SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

EIGHTH REPORT

OF

2005

17 August 2005

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MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator B Mason (Deputy Chair)
Senator G Barnett
Senator D Johnston
Senator A McEwen
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

EIGHTH REPORT OF 2005

The Committee presents its Eighth Report of 2005 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:

Tax Laws Amendment (2005 Measures No. 4) Bill 2005

Trade Practices Amendment (National Access Regime) Bill 2005*****

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

Tax Laws Amendment (2005 Measures No. 4) Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2005*. The Minister for Revenue and Assistant Treasurer has responded to those comments in a letter dated 16 August 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 8 of 2005

Introduced into the House of Representatives on 23 June 2005
Portfolio: Treasury

Background

This bill is an omnibus tax laws amendment bill, comprising four Schedules and making amendments to four Acts. Topics include:

- introduction of child care tax rebate of 30 per cent of out-of-pocket child care expenses;
- adding new organisations to the list of deductible gift recipients;
- disclosure of business income tax information to the Australian Statistician; and
- access to the wine producer rebate for New Zealand wine producers who export to the Australian market.

The bill also makes consequential amendments to the *Taxation Administration Act 1953* and the *A New Tax System (Family Assistance) (Administration) Act 1999.*

Commencement on Proclamation
Schedule 4

Drafting Direction 2005, No. 10, issued by the Office of Parliamentary Counsel, provides (at paragraphs 18 and 19) that any proposal to defer commencement for more than 6 months after assent should be explained in the explanatory memorandum.

By virtue of item 3 of the table in subclause 2(1) of this bill, the amendments proposed in Schedule 4 will commence on Proclamation, but may not commence for up to 12 months after Assent. The explanatory memorandum appears not to refer to this fact, and therefore does not comply with the drafting direction. The amendments proposed by Schedule 4 will extend the wine equalisation rebate to New Zealand wine producers, and it may be that complementary legislation in that country is required for the amendment to become effective, a circumstance that is usually accepted by the Committee as a reasonable explanation for an extended delay in commencement.

The Committee **seeks the Treasurer's advice** on the reason for this delayed commencement, and whether an explanation should have been provided in the explanatory memorandum.

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

Relevant extract from the response from the Assistant Treasurer

Schedule 4 amends the *A New Tax System (Wine Equalisation Tax) Act 1999* to create a specific scheme to provide the existing wine producer rebate to New Zealand wine producers whose wine is exported to the Australian market. As part of the agreement to extend the rebate, New Zealand agreed to put in place enabling legislation that would provide complementary administration and compliance powers for the scheme in New Zealand.

This legislation was tabled in the form of a Supplementary Order Paper in the New Zealand Parliament on 22 June 2005. New Zealand's Parliament is presently dissolved as a consequence of its election being called. As a result of recent changes to the Constitution Act 1986 (NZ), all New Zealand parliamentary business, including bills before the New Zealand Parliament, must lapse upon the expiry or dissolution of the Parliament.

Therefore it is still unclear when the New Zealand legislation will be passed. I have proposed deferred commencement for the Australian legislation, as I do not consider it appropriate for the scheme to commence without the supporting compliance powers under New Zealand legislation. I note that under the proposed Australian legislation, eligibility for the rebate will be retrospectively available from 1 July 2005.

I trust this information will be of assistance to you.

The Committee thanks the Assistant Treasurer for this response, but suggests that it would have been useful if this information had been included in the explanatory memorandum to the bill.

Trade Practices Amendment (National Access Regime) Bill 2005

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2005*. The Parliamentary Secretary to the Treasurer has responded to those comments in a letter dated 8 August 2005. A copy of the letter is attached to this report.

Extract from Alert Digest No. 6 of 2005

Introduced into the House of Representatives on 2 June 2005
Portfolio: Treasury

Background

The bill amends the *Trade Practices Act 1974* to implement aspects of the Government's response to the Productivity Commission's Inquiry Report No. 17, *Review of the National Access Regime*. According to the Minster's second reading speech, the amendments 'will make an important contribution to promoting timely and efficient infrastructure investment decisions and outcomes, through an improved National Access Regime for infrastructure facilities of national significance.'

The bill inserts a new objects clause into Part IIIA of the Act and requires decision makers under Part IIIA to have regard to that clause. The other amendments to that part are intended to encourage efficient investment, enhance the national access regime, and improve the transparency, accountability and timeliness of the decision-making process in Part IIIA.

Retrospective application
Schedule 1, Part 2: Subitems 121(1) and (2), items 123 and 127

Various provisions of Part 2 of Schedule 1 to this bill would apply some of the amendments proposed by Part 1 of Schedule 1 to events occurring before the commencement of this bill, as well as to events occurring thereafter. The relevant provisions are subitems 121(1) and (2), item 123 and item 127 of Part 2 of the Schedule.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

Unfortunately, the explanatory memorandum merely states the fact that the amendments are to apply retrospectively as well as prospectively and does not indicate clearly whether that retrospective application may adversely affect any person – see paragraphs 5.73, 5.236, 5.126 and 5.153. The Committee **seeks the Treasurer's advice** as to whether the retrospective application of any of the amendments referred to in those subitems or items of Part 2 of Schedule 1 would adversely affect any person.

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 Parliamentary Secretary

The amendments of concern to the Committee should not adversely affect any person by way of retrospective application. Rather, they should result in more timely decision-making processes and greater regulatory certainty, to the benefit of those operating under the National Access Regime. Further comments on each of the amendments are provided below.

Item 121 Application─extensions of access regimes

(1) The amendment made by item 44 (in so far as it inserts section 44NA of the Trade Practices Act 1974) applies in relation to decisions made by the Commonwealth Minister before or after the commencement of that item that an access regime is an effective access regime.

Item 44 introduces a process by which a state or territory minister may seek an extension of a decision by the Commonwealth Minister that a state or territory access regime is an effective access regime, through an application to the National Competition Council (NCC).

Item 121 has the effect that this new process will be available where a decision of the Commonwealth Minister is already in place at the time Item 44 commences (the alleged retrospective element of the provisions), and in respect of all such decisions in the future.

It is arguable whether making this new process available with respect to pre-existing decisions represents 'retrospective' application of the provisions, because the actual application for an extension of an effective access regime cannot be made retrospectively.

If the new process was not available in relation to access regimes already certified as effective by the Commonwealth Minister, the states and territories which operate those regimes would be disadvantaged, and there would be greater regulatory uncertainty for the access providers and access seekers subject to the regimes in question.

It is also worth noting that before making a decision on an extension application, the Commonwealth Minister will receive advice on the matter from the National Competition Council (NCC). In making its recommendation to the Commonwealth Minister, the NCC will have the discretion to consult publicly on the extension application.

Item 121 Application—extensions of access undertakings and access codes

(2) The amendment made by item 108 (in so far as it inserts section 44ZZBB of the Trade Practices Act 1974) applies in relation to decisions made by the Commission before or after the commencement of that item to accept an access undertaking or an access code.

Item 108 enables an access provider to apply to the Australian Competition and Consumer Commission (ACCC) for an extension to the period for which an access undertaking or an access code is in operation.

Item 121 has the effect that this new process applies to access undertakings or access codes that are already in effect at the time Item 108 commences (the alleged retrospective element), and to future decisions by the ACCC to accept an undertaking or code.

Once again, it is arguable whether making the new process available in respect of pre-existing decisions of the ACCC is in fact a 'retrospective' application of those provisions, because the application for an extension of an undertaking or code cannot be made retrospectively.

Furthermore, the ACCC, in considering an extension application, will be required to assess the undertaking or code against specific criteria, including the interests of the parties involved, as well as the public interest, and may undertake public consultation where it considers that such consultation is appropriate and practicable.

This amendment should benefit a wide range of stakeholders, without adversely affecting any of them. It will benefit infrastructure service providers by enabling them to streamline any application to extend an access undertaking or code, thereby avoiding potential uncertainty and delay. The alternative is that the access provider would be required to submit an entirely new access undertaking or access code, as is currently the case. The amendment will also benefit access seekers by facilitating greater certainty regarding the terms and conditions of access in the future. Both access seekers and consumers should benefit from participation in the application via the proposed public consultation process, where the ACCC decides to conduct such a process.

Item 123 Application—interim determinations

The amendment made by item 58.applies in relation to access disputes notified to the Commission before or after the commencement of that item.

Item 58 enables the ACCC to make a written interim determination when arbitrating an access dispute.

Item 123 has the effect that the power of the ACCC to make an interim determination will apply in relation to access disputes that have already been notified to the ACCC at the time Item 58 commences (the alleged retrospective element), and to access disputes that are notified to the ACCC in the future.

While the ability of the ACCC to provide an interim arbitration determination will apply to access disputes already notified to it, an interim determination under these new provisions can only operate prospectively. In addition, the ACCC's power to make an interim determination is a discretionary power, and one factor the ACCC can take into account is the views of the parties in dispute as to whether an interim determination should be made.

Interim arbitrations will improve certainty for service providers and access seekers, and will enable an access seeker to gain access to a service while arbitrations are conducted, which should reduce the incentive for either party to obstruct arbitration proceedings (for example, by withholding information). This may encourage commercial negotiations as a means to resolve disputes and also improve the timeliness of decision-making.

Item 127 Application—joint arbitration hearings

> *The amendment made by item 71 applies in relation to access disputes notified to the Commission either before or after the commencement of that item.*

Item 71 enables the ACCC to hold a joint arbitration hearing for access disputes notified to it in certain circumstances.

Item 127 provides that the ACCC may hold joint hearings in relation to access disputes already notified to it at the time Item 71 commences (the alleged retrospective element), as well as in relation to future notified access disputes.

Under Item 71, an access dispute may be dealt with in a joint arbitration hearing by the ACCC, rather than in a separate arbitration hearing, if the ACCC is arbitrating two or more disputes with one or more matters in common. However, the ACCC can only elect to conduct a joint arbitration hearing where it is likely to resolve the dispute in a more efficient and timely manner. Each party subject to a proposed joint arbitration must be notified by the ACCC and given 14 days to make a written submission on the ACCC's proposal to conduct a joint arbitration. The ACCC must have regard to any such submission in deciding whether to proceed with the joint arbitration.

Otherwise, the main the effect of Item 71 is to apply existing provisions of Part IIIA of the *Trade Practices Act 1974* (sections 44Z to 44ZN) to joint arbitration hearings in the same manner that they already apply to separate arbitration hearings.

Consequently, Item 71 should not cause any detriment to parties involved in an access dispute compared with the situation where they would have been subject to a separate arbitration hearing.

In conclusion, to the extent that the provisions of the Bill do operate retrospectively, this is only to ensure that the benefits of improved processes are extended to all

parties that may be in a position to take advantage of them, and will not trespass on personal rights and liberties.

I thank the Committee for raising this matter and for the opportunity to respond to the Committee's concerns. I trust the information provided will be of assistance.

The Committee thanks the Parliamentary Secretary for this detailed response.

The Committee accepts the Parliamentary Secretary's contention that it is arguable whether these provisions operate retrospectively. The Committee is always concerned to ensure that, where legislation appears to apply to events occurring before commencement, the Parliament has sufficient information available to determine whether the provisions have retrospective effect and, if so, whether the retrospectivity is warranted. In this respect, the Committee particularly thanks the Parliamentary Secretary for his assurance that 'to the extent that the provisions of the bill do operate retrospectively, this is only to ensure that the benefits of improved processes are extended to all parties that may be in a position to take advantage of them, and will not trespass on personal rights and liberties.'

Robert Ray
Chair

MINISTER FOR REVENUE AND ASSISTANT TREASURER
The Hon Mal Brough MP

PARLIAMENT HOUSE
CANBERRA ACT 2600

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16 AUG 2005

Senator Robert Ray
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

I refer to the Scrutiny of Bills Alert Digest No. 8 of 2005 (10 August 2005), and in particular, the Committee's request for advice on the reason for deferred commencement of Schedule 4 of the Tax Laws Amendment (2005 Measures No. 4) Bill 2005.

Schedule 4 amends the *A New Tax System (Wine Equalisation Tax) Act 1999* to create a specific scheme to provide the existing wine producer rebate to New Zealand wine producers whose wine is exported to the Australian market. As part of the agreement to extend the rebate, New Zealand agreed to put in place enabling legislation that would provide complementary administration and compliance powers for the scheme in New Zealand.

This legislation was tabled in the form of a Supplementary Order Paper in the New Zealand Parliament on 22 June 2005. New Zealand's Parliament is presently dissolved as a consequence of its election being called. As a result of recent changes to the Constitution Act 1986 (NZ), all New Zealand parliamentary business, including bills before the New Zealand Parliament, must lapse upon the expiry or dissolution of the Parliament.

Therefore it is still unclear when the New Zealand legislation will be passed. I have proposed deferred commencement for the Australian legislation, as I do not consider it appropriate for the scheme to commence without the supporting compliance powers under New Zealand legislation. I note that under the proposed Australian legislation, eligibility for the rebate will be retrospectively available from 1 July 2005.

I trust this information will be of assistance to you.

Yours sincerely

MAL BROUGH

THE HONOURABLE CHRIS PEARCE MP

Parliamentary Secretary to the Treasurer
Federal Member for Aston

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Senate Standing C'ttee for the Scrutiny of Bills

Senator the Hon Robert Ray
Chair of the Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

I refer to Mr Richard Pye's letter of 15 June 2005 to the Treasurer's Senior Adviser, concerning the *Trade Practices Amendment (National Access Regime) Bill 2005* (the Bill). Mr Pye invites the Treasurer's response to the request from the Standing Committee for the Scrutiny Bills, contained in its Scrutiny of Bills Alert Digest No. 6 of 2005, for advice as to whether the retrospective application of certain amendments in the Bill would adversely affect any person. The Treasurer has asked me to respond.

The amendments of concern to the Committee should not adversely affect any person by way of retrospective application. Rather, they should result in more timely decision-making processes and greater regulatory certainty, to the benefit of those operating under the National Access Regime. Further comments on each of the amendments are provided below.

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If the new process was not available in relation to access regimes already certified as effective by the Commonwealth Minister, the states and territories which operate those regimes would be disadvantaged, and there would be greater regulatory uncertainty for the access providers and access seekers subject to the regimes in question.

It is also worth noting that before making a decision on an extension application, the Commonwealth Minister will receive advice on the matter from the National Competition Council (NCC). In making its recommendation to the Commonwealth Minister, the NCC will have the discretion to consult publicly on the extension application.

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I thank the Committee for raising this matter and for the opportunity to respond to the Committee's concerns. I trust the information provided will be of assistance.

Yours sincerely

CHRIS PEARCE