SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SEVENTH REPORT

OF

2002

26 June 2002

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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 2002

The Committee presents its Seventh Report of 2002 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:

Australian Radiation Protection and Nuclear Safety (Licence Charges) Amendment Bill 2002

Financial Sector Legislation Amendment Bill (No. 1) 2002

General Insurance Reform Act 2001

Taxation Laws Amendment Bill (No. 2) 2002

Australian Radiation Protection and Nuclear Safety (Licence Charges) Amendment Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2002*, in which it made various comments. The Parliamentary Secretary to the Minister for Health and Ageing has responded to those comments in a letter dated 3 June 2002. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Parliamentary Secretary's response are discussed below.

Extract from Alert Digest No. 4 of 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Parliamentary Secretary to the Minister for Health and Ageing. [Portfolio responsibility: Health and Ageing]

The bill proposes to amend the *Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998* (the Act) to confirm that the charges imposed by the Act are payable even by Commonwealth entities that are otherwise exempt from taxation, unless the relevant exemption explicitly refers to the Act. The Australia New Zealand Food Authority, the Australian Nuclear Science and Technology Organisation, the Commonwealth Science and Industrial Research Organisation, the Australian Institute of Marine Science, the Australian National University, the Federal Airports Corporation, the Australian War Memorial and the Director of National Parks are Commonwealth entities that hold single or multiple licences issued under the Act. These entities are also exempt from taxation.

Retrospective commencement
Clause 2

Clause 2 of this bill provides that it is to commence retrospectively on 5 February 1999, immediately after the commencement of the Principal Act. The purpose of the bill is to ensure that various Commonwealth Government entities are liable to pay the charges that have been levied against private sector entities under the Principal Act.

The Explanatory Memorandum states that the bill has "no financial impact on the Commonwealth". However, it presumably has a financial impact on the Government entities which will now be liable for these charges. Given this, the Committee **seeks the Minister's advice** as to why these charges have been imposed retrospectively.

Pending the Minister's response, 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 Parliamentary Secretary

As Parliamentary Secretary with executive responsibility for the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA), I am responding on behalf of the Government.

Under the *Australian Radiation Protection and Nuclear Safety Act 1998* (the ARPANS Act), the Chief Executive Officer of the Australian Radiation Protection and Nuclear Safety Agency issues facility and source licences to Commonwealth entities. It is the Government's policy that the costs of regulating licence holders under the ARPANS Act be borne by licence holders. Annual licence charges are imposed by the *Australian Radiation Protection Nuclear Safety (Licence Charges) Act 1998* (the Licence Charges Act). The amount of an annual licence charge is prescribed in the *Australian Radiation Protection Nuclear Safety (Licence Charges) Regulations 2000.*

The purpose of the Bill is to amend the Licence Charges Act to confirm that the annual licence charges (taxes) imposed by that Act are payable even by Commonwealth entities that are otherwise exempt from taxation.

The amendment in the Bill is proposed to take effect from 5 February 1999, the date of the commencement of the Licence Charges Act. The bill is intended to clarify that the charge was payable at law since the commencement of the Licence Charges Act. To date, all but one of the Commonwealth entities operating under the APRANS Act have paid the prescribed annual licence charges. Consequently, I understand that the amendment will only impact financially on one current licence holder. This licence holder would be liable for $60,000, being the licence annual charge for a two-year period in relation to a prescribed radiation facility.

I trust this clarifies matters to your satisfaction.

The Committee thanks the Parliamentary Secretary for this response

Financial Sector Legislation Amendment Bill (No. 1) 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2002*, in which it made various comments. The Treasurer has responded to those comments in a letter dated 17 June 2002. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Treasurer's response are discussed below.

Extract from Alert Digest No. 4 of 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

Schedule 1 to the bill proposes to amend the *Australian Prudential Regulation Authority Act 1998* in relation to financial institutions supervisory levies to ensure that outstanding levies are recognised on an accrual basis and clarify that the Treasurer's determination is specific to each levy.

Schedule 2 proposes to amend the *Financial Institutions Supervisory Levies Collection Act 1998* to address concerns raised by the Australian National Audit Office (ANAO), and to ease the administration of the collection of financial institutions supervisory levies by the Australian Prudential Regulation Authority (APRA).

Schedule 3 proposes to amend the *Financial Sector (Transfers of Business) Act 1999* to provide that APRA must consult with the Commissioner of Taxation on the taxation implications of a proposed transfer of a business before approving transfers between regulated bodies.

Schedule 4 proposes to amend the *Insurance Act 1973* in relation to general insurance matters to complement proposed changes in the *Banking Act 1959* to be included in the proposed *Financial Sector Legislation Amendment Bill (No.2) 200*2. The bill also corrects a drafting error in the *General Insurance Reform Act 2001*.

Schedule 5 proposes to amend the *Insurance Acquisitions and Takeovers Act 1991* to remove the 30 day time limit for the Minister to make a decision to allow APRA to undertake necessary investigations prior to allowing a merger or acquisition to proceed; and makes consequential amendments.

Schedule 6 proposes to amend the *Life Insurance Act 1995* to remove sunset clauses on the right to appeal prudential decisions to the Administrative Appeals Tribunal.

Schedule 7 proposes to amend the *Reserve Bank Act 1959* in relation to the superannuation provisions and procedures for Reserve Bank, Reserve Bank Board and Payments System Board appointments, terminations and resignations; location of the head office; and to repeal unnecessary service provisions in the Act.

Schedule 8 proposes to amend the *Superannuation Industry (Supervision) Act 1993* in relation to winding up procedures for superannuation funds with less than five members; and to align the secrecy provisions applying to the Australian Tax Office with equivalent provisions applying to APRA.

Schedule 9 proposes to amend the *Superannuation Supervisory Levy Imposition Act 1998* to remove uncertainty about the levy payable by a superannuation entity that becomes a superannuation entity during a fiscal year, but was unregulated the previous year.

Commencement
Subclause 2(1)

By virtue of item 3 in the table to subclause 2(1) of this bill, the amendments proposed to be made by items 1 to 17 of Schedule 4 will apparently commence on 1 July 2002 (being the date of commencement of Schedule 1 to the *General Insurance Reform Act 2001*).

By virtue of item 4 of the same table, the amendment proposed to be made by item 18 of Schedule 4 will commence on 19 September 2001 (being the date of commencement of Schedule 2 to the *General Insurance Reform Act 2001*).

Paragraph 3.2 of the Explanatory Memorandum states that "More details [as to commencement] are provided in the notes on items relating to the respective Schedules". However, the only 'additional' information concerning commencement which is provided in the notes on Schedule 4 is at paragraph 7.16. This paragraph simply repeats the terms of items 3 and 4 in the table to subclause 2(1), but does not, for example, indicate when the relevant Schedules to the *General Insurance Reform Act 2001* commenced, or will commence, nor does it indicate – should it turn out that the amendments proposed by items 1 to 17 of Schedule 4 are to commence retrospectively – whether that retrospectivity would disadvantage any person other than the Commonwealth. The Committee, therefore, **seeks the Minister's advice** as to why these matters are not explained in the Explanatory Memorandum.

Pending the Minister's advice, 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 Treasurer

Specifically, the Committee has asked for advice on when the schedules to the *General Insurance Reform Act 2001* commenced or will commence and why this was not explained in the Explanatory Memorandum. The Committee also is concerned that the items may be retrospective.

The commencement of items 1 to 18 of Schedule 4 in the Explanatory Memorandum depend on the commencement of the schedules to the *General Insurance Reform Act 2001*.

Items 1 to 17 are due to commence immediately after the commencement of Schedule 1 to the *General Insurance Reform Act 2001.* This is to be 1 July 2002. Item 18 is to commence immediately after the commencement of Schedule 2 to the *General Insurance Reform Act 2001.* Schedule 2 commenced on Royal Assent on 19 September 2001.

Item 18 corrects a grammatical error in paragraph (a) of subitem 5(2) of Schedule 2 to the *General Insurance Reform Act 2001*. Paragraph 5(2)(a) is supposed to read that the determination may include a different specified period in respect of different provisions of the **new** Act, but the word **old** was mistakenly inserted. Reading this section as it currently stands does not make sense when reading the rest of subitem 5. Under the *Acts Interpretation Act 1901* the word **old** would be read as meaning **new**, as this is what appears to be intended on the face of subitem 5. This amendment corrects a grammatical error and its retrospective commencement does not disadvantage any person in any way.

The explanation of the commencement dates was not included in the Explanatory Memorandum due to a drafting omission.

The Committee thanks the Treasurer for this response.

General Insurance Reform Act 2001

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 9 of 2001*, in which it made various comments. The Minister for Financial Services and Regulation responded to those comments in a letter dated 27 August 2001 and the Committee reported on the response in its *Eleventh Report of 2001*.

In the Committee's *Alert Digest No. 11 of 2001*, the Committee sought advice on amendments made in the House of Representatives on 22 August 2001, which came within its terms of reference. The Minister for Revenue and Assistant Treasurer has responded to those comments in a letter dated 21 June 2002.

Although this bill has been passed by both Houses (and received Royal Assent on 19 September 2001) the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report. An extract from *Alert Digest No. 11 of 2001* and relevant parts of the Minister's response are discussed below.

Amendment commented on in Alert Digest No. 11 of 2001

Strict liability offences
Various provisions

This bill proposes a number of amendments to the *Insurance Act 1973*. The Committee considered the bill in *Alert Digest No. 9 of 2001* in which it sought the Minister's advice in relation to certain matters, and has reported on that advice in its *Eleventh Report of 2001*. The bill was passed by the Senate, with amendments, on 27 August 2001.

On 22 August 2001, the House of Representatives agreed to amend the bill. Most of these amendments raised no issues within the Committee's terms of reference. However, amendment (16) creates an offence of doing or failing to do an act which results in an insurer failing to comply with a direction under section 17. This offence is expressed to be a strict liability offence. Amendment (23) creates a similar offence in relation to a direction under section 27. Amendment (34) creates a similar offence in relation to an exemption condition under section 47. In the absence of an explanation, the Committee **seeks the Minister's advice** as to why these offences should be offences of strict liability.

Pending the Minister's advice, 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 Minister

Strict liability offences in amendment 16 (section 17), 23 (section 27) and 34 (section 47)

An effective enforcement regime is crucial for APRA to fulfil its roles and responsibilities as a prudential regulator. The experience of APRA, and previously the Insurance and Superannuation Commission, is that many fault liability offence provisions are virtually unenforceable, particularly in circumstances where the conduct that contravenes an offence provision involves a failure to act. The requirement to prove a mental element creates a substantial impediment to proving such offences due to the fact that evidence of intention or recklessness is often difficult to obtain in the absence of admissions (ie confessions) or independent evidence. This in turn reduces the effectiveness of using the prospect of prosecutions as a deterrent to imprudent behaviour or an incentive to negotiate a rectification plan.

The move to strict liability is consistent with consumer protection measures contained in the *Corporations Act* 2001 and the *Managed Investments Act 1998* and with changes to the *Superannuation Industry (Supervision) Act 1993.*

It is vital that the new provisions contained in the *Insurance Act* 1973 as amended by the *General Insurance Reform Act* 2001 (the amended Insurance Act) are enforceable, otherwise the intent of these provisions will be compromised. APRA's credibility would be damaged if the situation was to arise where it was unable to achieve successful criminal prosecutions under the Insurance Act. It would only take a single widely publicised instance of APRA's inability to prosecute to seriously erode public confidence in the insurance system.

In adopting a regime of strict liability for these provisions rather than a fault liability regime there is sometimes a misunderstanding that offences identified as attracting strict liability will lead to a reversal in the onus of proof. Such offences will still require the prosecution to prove the elements of the offence beyond reasonable doubt. It will be open to a defendant to raise defences and to bear an evidential burden only as to their existence. The prosecution must then disprove the existence of any defence beyond reasonable doubt.

As the burden of proof on a defendant is an evidential burden, the defendant will only have to point to evidence that suggests a reasonable possibility that the defence applies. This is a consistently lower standard of proof than for the prosecution.

In addition, it is important to note that under clause 9.2 of the Criminal Code, it will still be a defence to establish that there was a reasonable mistake as to fact. Accordingly, strict liability is not the same as absolute liability.

The Committee thanks the Minister for this response.

Amendment commented on in Alert Digest No. 11 of 2001

Incorporation of extrinsic material as in force from time to time
Proposed new subsection 32(6)

Proposed new section 32 authorises APRA to determine prudential standards. Under proposed subsection 32(5), such determinations are disallowable instruments.

However, amendment (25) adds a new subsection (6) which states that these standards may apply, adopt or incorporate any matter contained in an instrument or other writing as in force from time to time, contrary to section 49A of the *Acts Interpretation Act 1901*.

In the absence of an explanation, the Committee **seeks the Minister's advice** as to why it is appropriate that such standards should be able to incorporate any extrinsic material as it exists from time to time, and how parliamentary scrutiny can be effective where such material is incorporated.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to insufficiently subject the exercise of delegated 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

Incorporation of extrinsic material, proposed new subsection 32(6)

The prudential standards determined by APRA under section 32 of the amended Insurance Act may make occasional reference to extrinsic material.

The extrinsic material referred to in the prudential standards would be accounting standards released by the Australian Accounting Standards Board (AASB), company ratings for counterparties of insurers contained in ratings lists (for example, lists published by Standard & Poor), and possibly at a later date any specific actuarial standards as developed by the relevant professional body.

The purpose of subsection 32(6) is to allow for the automatic inclusion within the prudential standards of any alterations to incorporated extrinsic material without APRA having to amend the standard each time there is a change in the extrinsic document. (For example, on one view, section 49A of the *Acts Interpretation Act 1901* (AI Act) would prevent APRA from specifying matters in prudential standards by reference to the ratings of counterparties set out in a ratings lists published and updated from time to time by an established ratings agency.)

The justification for this exemption from the requirements of the AI Act is that any changes to these technical standards would usually be of a minor nature and (in the case of actuarial standards) would always be undertaken by the professional associations with responsibility for the technical standards, that is, they would be peer reviewed. If there were a significant change in, say, an actuarial standard,

APRA would need to consider whether it was appropriate that the prudential standard continue to refer to the actuarial standard in the same way, in any case. This amendment would also be conducive to the underlying purpose of the standards setting framework for prudential supervision, which is to allow for the development of flexible and adaptable regulatory tools.

It should also be emphasised that the extrinsic material most commonly referred to in the prudential standards would be AASB accounting standards, which, as disallowable instruments, would already be exempted from the requirements of section 49A of the AI Act.

The Committee thanks the Minister for this response, but notes that the provision enables a Commonwealth agency to make delegated legislation which may incorporate future material which is never seen by the Parliament.

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

Amendment commented on in Alert Digest No. 11 of 2001

Delegation to a 'class of persons'
Proposed new paragraph 59(1)(b)

Section 59 of the Principal Act deals with reports of investigations by the inspector. Amendment (46) proposes to substitute a new paragraph 59(1)(b) which authorises the inspector to delegate his or her powers to an APRA staff member or to "a person included in a class of persons approved in writing by APRA". No explicit provision is made requiring that a delegate have appropriate training, qualifications or experience. The Committee **seeks the Minister's advice** as to why such a wide and apparently unfettered power of delegation is appropriate.

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

Relevant extract from the response from the Minister

Delegation to a 'class of persons'. Proposed new paragraph 59(1)(b)

This amendment enables an inspector, with APRA's prior agreement, to delegate his or her powers by signed instrument to a person included in a class of persons. This amendment would allow, for example, the inspector to delegate powers to his or her employees, or for the inspector to call on particular expertise in carrying out an investigation.

Where an investigation is complex an inspector will require the help of other persons to assist him or her in the investigation. To ensure that at all times these persons can go about the tasks required by the inspector, it is important that the inspector be able to delegate relevant powers to these persons when and if required. In most cases APRA does not envisage the investigator would be required to make such delegations, as experience has shown that the majority of insurers are willing to co-operate during an investigation. If this co-operation is not forthcoming however, and evidence is required that these "assistants" have authority to act on behalf of the inspector, delegation powers are necessary.

The justification for not including explicit criteria in the provisions outlining required levels of training, qualifications and experience that the delegate must meet is for the same reason no provisions outline explicit criteria for the inspector. Flexibility is required to tailor the investigation to the particular circumstances of each case. To pose criteria in the relevant provisions on the skills and experience of the delegates could potentially limit the scope of a particular investigation. For this reason, APRA is seeking discretion to approve the class of persons to which an inspector could delegate powers.

The Committee thanks the Minister for this response.

Taxation Laws Amendment Bill (No. 2) 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2002*, in which it made various comments. The Minister for Revenue and Assistant Treasurer has responded to those comments in a letter dated 25 June 2002. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 3 of 2002

This bill was introduced into the House of Representatives on 14 March 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

Schedule 1 of the bill proposes to amend the imputation rules in the *Income Tax Assessment Act 1936* to take account of the reduction of the company tax rate from 34% to 30%.

Schedule 2 amends the *Income Tax Assessment Act 1997* to defer the commencement date of the Review of Business Taxation proposals to tax friendly societies on investment income received that is attributable to funeral policies, scholarship plans and income bonds sold after 30 November 1999. The Schedule also defers the commencement of the new methodology for working out the capital component of ordinary life insurance investment policies until 1 July 2002.

Schedule 3 amends the *Income Tax Assessment Act 1936* to make corrections so that the intercorporate dividend rebate is not available in respect of any unfranked dividends paid to or by a dual resident company, including dividends paid within a wholly-owned group; and the deduction allowed to certain non-resident owned companies to offset the removal of the rebate from 1 July 2000 is not available in respect of unfranked dividends paid to or by a dual resident company.

Schedule 4 amends the *Income Tax Assessment Act 1997* to make a correction to the refundable tax offset rules so that double claiming of a refund of excess imputation credits by both a trustee and a beneficiary will not be possible. It also makes a consequential amendment to the *Income Tax Assessment Act 1936*. The Schedule also proposes amendments to amend the *Income Tax Assessment Act 1997* to deny refunds of excess imputation credits to non-complying superannuation funds and non-complying ADFs.

Schedule 5 proposes technical corrections to the franking rebate provisions in the *Income Tax Assessment Act 1936* to clarify that registered charities and gift-deductible organisations which are trusts are eligible for refunds of excess imputation credits in respect of distributions attributable to franked dividends received indirectly through another trust.

Schedule 6 amends the *Income Tax Assessment Act 1936* to extend the eligibility criteria for Senior Australians Tax Offset (SATO) to ensure that all seniors who are eligible for either an age or service pension (whether or not they receive one) are entitled to receive SATO.

Schedule 7 amends the *Income Tax Assessment Act 1997* to ensure that taxpayers who received shares in Tower Limited as a consequence of the demutualisation of Tower Corporation in October 1999 are not subject to capital gains tax at the time their membership rights ceased to exist; and to specify the cost base for shares received in Tower Limited as a consequence of giving up those membership rights.

Schedule 8 makes a technical amendment to the *Medicare Levy Act 1986* to correct references to the *Income Tax Assessment Act 1936*.

Schedule 9 amends the *Income Tax Assessment Act 1997* and the *Income Tax Assessment Act 1936* to allow income tax deductions for certain gifts of $2 or more made to certain new organisations. This bill also amends the names of some organisations, extends the period of deductibility for two organisations and ends the period of deductibility for another organisation.

Schedule 10 amends the income tax law to recognise a new demutualisation method for non-insurance mutual entities. Members of non-insurance mutual entities that demutualise using the new method will qualify for the concessions in Schedule 2H to the *Income Tax Assessment Act 1936*.

Schedule 11 amends the *Income Tax Assessment Act 1997* to allow capital gains tax rollover for a policyholder/member of a mutual insurance company who becomes absolutely entitled to a share held on trust as part of a demutualisation and exchanged by the trustee under scrip for scrip rollover for another share.

Schedule 12 makes a number of technical amendments to the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997* and other tax-related legislation.

Retrospective commencement
Schedule 1

By virtue of the table in subclause 2(1), the amendments proposed by Schedule 1 are to have commenced on 1 July 2001. Unfortunately, the Explanatory Memorandum does not indicate whether that retrospectivity would prejudice any person. The Committee, therefore, **seeks the Treasurer's advice** as to whether these provisions will adversely affect any person.

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 Minister

I refer to the concerns raised by the Senate Standing Committee for the Scrutiny of Bills in Alert Digest No 3 of 2002 (dated 20 March 2002) about the retrospective application or commencement of Schedules 1, 4, 10 and 12 to the Taxation Laws Amendment Bill (No 2) 2002.

Schedule 1 to the Bill will make consequential amendments to the imputation rules in the *Income Tax Assessment Act 1936* to reflect the reduction of the company tax rate from 34% to 30%. The proposed amendments will commence on 1 July 2001, when the rate was reduced.

Schedule 1 provides for the conversion of franking accounts to reflect the new, lower company tax rate of 30%. The conversion preserves the value of franking credits accumulated before the reduction in the company tax rate. The franking credits available for distribution to shareholders after conversion will reflect the full amount of tax paid at the previous higher tax rate.

Franking accounts were converted in the same way when the company tax rate was increased from 33% to 36% from the 1995-96 year of income and when the rate was reduced from 36% to 34% from the 2000-01 year of income.

The Committee thanks the Minister for this response.

Retrospective commencement
Schedule 10

By virtue of the table in subclause 2(1), the amendments proposed by Schedule 10 would commence on 17 November 1999. Paragraph 9.18 of the Explanatory Memorandum indicates that at least one entity has already acted in reliance on these amendments being enacted. The Committee, therefore, **seeks the Treasurer's advice** as to whether these provisions will adversely affect any person.

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 Minister

Schedule 10 to the Bill recognises a new demutualisation method for non-insurance mutual entities. Members of non-insurance mutual entities that demutualise using the new method will qualify for the capital gains tax (CGT) concessions in Schedule 2H of the *Income Tax Assessment Act 1936*. The Schedule broadly:

- ensures that members of a mutual entity who receive shares as a result of demutualisation of that entity are not subject to CGT until they dispose of those shares; and

- specifies the cost base for shares issued to members as a result of the demutualisation of a mutual entity.

No taxpayers will be adversely affected by the retrospective application of the amendments in Schedule 10 to the Bill. Members of the entity that demutualised on the basis of the announcement would be adversely affected if the amendments were made prospective.

The Committee thanks the Minister for this response.

Retrospective commencement
Schedule 12

By virtue of the table in subclause 2(1), many of the amendments proposed by Schedule 12 will commence on a variety of dates prior to Assent. The Explanatory Memorandum does not give any assurance that this retrospectivity will not prejudice any person. The Committee, therefore, **seeks the Treasurer's advice** as to whether these provisions will adversely affect any person.

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 Minister

> The amendments in Schedule 12 to the Bill, which have various dates of effect, primarily correct typographical errors, renumber incorrect section references, correct cross-references and asterisks and repeal redundant provisions. As these amendments are purely technical in nature, they do not adversely affect the rights and liabilities of taxpayers.

The Committee thanks the Minister for this response.

Retrospective application
Schedule 4, Part 2

By virtue of item 8 of Schedule 4, the amendments proposed by Part 2 of that Schedule will apply from 22 May 2001. The Explanatory Memorandum does not give any assurance that this retrospective application would not prejudice any person. The Committee, therefore, **seeks the Treasurer's advice** as to whether these provisions will adversely affect any person.

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 Minister

Part 2 of Schedule 4 to the Bill will amend the *Income Tax Assessment Act 1997* to deny refunds of excess imputation credits to non-complying superannuation funds and non-complying approved deposit funds (ADFs).

Resident individuals and certain entities are eligible for refunds of excess imputation credits in respect of dividends paid on or after 1 July 2000. It has become apparent that non-complying superannuation entities may be used as a vehicle to access these refunds inappropriately. It is possible for such funds to enter into artificial schemes so as to produce surplus imputation credits in respect of which they would be entitled to a refund. To protect the revenue, non-complying superannuation funds and non-complying ADFs will be denied refunds of excess imputation credits.

The proposed amendments will apply to assessments for income years ending on or after 22 May 2001, when the measure was announced by the former Assistant Treasurer.

It is expected that this measure will affect few taxpayers. Non-complying superannuation funds and non-complying ADFs are taxed at the top marginal tax rate rather than the concessional 15% rate generally applicable to complying superannuation entities. Therefore, they would rarely be in a position to claim refunds of excess imputation credits.

The Committee thanks the Minister for this response.

Barney Cooney
Chairman

RECEIVED
4 JUN 2002
Senate Standing C'ttee for the Scrutiny of Bills

THE HON TRISH WORTH MP
Parliamentary Secretary to the Minister for Health and Ageing
Member for Adelaide

Senator Barney Cooney
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney,

Thank you for your letter of 16 May 2002 to the Minister for Health and Ageing, Senator the Hon Kay Patterson, concerning the *Australian Radiation Protection Nuclear Safety (Licence Charges) Amendment Bill*. As Parliamentary Secretary with executive responsibility for the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA), I am responding on behalf of the Government.

Under the *Australian Radiation Protection and Nuclear Safety Act 1998* (the ARPANS Act), the Chief Executive Officer of the Australian Radiation Protection and Nuclear Safety Agency issues facility and source licences to Commonwealth entities. It is the Government's policy that the costs of regulating licence holders under the ARPANS Act be borne by licence holders. Annual licence charges are imposed by the *Australian Radiation Protection Nuclear Safety (Licence Charges) Act 1998* (the Licence Charges Act). The amount of an annual licence charge is prescribed in the *Australian Radiation Protection Nuclear Safety (Licence Charges) Regulations 2000.*

The purpose of this Bill is to amend the Licence Charges Act to confirm that the annual licence charges (taxes) imposed by that Act are payable even by Commonwealth entities that are otherwise exempt from taxation.

The amendment in the Bill is proposed to take effect from 5 February 1999, the date of the commencement of the Licence Charges Act. The Bill is intended to clarify that the charge was payable at law since the commencement of the Licence Charges Act. To date, all but one of the Commonwealth entities operating under the APRANS Act have paid the prescribed annual licence charges. Consequently, I understand that the amendment will only impact financially on one current licence holder. This licence holder would be liable for $60,000, being the licence annual charge for a two-year period in relation to a prescribed radiation facility.

I trust this clarifies matters to your satisfaction.

Yours sincerely,

Trish Worth

Trish Worth
- 3 JUN 2002

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Senator Barney Cooney
Senator for Victoria
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
Canberra ACT 2600

17 JUN 2002

Dear Senator Cooney

I refer to the Committee's request for advice in the *Alert Digest No.4 of 2002* (15 May 2002) regarding certain issues relating to the Financial Sector Legislation Amendment Bill (No.1) 2002. Specifically, the Committee has asked for advice on when the schedules to the *General Insurance Reform Act 2001* commenced or will commence and why this was not explained in the Explanatory Memorandum. The Committee also is concerned that the items may be retrospective.

The commencement of items 1 to 18 of Schedule 4 in the Explanatory Memorandum depend on the commencement of the schedules to the *General Insurance Reform Act 2001*.

Items 1 to 17 are due to commence immediately after the commencement of Schedule 1 to the *General Insurance Reform Act 2001*. This is to be 1 July 2002. Item 18 is to commence immediately after the commencement of Schedule 2 to the *General Insurance Reform Act 2001*. Schedule 2 commenced on Royal Assent on 19 September 2001.

Item 18 corrects a grammatical error in paragraph (a) of subitem 5(2) of Schedule 2 to the *General Insurance Reform Act 2001*. Paragraph 5(2)(a) is supposed to read that the determination may include a different specified period in respect of different provisions of the **new** Act, but the word **old** was mistakenly inserted. Reading this section as it currently stands does not make sense when reading the rest of subitem 5. Under the *Acts Interpretation Act 1901* the word **old** would be read as meaning **new**, as this is what appears to be intended on the face of subitem 5. This amendment corrects a grammatical error and its retrospective commencement does not disadvantage any person in any way.

The explanation of the commencement dates was not included in the Explanatory Memorandum due to a drafting omission.

Yours sincerely

PETER COSTELLO

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Senator B Cooney
Chairman of the Committee
Standing Committee for the Scrutiny of Bills
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21 JUN 2002

Dear Senator Cooney

Please find attached a response to the comments made in the Scrutiny of Bills Alert Digest No. 11 of 2001 (29 August 2001) concerning the General Insurance Reform Bill 2001.

The response considers all the issues raised including strict liability offences, incorporation of extrinsic material and delegation to a 'class of persons'.

Yours sincerely

HELEN COONAN

Response to Issues Raised in Senate Standing Committee for the Scrutiny of Bills Alert Digest No. 11 of 2001 on Amendments to the General Insurance Reform Bill 2001

1. Strict liability offences in amendment 16 (section 17), 23 (section 27) and 34 (section 47)

An effective enforcement regime is crucial for APRA to fulfil its roles and responsibilities as a prudential regulator. The experience of APRA, and previously the Insurance and Superannuation Commission, is that many fault liability offence provisions are virtually unenforceable, particularly in circumstances where the conduct that contravenes an offence provision involves a failure to act. The requirement to prove a mental element creates a substantial impediment to proving such offences due to the fact that evidence of intention or recklessness is often difficult to obtain in the absence of admissions (ie confessions) or independent evidence. This in turn reduces the effectiveness of using the prospect of prosecutions as a deterrent to imprudent behaviour or an incentive to negotiate a rectification plan.

The move to strict liability is consistent with consumer protection measures contained in the *Corporations Act 2001* and the *Managed Investments Act 1998* and with changes to the *Superannuation Industry (Supervision) Act 1993.*

It is vital that the new provisions contained in the *Insurance Act 1973* as amended by the *General Insurance Reform Act 2001* (the amended Insurance Act) are enforceable, otherwise the intent of these provisions will be compromised. APRA's credibility would be damaged if the situation was to arise where it was unable to achieve successful criminal prosecutions under the Insurance Act. It would only take a single widely publicised instance of APRA's inability to prosecute to seriously erode public confidence in the insurance system.

In adopting a regime of strict liability for these provisions rather than a fault liability regime there is sometimes a misunderstanding that offences identified as attracting strict liability will lead to a reversal in the onus of proof. Such offences will still require the prosecution to prove the elements of the offence beyond reasonable doubt. It will be open to a defendant to raise defences and to bear an evidential burden only as to their existence. The prosecution must then disprove the existence of any defence beyond reasonable doubt.

As the burden of proof on a defendant is an evidential burden, the defendant will only have to point to evidence that suggests a reasonable possibility that the defence applies. This is a consistently lower standard of proof than for the prosecution.

In addition, it is important to note that under clause 9.2 of the Criminal Code, it will still be a defence to establish that there was a reasonable mistake as to fact. Accordingly, strict liability is not the same as absolute liability.

2. Incorporation of extrinsic material, proposed new subsection 32(6)

The prudential standards determined by APRA under section 32 of the amended Insurance Act may make occasional reference to extrinsic material.

The extrinsic material referred to in the prudential standards would be accounting standards released by the Australian Accounting Standards Board (AASB), company ratings for counterparties of insurers contained in ratings lists (for example, lists published by Standard & Poor), and possibly at a later date any specific actuarial standards as developed by the relevant professional body.

The purpose of subsection 32(6) is to allow for the automatic inclusion within the prudential standards of any alterations to incorporated extrinsic material without APRA having to amend the standard each time there is a change in the extrinsic document. (For example, on one view, section 49A of the *Acts Interpretation Act 1901* (AI Act) would prevent APRA from specifying matters in prudential standards by reference to the ratings of counterparties set out in a ratings lists published and updated from time to time by an established ratings agency.)

The justification for this exemption from the requirements of the AI Act is that any changes to these technical standards would usually be of a minor nature and (in the case of actuarial standards) would always be undertaken by the professional associations with responsibility for the technical standards, that is, they would be peer reviewed. If there were a significant change in, say, an actuarial standard, APRA would need to consider whether it was appropriate that the prudential standard continue to refer to the actuarial standard in the same way, in any case. This amendment would also be conducive to the underlying purpose of the standards setting framework for prudential supervision, which is to allow for the development of flexible and adaptable regulatory tools.

It should also be emphasised that the extrinsic material most commonly referred to in the prudential standards would be AASB accounting standards, which, as disallowable instruments, would already be exempted from the requirements of section 49A of the AI Act.

3. **Delegation to a 'class of persons'. Proposed new paragraph 59(1)(b)**

This amendment enables an inspector, with APRA's prior agreement, to delegate his or her powers by signed instrument to a person included in a class of persons. This amendment would allow, for example, the inspector to delegate powers to his or her employees, or for the inspector to call on particular expertise in carrying out an investigation.

Where an investigation is complex an inspector will require the help of other persons to assist him or her in the investigation. To ensure that at all times these persons can go about the tasks required by the inspector, it is important that the inspector be able to delegate relevant powers to these persons when and if required. In most cases APRA does not envisage the investigator would be required to make such delegations, as experience has shown that the majority of insurers are willing to co-operate during an investigation. If this co-operation is not forthcoming however, and evidence is required that these "assistants" have authority to act on behalf of the inspector, delegation powers are necessary.

The justification for not including explicit criteria in the provisions outlining required levels of training, qualifications and experience that the delegate must meet is for the same reason no provisions outline explicit criteria for the inspector. Flexibility is required to tailor the investigation to the particular circumstances of each case. To pose criteria in the relevant provisions on the skills and experience of the delegates could potentially limit the scope of a particular investigation. For this reason, APRA is seeking discretion to approve the class of persons to which an inspector could delegate powers.

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25 JUN 2002

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

Dear Senator Cooney Barney

Taxation Laws Amendment Bill (No 2) 2002: Senate Standing Committee For Scrutiny Of Bills

I refer to the concerns raised by the Senate Standing Committee for the Scrutiny of Bills in Alert Digest No 3 of 2002 (dated 20 March 2002) about the retrospective application or commencement of Schedules 1, 4, 10 and 12 to the Taxation Laws Amendment Bill (No 2) 2002.

Schedule 1 to the Bill will make consequential amendments to the imputation rules in the *Income Tax Assessment Act 1936* to reflect the reduction of the company tax rate from 34% to 30%. The proposed amendments will commence on 1 July 2001, when the rate was reduced.

Schedule 1 provides for the conversion of franking accounts to reflect the new, lower company tax rate of 30%. The conversion preserves the value of franking credits accumulated before the reduction in the company tax rate. The franking credits available for distribution to shareholders after conversion will reflect the full amount of tax paid at the previous higher tax rate.

Franking accounts were converted in the same way when the company tax rate was increased from 33% to 36% from the 1995-96 year of income and when the rate was reduced from 36% to 34% from the 2000-01 year of income.

Part 2 of Schedule 4 to the Bill will amend the *Income Tax Assessment Act 1997* to deny refunds of excess imputation credits to non-complying superannuation funds and non-complying approved deposit funds (ADFs).

Resident individuals and certain entities are eligible for refunds of excess imputation credits in respect of dividends paid on or after 1 July 2000. It has become apparent that non-complying superannuation entities may be used as a vehicle to access these refunds inappropriately. It is possible for such funds to enter into artificial schemes so as to produce surplus imputation credits in respect of which they would be entitled to a refund. To protect the revenue, non-complying superannuation funds and non-complying ADFs will be denied refunds of excess imputation credits.

The proposed amendments will apply to assessments for income years ending on or after 22 May 2001, when the measure was announced by the former Assistant Treasurer.

It is expected that this measure will affect few taxpayers. Non-complying superannuation funds and non-complying ADFs are taxed at the top marginal tax rate rather than the concessional 15% rate generally applicable to complying superannuation entities. Therefore, they would rarely be in a position to claim refunds of excess imputation credits.

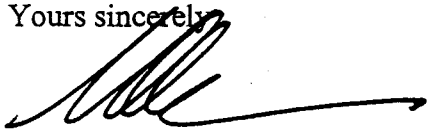
Schedule 10 to the Bill recognises a new demutualisation method for non-insurance mutual entities. Members of non-insurance mutual entities that demutualise using the new method will qualify for the capital gains tax (CGT) concessions in Schedule 2H of the *Income Tax Assessment Act 1936*. The Schedule broadly:

- ensures that members of a mutual entity who receive shares as a result of demutualisation of that entity are not subject to CGT until they dispose of those shares; and
- specifies the cost base for shares issued to members as a result of the demutualisation of a mutual entity.

No taxpayers will be adversely affected by the retrospective application of the amendments in Schedule 10 to the Bill. Members of the entity that demutualised on the basis of the announcement would be adversely affected if the amendments were made prospective.

The amendments in Schedule 12 to the Bill, which have various dates of effect, primarily correct typographical errors, renumber incorrect section references, correct cross-references and asterisks and repeal redundant provisions. As these amendments are purely technical in nature, they do not adversely affect the rights and liabilities of taxpayers.

Yours sincerely,



HELEN COONAN