SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRD REPORT

OF

2003

26 March 2003

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ISSN 0729-6258

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MEMBERS OF THE COMMITTEE

Senator J McLucas (Chair)
Senator B Mason (Deputy Chairman)
Senator G Barnett
Senator T Crossin
Senator D Johnston
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT OF 2003

The Committee presents its Third Report of 2003 to the Senate.

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

Energy Grants (Credits) Scheme Bill 2003

Taxation Laws Amendment Bill (No. 4) 2003

Energy Grants (Credits) Scheme Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2003*, in which it made various comments. The Treasurer has responded to those comments in a letter dated 21 March 2003. 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. 2 of 2003

This bill was introduced into the House of Representatives on 13 February 2003 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

Introduced with the Energy Grants (Credit) Scheme (Consequential Amendments) Bill 2003, the bill proposes to replace the Diesel Fuel Rebate Scheme and the Diesel and Alternative Fuels Grants Scheme with a single scheme to be called the Energy Grants Credits Scheme, with effect from 1 July 2003. The proposed new scheme will maintain entitlements equivalent to those currently available and correct administrative inconsistencies. The bill also contains a regulation-making power.

Non-disallowable determinations
Clause 9

Clause 9 would permit the Commissioner of Taxation to make a written determination which would, in effect, define which operations of a vehicle were a journey, for the purposes of the legislation, and which were to be taken not to be a journey. It would appear that this power is legislative in character, but apparently it is not subject to any form of Parliamentary scrutiny. The Committee therefore **seeks the Treasurer's advice** as to why these determinations are not subject to the usual Parliamentary oversight.

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

Relevant extract from the response from the Treasurer

I refer to the comments contained in the Scrutiny of Bills Alert Digest No. 2 of 2003 (5 March 2003) concerning the above bill.

The Committee draws Senators' attention to clause 9 of the bill. This clause permits the Commissioner of Taxation to make determinations in relation to the circumstances in which the operation of a vehicle between two points is taken to be a journey in its own right and those in which it is not taken to be a journey. The clause operates in conjunction with clause 43 of the bill which is the key provision specifying the circumstances that give rise to entitlement to an on-road credit. Clause 43 provides an entitlement for an on-road credit for the use of diesel fuel or an alternative fuel in vehicles with a gross vehicle mass of between 4.5 and 20 tonnes, where the vehicle is a vehicle for transporting passengers or goods. The entitlement to an on-road credit for this class of vehicle is limited to the operation of the vehicle on a road in Australia on a journey:

- between a point outside the metropolitan areas and another point outside the metropolitan areas;
- between a point outside the metropolitan areas and a point inside a metropolitan area;
- between a point inside a metropolitan area and a point outside the metropolitan areas; and
- between different metropolitan areas.

The purpose of clause 9 is to allow the Commissioner of Taxation to make a determination to clarify the status of an operation of a vehicle when part of the vehicle's operation is undertaken within a metropolitan area. The ability to make such a determination is intended to provide certainty to claimants about the status of various vehicle operations they may undertake in order to allow them to correctly self-assess their entitlement to an on-road credit under clause 43. The determination is a key tool for easing the compliance requirements on businesses.

The power to make a determination under clause 9 closely mirrors the existing power contained in section 10A of the *Diesel and Alternative Fuels Grants Scheme Act 1999* (the DAFGS Act), which the Energy Grants (Credits) Scheme Bill replaces. The Diesel and Alternative Fuels Grants Scheme (Journeys) Determination 2000 was made under section 10A and has been in force since the commencement of the Diesel and Alternative Fuels Grants Scheme on 1 July 2000. The determination was developed in consultation with relevant industry associations, which is a statutory requirement, and is accepted by industry.

Schedule 2 of the Energy Grants (Credits) Scheme (Consequential Amendments) Bill 2003 contains a transitional provision that provides that the Diesel and Alternative Fuels Grants Scheme (Journeys) Determination 2000 will continue to have effect as if it had been made under clause 9.

The role of the determination is to allow for fine tuning of the administrative arrangements surrounding the application of the primary legislative provision in consultation with industry and it does not trespass unduly on personal rights and liberties. The existing arrangement under the DAFGS Act, which was developed in consultation with industry, has been in place for some time and it is working well and will be retained, as mentioned above, by Schedule 2 of the Energy Grants

(Credits) Scheme (Consequential Amendments) Bill 2003. Therefore it is not considered necessary for the power to make a determination under clause 9 to be subject to disallowance by Parliament.

I trust this information will be of assistance to you.

The Committee thanks the Treasurer for this detailed response. In light, however, of the Treasurer's advice that the determination is administrative in nature, the Committee makes the following comments.

The Committee is generally wary of any provision with the potential for differential treatment of related circumstances, as appears to be the case here. The Committee accepts that clause 9 requires the Commissioner to consult named industry groups before making a determination and that this is a significant safeguard. Nevertheless, where a bill confers administrative power on a public official the Committee must report on whether that power is sufficiently circumscribed and whether it is subject to appropriate review. The present provision includes a procedural safeguard, but apparently is not subject to merits review. It is therefore for the Senate to decide whether this unduly affects rights and liberties.

In the meantime, the Committee continues to draw Senators' attention to this provision as it may breach principles 1(a)(ii) and (iii) of its terms of reference in relation to administrative powers and non-reviewable decisions.

Taxation Laws Amendment Bill (No. 4) 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2003*, in which it made various comments. The Minister for Revenue and Assistant Treasurer has responded to those comments in a letter received on 18 March 2003. 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. 2 of 2003

This bill was introduced into the House of Representatives on 13 February 2003 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

Schedule 1 to the bill proposes to amend the *Income Tax Assessment Act 1936* to ensure that roll-over transactions which occur wholly within the one superannuation fund or annuity provider (internal roll-overs) are treated in the same way for RBL purposes as roll-overs which occur between funds or providers (external roll-overs).

Schedule 2 to the bill proposes to amend the *Income Tax Assessment Act 1997* and the *Income Tax (Transitional Provisions) Act 1997* to make technical corrections and amendments in relation to the uniform capital allowances system.

Schedule 3 to the bill proposes to amend the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Income Tax (Transitional Provisions) Act 1997* and the *Taxation Administration Act 1953* to clarify, standardise and rationalise the recognition and treatment of non-assessable non-exempt income amounts.

Schedule 4 to the bill proposes to amend the *Income Tax Assessment Act 1997* to ensure that taxpayers always receive the maximum benefit from refundable tax offset carry forward rules; and to prevent double refunds of the private health insurance tax offset to trustees and beneficiaries.

Schedule 5 to the bill proposes to amend the *Taxation Administration Act 1953* to introduce new withholding obligations to apply to certain payments to foreign residents, thereby facilitating greater compliance of foreign residents with their Australian tax obligations.

Schedule 6 to the bill proposes to amend the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* to ensure that the "no ABN withholding event" will apply to enterprise-to-enterprise transactions in Australia; and to amend the "no ABN withholding rules" so that they have the same geographical application as contained in the *A New Tax System (Australian Business Number) Act 1999*.

Schedule 7 to the bill proposes to amend the *Fringe Benefits Tax Assessment Act 1986* to provide a fringe benefits tax exemption for certain payments to approved worker entitlement funds; and the *Income Tax Assessment Act 1997* to provide a capital gains tax roll-over to a fund that amends or replaces its trust deed in order to be approved as an "approved worker entitlement fund".

The bill also contains application and transitional provisions.

Title of bill not chronological
Clause 1

Clause 1 provides for the short title to this measure. That short title indicates that the bill which has been introduced in the second sitting week of the year is the fourth measure of 2003 to amend various parts of the taxation laws. In addition, under the table in subclause 2(1), some provisions in this bill may commence immediately after the commencement of the *Taxation Laws Amendment* ***Act (No. 2) 2003***, a measure which has not yet been introduced into the Parliament under that title. The Committee **seeks the Treasurer's advice** on these matters.

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

Relevant extract from the response from the Minister

Clauses 1 and 2

The Committee has queried the short title of the bill contained in Clause 1 (Taxation Laws Amendment Bill (No. 4) 2003) given it suggests it is the fourth bill of that name introduced in 2003, whereas it is the first. Consistent with past practice and normal procedure, the bill is numbered taking into account any bills of the same name not passed in the previous Parliamentary year. This way when enacted the bill and Act will be similarly named.

Clause 2 refers to *Taxation Laws Amendment Act* (No. 2) 2003, whose title was queried by the Committee as having no similarly named bill currently before Parliament. However, this bill was introduced into Parliament as Taxation Laws Amendment Bill (No. 7) 2002, on 23 October 2002 and is currently before the House of Representatives awaiting debate. If this bill receives Royal Assent in 2003, its title, in line with normal procedure, will be as above.

The Committee thanks the Minister for this response, but notes that existing practice relating to the short titles of bills, particularly those with sequential numbers in their title and whose passage overlaps two or more calendar years of a session, may result in some confusion.

At present such bills are amended by the Chairman's amendment procedure to omit references to the previous year and insert references to the current year. The amendments include any necessary sequential re-numbering of bills. The difficulty with these arrangements is that unless there is another print of a bill such as a third reading print, the new title of these bills may not be in the public domain until they receive Royal Assent, which might not be until months into the new year.

The Committee will write to the Attorney-General and the First Parliamentary Counsel about this matter, asking for comments and suggesting that the position might be improved by the greater use of explanatory words in parentheses in the titles of bills which are at present differentiated only by sequential numbers. The Committee will report again after it has considered the replies to these letters.

Retrospective application
Item 18 of Schedule 1

By virtue of item 18 of Schedule 1, the amendments proposed by that Schedule are to apply from 1 July 2001. Unfortunately, the Explanatory Memorandum does not make it clear whether this retrospective application will adversely affect any taxpayers. The Memorandum indicates that the amendments are to give effect to a Press Release issued on 1 July 2001, and the Committee **seeks the Treasurer's advice** on two matters. First, this amendment has been introduced long after the expiry of the six months' grace which the Committee is usually prepared to give to Press Releases relating to taxation matters, and the Committee would appreciate the reasons for that delay. Secondly, the Memorandum merely states that "the revenue impact of [this] measure is not readily quantifiable". In this case, the Committee asks whether this means that the measure will increase or decrease the tax burden on affected taxpayers.

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

Relevant extract from the response from the Minister

The Committee sought clarification of whether the retrospective application of the amendments contained in Schedule 1 to the bill would adversely affect any taxpayers. The Committee also requested the Treasurer's advice on two matters relating to Item 18 of the Schedule - viz, the reasons why the amendments had been introduced outside of the 6 months' grace period for Press Releases relating to taxation matters, and whether the measure would increase or decrease the tax burden on affected taxpayers.

The retrospective application of the amendments contained in Schedule 1 to the bill will benefit taxpayers. The changes have been backdated to 1 July 2001 to coincide with the Government's 2001-2002 Federal Budget measure to exempt superannuation assets in the accumulation stage from the social security means test for people aged between SS and age pension age. Backdating the amendments to this date will ensure that retirees who took advantage of this measure by commuting a pension and rolling an amount back to the accumulation stage within the same fund will not be adversely affected by the current treatment of internal rollovers.

The measure contained in Schedule 1 was announced in my Press Release No.C74/02 of 1 July 2002, and not on 1 July 2001 as indicated in the Alert Digest. The amendments were therefore introduced approximately seven months after their announcement, and approximately one month after the expiry of the 6 months' grace period for Press Releases relating to taxation matters. The minor delay was

attributable to the Government's decision to consult with industry on the detailed amendments prior to their introduction into Parliament.

As noted in paragraph 1.39 of the Explanatory Memorandum, the measure benefits pension and annuity recipients. The amendments will reduce the tax burden on affected taxpayers by removing the double counting of benefits problem currently associated with internal rollovers. The double counting problem can lead to a taxpayer having an excess benefits position, and therefore incurring excess benefits tax, when their rolled-over benefit is eventually paid out of the superannuation system. Taxpayers who would not otherwise have been in an excessive benefits position but for the double counting problem will therefore benefit from the amendments by having their tax burden reduced.

The Committee thanks the Minister for this response.

Retrospective application
Item 17 of Schedule 2

By virtue of item 17 of Schedule 2, the amendments proposed by that Schedule are to apply from 1 July 2001. Unfortunately, the Explanatory Memorandum does not make it clear whether this retrospective application will adversely affect any taxpayers. All that the Memorandum reveals is that there is "no revenue impact as a result of these amendments, as the amendments ensure that the uniform capital allowance system operates as intended and as originally costed." The Committee, therefore, **seeks the Treasurer's advice** as to whether this means that the measure will increase or decrease the tax burden on affected taxpayers.

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

Relevant extract from the response from the Minister

The amendments proposed by Schedule 2, which are to apply from 1 July 2001, do not vary either compliance costs or the taxation burden on taxpayers. These amendments ensure that the uniform capital allowance (UCA) system and associated transitional provisions for the mining industry, which commenced on 1 July 2001, operate as the Government originally intended. The mining industry was consulted

and indicated that the preferred date of application for these amendments was 1 July 2001.

I trust that the above comments address the concerns of the Committee.

The Committee thanks the Minister for this response.

Jan McLucas
Chair

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21 MAR 2003
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for the Scrutiny of Bills

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21 MAR 2003

Senator J McLucas
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator McLucas

Energy Grants (Credits) Scheme Bill 2003

I refer to the comments contained in the Scrutiny of Bills Alert Digest No. 2 of 2003 (5 March 2003) concerning the above bill.

The Committee draws Senators' attention to clause 9 of the bill. This clause permits the Commissioner of Taxation to make determinations in relation to the circumstances in which the operation of a vehicle between two points is taken to be a journey in its own right and those in which it is not taken to be a journey. The clause operates in conjunction with clause 43 of the bill which is the key provision specifying the circumstances that give rise to entitlement to an on-road credit. Clause 43 provides an entitlement for an on-road credit for the use of diesel fuel or an alternative fuel in vehicles with a gross vehicle mass of between 4.5 and 20 tonnes, where the vehicle is a vehicle for transporting passengers or goods. The entitlement to an on-road credit for this class of vehicle is limited to the operation of the vehicle on a road in Australia on a journey:

- between a point outside the metropolitan areas and another point outside the metropolitan areas;
- between a point outside the metropolitan areas and a point inside a metropolitan area;
- between a point inside a metropolitan area and a point outside the metropolitan areas; and
- between different metropolitan areas.

The purpose of clause 9 is to allow the Commissioner of Taxation to make a determination to clarify the status of an operation of a vehicle when part of the vehicle's operation is undertaken within a metropolitan area. The ability to make such a determination is intended to provide certainty to claimants about the status of various vehicle operations they may undertake in order to allow them to correctly self-assess their entitlement to an on-road credit under clause 43. The determination is a key tool for easing the compliance requirements on businesses.

The power to make a determination under clause 9 closely mirrors the existing power contained in section 10A of the *Diesel and Alternative Fuels Grants Scheme Act 1999* (the DAFGS Act), which the Energy Grants (Credits) Scheme Bill replaces. The Diesel and Alternative Fuels Grants Scheme (Journeys) Determination 2000 was made under section 10A and has been in force since the commencement of the Diesel and Alternative Fuels Grants Scheme on 1 July 2000. The

determination was developed in consultation with relevant industry associations, which is a statutory requirement, and is accepted by industry.

Schedule 2 of the Energy Grants (Credits) Scheme (Consequential Amendments) Bill 2003 contains a transitional provision that provides that the Diesel and Alternative Fuels Grants Scheme (Journeys) Determination 2000 will continue to have effect as if it had been made under clause 9.

The role of the determination is to allow for fine tuning of the administrative arrangements surrounding the application of the primary legislative provision in consultation with industry and it does not trespass unduly on personal rights and liberties. The existing arrangement under the DAFGS Act, which was developed in consultation with industry, has been in place for some time and it is working well and will be retained, as mentioned above, by Schedule 2 of the Energy Grants (Credits) Scheme (Consequential Amendments) Bill 2003. Therefore it is not considered necessary for the power to make a determination under clause 9 to be subject to disallowance by Parliament.

I trust this information will be of assistance to you.

Yours sincerely

PETER COSTELLO

MINISTER FOR REVENUE AND
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Dear Senator McLucas

Taxation Laws Amendment Bill (No. 4) 2003

I am writing in response to the Committee's concerns with Clauses 1 and 2, item 18 of Schedule 1 and item 17 of Schedule 2 to the Taxation Laws Amendment Bill (No. 4) 2003, that were raised in Alert Digest No. 2 of 5 March 2003. The Treasurer has asked me to respond to your letter of 6 March 2003.

Clauses 1 and 2

The Committee has queried the short title of the bill contained in Clause 1 (Taxation Laws Amendment Bill (No. 4) 2003) given it suggests it is the fourth bill of that name introduced in 2003, whereas it is the first. Consistent with past practice and normal procedure, the bill is numbered taking into account any bills of the same name not passed in the previous Parliamentary year. This way when enacted the bill and Act will be similarly named.

Clause 2 refers to *Taxation Laws Amendment Act (No. 2) 2003*, whose title was queried by the Committee as having no similarly named bill currently before Parliament. However, this bill was introduced into Parliament as Taxation Laws Amendment Bill (No. 7) 2002, on 23 October 2002 and is currently before the House of Representatives awaiting debate. If this bill receives Royal Assent in 2003, its title, in line with normal procedure, will be as above.

Item 18 of Schedule 1

The Committee sought clarification of whether the retrospective application of the amendments contained in Schedule 1 to the bill would adversely affect any taxpayers. The Committee also requested the Treasurer's advice on two matters relating to Item 18 of the Schedule – viz, the reasons why the amendments had been introduced outside of the 6 months' grace period for Press Releases relating to taxation matters, and whether the measure would increase or decrease the tax burden on affected taxpayers.

The retrospective application of the amendments contained in Schedule 1 to the bill will benefit taxpayers. The changes have been backdated to 1 July 2001 to coincide with the Government's 2001-2002 Federal Budget measure to exempt superannuation assets in the accumulation stage from the social security means test for people aged between 55 and age pension age. Backdating the amendments to this date will ensure that retirees who took advantage of this measure by commuting

a pension and rolling an amount back to the accumulation stage within the same fund will not be adversely affected by the current treatment of internal rollovers.

The measure contained in Schedule 1 was announced in my Press Release No.C74/02 of 1 July 2002, and not on 1 July 2001 as indicated in the Alert Digest. The amendments were therefore introduced approximately seven months after their announcement, and approximately one month after the expiry of the 6 months' grace period for Press Releases relating to taxation matters. The minor delay was attributable to the Government's decision to consult with industry on the detailed amendments prior to their introduction into Parliament.

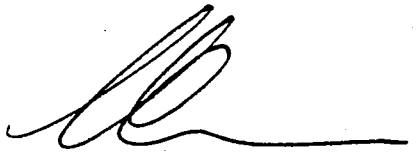
As noted in paragraph 1.39 of the Explanatory Memorandum, the measure benefits pension and annuity recipients. The amendments will reduce the tax burden on affected taxpayers by removing the double counting of benefits problem currently associated with internal rollovers. The double counting problem can lead to a taxpayer having an excess benefits position, and therefore incurring excess benefits tax, when their rolled-over benefit is eventually paid out of the superannuation system. Taxpayers who would not otherwise have been in an excessive benefits position but for the double counting problem will therefore benefit from the amendments by having their tax burden reduced.

Item 17 of Schedule 2

The amendments proposed by Schedule 2, which are to apply from 1 July 2001, do not vary either compliance costs or the taxation burden on taxpayers. These amendments ensure that the uniform capital allowance (UCA) system and associated transitional provisions for the mining industry, which commenced on 1 July 2001, operate as the Government originally intended. The mining industry was consulted and indicated that the preferred date of application for these amendments was 1 July 2001.

I trust that the above comments address the concerns of the Committee.

Yours sincerely



HELEN COONAN