alienation or disposition occurs they "will not be able to determine whether to apply section 3A or the DTA".

The Committee draws these concerns to the Treasurer's attention, and **seeks the Treasurer's advice** as to their effect.

Pending the Treasurer's advice, the Committee draws Senators' attention to this provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Assistant Treasurer dated 3 April 2000

The measure concerns the interpretation of provisions of Australia's double tax agreements (DTAs) that address the alienation of real property held through interposed entities. You will recall that the proposed measure is intended to address the impact of the Federal court's decision in the *Lamesa* case.

Legislation said to be contrary to our international obligations - need to renegotiate treaties rather than legislate

The CTA expressed concern over 'legislation by press release' and at the effect on Australia's international reputation. It noted the provision in the Vienna Convention on the Law of Treaties that a country may not invoke its internal law provisions as justification for its failure to perform its international obligations, and said the proper course would be bilateral renegotiation of affected DTAs.

The proposed amendment is not regarded as in breach of our international obligations. It will simply ensure that the existing provisions in the *Alienation of Property* Article of our DTAs are interpreted in a manner that will render them fully effective in achieving their intended purpose of addressing alienations of Australian real property. It prevents easy avoidance of the intent of the Article by, for example, insertion of one or more corporations to take advantage of the separate legal personality of corporations.

To understand this aspect of the proposed measure, it is important to recognise that the *Alienation of Property Article* in the affected DTAs provides a taxing right in relation to alienations of real property, as defined in the Agreement, to the country in which the property is situated. This right specifically extends to effective alienations

of 'incorporated' real property through the alienation of shares in a company, the assets of which consist wholly or principally of real property.

The object and purpose of those 'incorporated real property' provisions is best expressed in the official Commentary to the comparable provision of the United Nations Model Double Taxation Convention, which provides that: 'This paragraph is designed to prevent the avoidance of taxes on the gains from the sale of immovable property. Since it is often relatively easy to avoid taxes on such gains through the incorporation of such property, it is necessary to tax the sale of shares in such a company.'

It follows that for the 'incorporated real property' provisions to be fully effective, they must apply to real property held through interposed entities, and it has always been the Commissioner of Taxation's position that the DTA's should be interpreted accordingly.

To have taken an approach of renegotiating all the affected DTAs (which number more than thirty) rather than legislating, would have involved major delays and costs. That option could not have adequately dealt with the short to medium term impact of the *Lamesa* case decision on the revenue. It could have sent the signal that we will only move with the agreement of all DTA partners, and some countries (especially those lacking the land and mineral wealth of Australia) might, whether they share our understanding of the provision's intent or not, have taken the opportunity to seek a 'quid pro quo' for the DTA amendment that we could not give. However, for DTAs concluded subsequent to the Treasurer's Press Release, it has been Australia's practice to deal with the matter during negotiations and to ensure that the wording of the DTAs is unequivocal on this issue.

Australia has been very open with its DTA partners about the proposed legislation. They and the OECD forum for discussion of tax treaty issues were notified of the Treasurer's Press Release and of the introduction of the legislation in the Parliament. We have offered to negotiate an amendment to relevant DTAs to the same effect as the legislation, but with the legislation operating in the meantime, as provided for in paragraph 4 of clause 3A of the Bill. This strikes a balance between the bilateral character of the DTA relationship, and the need to act quickly to confirm the allocation of taxing rights intended under the DTAs. Indications to date are that most countries do not regard renegotiation as necessary, but productive negotiations have already commenced with one country on this basis.

Article 27 of the Vienna Convention on the Law of Treaties, which was referred to by the CTA, is designed to ensure that countries do not rely on their constitutions or other domestic laws as the reason why they cannot meet their treaty obligations. Here there is no failure to meet our DTA obligations, and we are not relying on the legislation in the fashion contemplated by that provision. Rather, the proposed legislation is simply designed to clarify the intention of the relevant DTA provisions following a decision which was open to the court on the wording of those provisions, but which it is considered does not fully reflect the intent of the provisions as negotiated.

Retrospectivity and transactions in progress

The CTA indicates the view that the Bill should not apply where there is objective evidence that a relevant transaction was under way at the date of the Press Release, or at the commencement date for the legislation if this should be ultimately later than proposed in the Bill.

I do not consider that such exceptions should be made. After the *Lamesa* decision, the Commissioner and the Government considered various ways in which Australia could act to preserve its DTA taxing rights, because of the ongoing potential for major revenue losses and the opportunities for relatively easy tax avoidance exposed by the decision. As you will be aware, it is not unprecedented for the Government of the day to legislate to close off risks to the revenue exposed by an adverse court decision.

The approach outlined in the Treasurer's Press Release of 27 April 1998 was therefore decided upon, as a fair and balanced approach which reflected the intent of the DTA provisions, but did not affect already completed alienations. It is relevant that the ATO is not aware of any rulings being sought on the issue during the period while consideration was being given to the most appropriate response. Accordingly, those who relied on the Court decision, without checking the Commissioner's view, but had not actually alienated the property (the point at which the liability to tax arises) should be governed by the DTA rules clarified in the legislation.

To make exceptions where alienations had not occurred, but were in train at the time of the Press Release, would put such arrangements in a privileged position (as compared with later transactions, or transactions without interposed entities) that would not appear to be justified, and would involve a large potential risk to the revenue. It would also allow for the argument that alienations a long time into the future were set in train prior to the Press Release, even if the alienation did not occur for months or perhaps even years later. A provision fairly dealing with transitional cases might also have to deal with each case on a factual, case by case, basis that could create uncertainties of its own.

Certainty

The CTA has also suggested that the terms 'alienation' and 'disposition' should be defined in the proposed legislation, for the sake of certainty. The language used ('alienation or disposition') does no more than reflect the language of the DTAs themselves. Neither the DTAs nor the legislation seek to define what those terms mean, since they have broad international meanings that are well recognised, including by the OECD Model Tax Convention Commentary. The DTAs therefore accord a taxing right in respect of alienations or dispositions broadly defined, and in a practical sense, the domestic taxation laws reflect that broad coverage.

The lack of a definition in the DTAs follows normal international practice (as in the OECD and United Nations Model DTAs, for example) and did not attract criticism in the *Lamesa* decision. Nor has it been a point of criticism of our DTA practice. The CTA is represented on the ATO's Tax Treaties Advisory Panel, which advises the Australian Tax Office on proposed new DTAs, and while the ATO advises that the issue has not arisen in the present context, it is one that the CTA is certainly entitled to raise in that forum, especially in the context of the current review of DTA policy. I do not, however, consider that the proposed legislation should address the issue.

In conclusion, then, I do not see the proposed legislation as trespassing unduly on personal rights and liberties, but as effectively confirming Australia's negotiated taxing rights, and operating in a manner that is fair to taxpayers generally, as well as those directly affected.

I trust that the above information is useful in the Committee's deliberations in relation to these matters.

The Committee thanks the Assistant Treasurer for this response which clarifies the Committee's concerns as to the effect of the bill on Australia's international obligations, and as to the desirability of defining the terms 'alienation' and 'disposition'.

With regard to the bill's retrospective application, the Committee notes the view of the Assistant Treasurer that, "those who relied on the Court decision, without checking the Commissioner's view, but had not actually alienated the property … should be governed by the DTA rules clarified in the legislation". The Assistant Treasurer further states that, to make exceptions where alienations were in train but incomplete at the time of the Press Release, would "put such arrangements in a privileged position (as compared with later transactions, or transactions without interposed entities) that would not appear to be justified, and would involve a large potential risk to the revenue".

The Committee is only concerned with incomplete transactions for which there is objective evidence that they were under way at the relevant date. Exempting such transactions from the retrospective operation of this bill does not confer a privilege, it removes a disadvantage, particularly where such transactions, though incomplete, have become commercially irrevocable.

Further, it is appropriate that taxpayers act in reliance on the decisions of courts rather than on the view of the Tax Commissioner. The courts adjudicate on the law; the Commissioner administers it. The Committee reiterates the observation in its *Fifth Report of 1997* that "People are entitled to be dealt with for their actions and omissions in accordance with the law prevailing at the time of their occurrence and not with a legal regime instituted at a later date".

For these reasons, the Committee continues to draw Senators' attention to this 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.

Barney Cooney
Chairman

SENATOR THE HON RICHARD ALSTON
Minister for Communications, Information Technology and the Arts
Deputy Leader of the Government in the Senate

- 3 MAY 2000

Senator B Cooney
Chairman
Senate Standing Committee for Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney Barney.

The Committee's Alert Digest 1/00 commented on the Broadcasting Services Amendment Bill (No.3) 1999 and Broadcasting Services Amendment Bill (No.4) 1999 (BSAB 4). In the second reading debate on Broadcasting Services Amendment Bill (No.3) 1999 in the House of Representatives on 7 December 1999, the Government moved an amendment to the Bill to remove Schedule 3 – International Broadcasting Services from the Bill. On 9 December 1999 the Government introduced BSAB 4 into the House. BSAB 4 contains the proposed amendments to the *Broadcasting Services Act 1992* (BSA), the *Radiocommunications Act 1992* and the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act) in relation to international broadcasting services.

[Omitted from this letter is advice from the Minister irrelevant to the Broadcasting Services Amendment Bill (No. 3) 1999]

I trust this addresses the Committee's concerns.

Richard Alston

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Minister for Communications, Information Technology
and the Arts

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Senator B Cooney
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Dear Senator Cooney

PRODUCT GRANTS AND BENEFITS ADMINISTRATION BILL 2000

I refer to Alert Digest No. 6 of 2000 and the concerns expressed by the Committee in relation to clauses 43 and 48 of the *Product Grants and Benefits Administration Bill 2000.*

The Product Grants and Benefits Administration Bill was introduced into the Senate on 11 May 2000 as part of a package of three Bills which are required for the Fuel Grants Scheme. The Scheme will allow a tiered system of grants to be paid for fuel sales to consumers in non-metropolitan and remote areas. The Bill will provide a standardised administrative framework for the grants and benefits administered by the Commissioner of Taxation.

Abrogation of the privilege against self-incrimination - Clause 43

Clause 43 is contained in Part 9 which deals with the information-gathering powers of the Commissioner of Taxation. Clause 42 provides that the Commissioner may require a person to provide information, produce documents or give evidence relevant to the operation of the Act or of an Act under which the entitlement to a grant or benefit arises.

The Committee has expressed concern at "the loss of the privilege against self incrimination" in section 43. However, the Committee also noted that clause 43(2) limits the circumstances in which the information so provided, or any information document of thing obtained as a direct or indirect consequence, may be used in evidence.

The Committee has requested advice as to "the reasons for diminishing the rights of defendants in this manner".

Clause 42 of the bill under consideration confers on the Commissioner the same information-gathering powers powers as are currently conferred by section 264 *Income Tax Assessment Act 1936*, section *128 Fringe Benefits Tax Assessment Act 1986*, section 39 of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* and section 108 *Sales Tax Assessment Act 1992* among others administered by the Commissioner of Taxation.

These statutes listed in the above paragraph do not contain provisions specifically abrogating the privilege against self incrimination. However, the courts have consistently held that, having regard

to the purpose for which the Commissioner's information gathering powers are conferred, the person who is required to furnish information or answer any question will not be entitled to refuse to furnish that information or answer that question on the grounds that to do so might tend to incriminate him or her: *Stergis v Federal Commissioner of Taxation* 88 ATC 4442; *Donovan v Deputy Federal Commissioner of Taxation* 92 ATC 4114; *Deputy Federal Commissioner of Taxation v De Vonk* 95 ATC 4820.

The policy objective underlying these powers is reinforced by sections 8C and 8D *Taxation Administration Act 1953* which make it an offence for a person to refuse or fail to furnish information to the Commissioner and to fail to answer questions when attending before the Commissioner.

If the privilege against self incrimination were not abrogated in these circumstances, it would be impossible for the Commissioner to ascertain the liability or entitlement (in the case of a grant or benefit) of a person where the answers are crucial to determining the person's liability or entitlement.

The terms of clause 43 therefore accord with the existing information-gathering powers of the Commissioner. Clause 43(2) limits the extent of the abrogation of the privilege against self-incrimination by making it clear that the abrogation does not apply in criminal proceedings unless those proceedings relate to specific offences under the *Taxation Administration Act 1953*. Moreover, documents produced pursuant to the information-gathering power cannot be the subject of a prosecution for making a false or misleading statement by virtue of section 8J(2) of the *Taxation Administration Act 1953* - as proposed to be amended by item 2 of Schedule 1 to the Fuel Sales Grants (Consequential Amendments) Bill 2000.

Guidelines for the exercise of information-gathering powers are contained in the ATO's *Access and Information Gathering Manual*. The Taxpayers' Charter sets out guidelines in relation to the use of information gathering powers. Relevantly, taxpayers are given reasonable opportunity at any time to consult with their advisers. The taxpayer's right to claim legal professional privilege in relation to certain communications is also acknowledged. In certain circumstances, advice given to a taxpayer by a professional accounting adviser is not required to be disclosed.

The information-gathering powers of the Commissioner are necessary as one of the safeguards in the Bill to prevent abuse of grants and benefits schemes and to protect public funds.

Search and entry without judicial warrant - clause 48

Clause 48 is contained Part 11 of the Bill which deals with access to premises for purposes relevant to the operation of a product grant or benefit scheme. Broadly speaking, the clause allows an authorised officer to have access to premises and to inspect relevant documents and goods on those premises.

The Committee has expressed concern that the access provisions contained in clause 48 may trespass unduly on personal rights and liberties. The Committee has previously recommended that all such provisions in Commonwealth legislation should accord with the set of fundamental principles which the Committee has stated in its *Fourth Report of 2000*. The Government has not yet responded to the Committee's recommendations.

Clause 48 is consistent with the access provisions contained in section 263 *Income Tax Assessment Act 1936*, section 109 *Sales tax Assessment Act 1992*, section 127 *Fringe Benefits Tax Assessment Act* 1986, and section 38 *Superannuation Contributions Tax (Assessment and Collection) Act 1997* among others administered by the Commissioner of Taxation.

The Australian Taxation Office has developed a compliance model based on leverage, education and intelligence for all activities. It advocates a partnership approach and self assessment. The model seeks to maximise voluntary compliance.

The Australian Taxation Office has published guidelines for the use of the access powers. The Taxpayers' Charter and Access and Information Gathering Manual governs the conduct of ATO officers, who are bound to act in a fair and professional manner. The guidelines emphasise a cooperative approach whereby access to records is sought with the consent of the occupier. The access power is exercised only in exceptional circumstances, such as where there is reason to suspect that the existence or integrity of relevant information is under threat. The ATO also controls the use of these powers through a system of delegation and authorisation. Those officers who are authorised to exercise the access power receive appropriate training in accordance with the ATO guidelines.

As currently framed, the access powers provide ATO officers with flexibility in managing the conduct of their activities according to the degree of cooperation they receive. The proposed requirement for judicial oversight would produce an unnecessarily adversarial climate and would not be conducive to a relationship of mutual cooperation between ATO officers and taxpayers. It may undermine the promotion within the community of voluntary compliance with laws administered by the Commissioner.

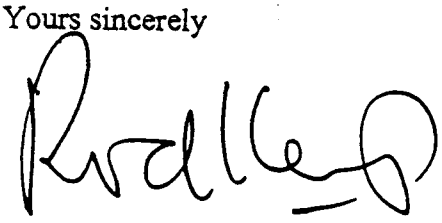
As the emphasis is on a cooperative approach, ATO officers seeking access to records usually provide advance notice and request the taxpayer's cooperation. The guidelines require the approval of a senior officer where urgent access is contemplated. Taxpayers are given a reasonable time and opportunity to consult with their advisers.

When entering premises or seeking documents, ATO officers are required to produce their identification and explain the purpose of their visit.

The access power is one of the compliance provisions in the Bill which are necessary to prevent abuse of the scheme and to protect public funds.

I trust that the above information assists the Committee in its deliberations.

Yours sincerely



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28 MAR 2000

Senator B Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA

Dear Senator Cooney

I refer to Alert Digest No. 1, of 17 February 2000, detailing concerns expressed by the Committee in relation to two measures contained in the *Taxation Laws Amendment Bill (No. 11) 1999*. The first measure concerned capital gains tax matters relating to goodwill. The second concern of the Committee related to why the Senate's six-month rule regarding the announcement of legislation by press release was not met in relation to measures concerning the alienation of property through interposed entities.

Retrospective commencement
Subclause 2(2) and Schedule 4, items 43 and 44

The amendment proposed by item 43 of Schedule 4 (like that proposed by item 44) relates to the former capital gains tax (CGT) goodwill exemption conferred by Subdivision 118-C of the *Income Tax Assessment Act 1997*. Subdivision 118-C corresponded to section 160ZZR of the *Income Tax Assessment Act 1936* (the 1936 Act).

Subdivision 118-C allowed a 50% exemption on a capital gain arising from the disposal of goodwill by a small business with net assets under the 'business exemption threshold'. The threshold was $2 248 000 for the 1998-99 income year and $2 275 000 for the 1999-2000 income year until 21 September 1999.

Subdivision 118-C was repealed by item 45 of Schedule 1 of the *New Business Tax System (Capital Gains Tax) Act 1999* (Act No. 165 of 1999). The repeal was effective from 11.45 am eastern standard time on 21 September 1999 when the goodwill exemption was subsumed within the new small business 50% reduction for all active assets (including goodwill) disposed of by small business taxpayers with net CGT assets of $5 million or less.

The amendment proposed by item 43 of Schedule 4 is a measure favouring taxpayers that would reinstate the position in section 160ZZR of the 1936 Act. It would ensure that the business exemption threshold applies to a partner's assets rather than those of the whole partnership.

Given the repeal of Subdivision 118-C from 21 September 1999, there was some doubt whether the amendments proposed by items 43 and 44 of Schedule 4 could apply from the beginning of the 1998-99 income year as contemplated by subitem 82(1) of Schedule 4. Subclause 2(2) (which provides that items 43 and 44 of Schedule 4 are taken to have commenced on 1 July 1998) was included to put beyond doubt that the technical corrections to Subdivision 118-C were effective during the relevant period before 11.45 am on 21 September 1999.

Legislation by press release
Schedule 1 - Alienation of property through interposed entities

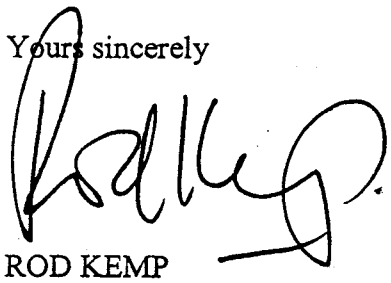
The proposed legislation was delayed for a number of reasons, most notably the federal election in 1998 and the amount of time required for the Commissioner of Taxation to consult and discuss the proposals with representatives of the 32 affected double taxation agreement partners.

The Commissioner wrote to the affected treaty partners on 28 April 1998 notifying them of the proposed legislation. As in all treaty matters, such consultation takes time, and is often subject to the domestic concerns of the treaty partner in question. As such, a delay was justified in awaiting and fully evaluating the responses. The proposed legislation was also the topic of numerous meetings at international forums at which the ATO delegates attended and explained Australia's position.

The feedback from these consultations and meetings were factored into the form of the legislation, as was our experience of developments in the OECD and UN fora.

I trust that the above information is useful in the Committee's deliberations in relation to these matters.

Yours sincerely



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Dear Senator Cooney

I refer to Alert Digest No. 2, of 2000 of 9 March 2000, detailing issues raised by the Corporate Taxpayers Association (CTA) with the Committee in relation to a measure contained in the *Taxation Laws Amendment Bill (No. 11) 1999*. The measure concerns the interpretation of provisions of Australia's double tax agreements (DTAs) that address the alienation of real property held through interposed entities. You will recall that the proposed measure is intended to address the impact of the Federal Court's decision in the *Lamesa* case.

Legislation said to be contrary to our international obligations – need to renegotiate treaties rather than legislate

The CTA expressed concern over 'legislation by press release' and at the effect on Australia's international reputation. It noted the provision in the Vienna Convention on the Law of Treaties that a country may not invoke its internal law provisions as justification for its failure to perform its international obligations, and said the proper course would be bilateral renegotiation of affected DTAs.

The proposed amendment is not regarded as in breach of our international obligations. It will simply ensure that the existing provisions in the *Alienation of Property* Article of our DTAs are interpreted in a manner that will render them fully effective in achieving their intended purpose of addressing alienations of Australian real property. It prevents easy avoidance of the intent of the Article by, for example, insertion of one or more corporations to take advantage of the separate legal personality of corporations.

To understand this aspect of the proposed measure, it is important to recognise that the *Alienation of Property* Article in the affected DTAs provides a taxing right in relation to alienations of real property, as defined in the Agreement, to the country in which the property is situated. This right specifically extends to effective alienations of 'incorporated' real property through the alienation of shares in a company, the assets of which consist wholly or principally of real property.

The object and purpose of those 'incorporated real property' provisions is best expressed in the official Commentary to the comparable provision of the United Nations Model Double Taxation Convention, which provides that: 'This paragraph is designed to prevent the avoidance of taxes on the gains from the sale of immovable property. Since it is often relatively easy to avoid taxes on such gains through the incorporation of such property, it is necessary to tax the sale of shares in such a company.'

It follows that for the 'incorporated real property' provisions to be fully effective, they must apply to real property held through interposed entities, and it has always been the Commissioner of Taxation's position that the DTA's should be interpreted accordingly.

To have taken an approach of renegotiating all the affected DTAs (which number more than thirty) rather than legislating, would have involved major delays and costs. That option could not have adequately dealt with the short to medium term impact of the *Lamesa* case decision on the revenue. It could have sent the signal that we will only move with the agreement of all DTA partners, and some countries (especially those lacking the land and mineral wealth of Australia) might, whether they share our understanding of the provision's intent or not, have taken the opportunity to seek a 'quid pro quo' for the DTA amendment that we could not give. However, for DTAs concluded subsequent to the Treasurer's Press Release, it has been Australia's practice to deal with the matter during negotiations and to ensure that the wording of the DTAs is unequivocal on this issue.

Australia has been very open with its DTA partners about the proposed legislation. They and the OECD forum for discussion of tax treaty issues were notified of the Treasurer's Press Release and of the introduction of the legislation in the Parliament. We have offered to negotiate an amendment to relevant DTAs to the same effect as the legislation, but with the legislation operating in the meantime, as provided for in paragraph 4 of Clause 3A of the Bill. This strikes a balance between the bilateral character of the DTA relationship, and the need to act quickly to confirm the allocation of taxing rights intended under the DTAs. Indications to date are that most countries do not regard renegotiation as necessary, but productive negotiations have already commenced with one country on this basis.

Article 27 of the Vienna Convention on the Law of Treaties, which was referred to by the CTA, is designed to ensure that countries do not rely on their constitutions or other domestic laws as the reason why they cannot meet their treaty obligations. Here there is no failure to meet our DTA obligations, and we are not relying on the legislation in the fashion contemplated by that provision. Rather, the proposed legislation is simply designed to clarify the intention of the relevant DTA provisions following a decision which was open to the court on the wording of those provisions, but which it is considered does not fully reflect the intent of the provisions as negotiated.

Retrospectivity and transactions in progress

The CTA indicates the view that the Bill should not apply where there is objective evidence that a relevant transaction was under way at the date of the Press Release, or at the commencement date for the legislation if this should be ultimately later than proposed in the Bill.

I do not consider that such exceptions should be made. After the *Lamesa* decision, the Commissioner and the Government considered various ways in which Australia could act to preserve its DTA taxing rights, because of the ongoing potential for major revenue losses and the opportunities for relatively easy tax avoidance exposed by the decision. As you will be aware, it is not unprecedented for the Government of the day to legislate to close off risks to the revenue exposed by an adverse Court decision.

The approach outlined in the Treasurer's Press Release of 27 April 1998 was therefore decided upon, as a fair and balanced approach which reflected the intent of the DTA provisions, but did not affect already completed alienations. It is relevant that the ATO is not aware of any rulings being sought on the issue during the period while consideration was being given to the most appropriate response. Accordingly, those who relied on the Court decision, without checking the Commissioner's view, but had not actually alienated the property (the point at which the liability to tax arises) should be governed by the DTA rules clarified in the legislation.

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The lack of a definition in the DTAs follows normal international practice (as in the OECD and United Nations Model DTAs, for example) and did not attract criticism in the *Lamesa* decision. Nor has it been a point of criticism of our DTA practice. The CTA is represented on the ATO's Tax Treaties Advisory Panel, which advises the Australian Tax Office on proposed new DTAs, and while the ATO advises that the issue has not arisen in the present context, it is one that the CTA is certainly entitled to raise in that forum, especially in the context of the current review of DTA policy. I do not, however, consider that the proposed legislation should address the issue.

In conclusion, then, I do not see the proposed legislation as trespassing unduly on personal rights and liberties, but as effectively confirming Australia's negotiated taxing rights, and operating in a manner that is fair to taxpayers generally, as well as those directly affected.

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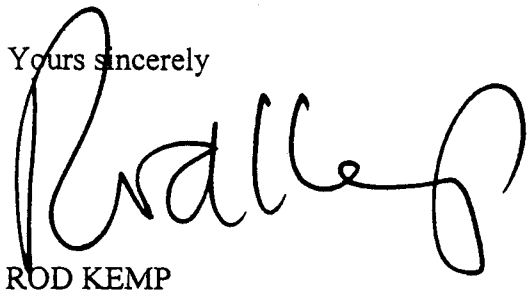
Yours sincerely



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