SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIRST REPORT

OF

2009

4 February 2009

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MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)
Senator M Bishop (Deputy Chair)
Senator D Cameron
Senator J Collins
Senator R Siewert
Senator the Hon J Troeth

TERMS OF REFERENCE

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT OF 2009

The Committee presents its First Report of 2009 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:

Corporations Amendment (Short Selling) Act 2008

Fair Work Bill 2008

Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008

Nation-building Funds (Consequential Amendments) Act 2008

Tax Agent Services Bill 2008 *****

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

Corporations Amendment (Short Selling) Act 2008

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 13 of 2008*. The Treasurer responded to the Committee's comments in a letter dated 22 December 2008. A copy of the letter is attached to this report.

Although the bill has now been passed by both Houses and received Royal Assent on 11 December 2008, the Treasurer's response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 13 of 2008

Introduced into the House of Representatives on 13 November 2008
Portfolio: Treasury

Background

This bill amends the *Corporations Act 2001* to address the regulation of short selling of financial products and transactions. In particular, the bill:

- clarifies the Australian Securities and Investments Commission's powers to regulate all aspects of short selling of financial products and transactions;
- repeals sections of the Corporations Act that allow certain financial products to be sold even though the seller does not have an exercisable and unconditional right to vest the products in the buyer (naked short selling); and
- ensures the disclosure of covered short sale transactions (sales supported by securities obtained under a securities lending agreement).

Commencement more than six months after assent
Subclause 2(1)

Item 4 in the table to subclause 2(1) provides that Schedule 3 of the bill is to commence on Proclamation, but in any event within 12 months of Assent.

The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of delayed commencement is six months or less. Where the delay is longer, the Committee expects that the explanatory memorandum to the bill will provide an explanation, in accordance with Paragraph 19 of Drafting Direction No. 1.3.

In this instance, the explanatory memorandum gives no reason for the failure to comply with paragraph 19 of Drafting Direction No 1.3, and does not explain the reason for the period of delay of commencement being longer than six months. The Committee **seeks the Treasurer's advice** as to the reason for this delay.

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 Treasurer

The Committee has expressed concerns about the commencement of Schedule 3 of this Bill, and in particular, the fact that Schedule 3 commences on Proclamation, but in any event within 12 months of Royal Assent. The Committee has indicated that potentially delaying commencement by up to 12 months may be considered to delegate legislative powers inappropriately. The Secretary to the Committee has requested that I write to you on this matter.

Schedule 3 of the Bill contains amendments to require the disclosure of covered short sale transactions. Consultation with industry as part of developing the proposed disclosure regime indicated that the requirements will involve changes to IT and other administrative systems in order to enable electronic reporting of these transactions. Industry indicated that these changes may take up to 12 months to complete. In order to provide industry with sufficient time to transition to the new disclosure regime, it was decided appropriate for Schedule 3 to commence on Proclamation, but no later than 12 months after Royal Assent. Delaying the commencement of Schedule 3 by a period less than 12 months (for example, 6 months) could potentially result in industry having insufficient time to put in place the systems necessary to allow for compliance with the requirements imposed by the Bill.

These issues are outlined in paragraph 1.3 of the Explanatory Memorandum to the Bill.

I trust this information will be of assistance to you.

The Committee thanks the Treasurer for this response, which addresses the Committee's concerns.

Fair Work Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 14 of 2008*. The Minister for Employment and Workplace Relations responded to the Committee's comments in a letter dated 15 January 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 14 of 2008

Introduced into the House of Representatives on 25 November 2008
Portfolio: Education, Employment and Workplace Relations

Background

This bill establishes a national workplace relations system which seeks to provide a balanced framework for cooperative and productive workplace relations and flexibility for business, and seeks to promote productivity and economic growth.

Amongst other things, the bill:

- establishes a 'safety net' comprising the National Employment Standards (NES) to guarantee minimum employment conditions for all employees in relation to wages, weekly hours of work, leave, public holidays, notice of termination and redundancy pay, and the right to request flexible working arrangements;

- establishes modern awards to provide flexibility and stability for employers and their employees;

- establishes national minimum wage orders that apply to award/agreement-free employees;

- allows employees earning an indexed high-earnings figure to voluntarily enter into a written guarantee with an employer;

- establishes Fair Work Australia, an independent, statutory body with a range of functions and powers;
- establishes the Office of Fair Work Ombudsman to promote harmonious and cooperative workplace relations and compliance with the bill;
- provides protection from unfair dismissal for all employees;
- allows employees to be represented at work by a union;
- allows employees and employers to bargain on a multi-employer basis;
- provides a new scheme of bargaining for low-paid employees;
- provides for a publication, *Small Business Fair Dismissal Code*, to guide small businesses to ensure dismissals are not unfair;
- provides clear rules to govern industrial action; and
- provides the Federal Court and the Federal Magistrate's Court with powers to deal with breaches and entitlements.

Strict liability
Subclause 702(6)

Subclause 702(6) creates an offence of strict liability where a person ceases to be a Fair Work Inspector and the person does not, within 14 days, return his or her identity card to the Fair Work Ombudsman or the Minister (as the case may be).
The Committee will generally draw to Senators' attention provisions which create strict liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In this case, the explanatory memorandum notes that '(i)t is appropriate that this offence is one of strict liability because of the consequences of a person who is not an inspector misusing an identity card'. However, the explanatory memorandum does not indicate whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by the Minister for Justice and Customs in February 2004, was considered in the course of framing this strict liability offence.

The Committee **seeks the Minister's advice** whether the recommendations in the *Guide* were considered in the drafting of this provision.

Pending the Minister'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 Committee has sought my advice concerning subclause 702(6), which creates a strict liability offence for failure by a fair work inspector to return an identity card. I confirm that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers – 2007 Interim New Edition* (the Guide) was considered in drafting that subclause 702(6) of the Bill. The provision was also discussed with the Criminal Law Branch of the Attorney-General's Department. As noted in the Alert Digest, the explanatory memorandum provides that 'it is appropriate that this offence is one of strict liability because of the consequences of a person who is not an inspector misusing an identity card'.
>
> Subclause 702(6) of the Bill effectively replicates subsection 168(4) of the *Workplace Relations Act 1996* (Cth) (WR Act) in relation to the offence of failing to return an inspector's identity card within 14 days. In each case, the offence is strict liability, and attracts a penalty of one penalty unit. Subsection 168(4) was introduced into the WR Act in 2005. Consistent with the Guide and the views of the Attorney-General's Department, a new defence of accidental loss or destruction of the identity card was included in subclause 702(7) of the Bill.
>
> I trust that my response addresses the Committee's comments in relation to subclause 702(6); however, please do not hesitate to contact my Office if you have any further queries.

The Committee thanks the Minister for this response, which addresses the Committee's concerns.

Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008

Introduction

The Committee dealt with this Act in *Alert Digest No. 12 of 2008*. The Treasurer responded to the Committee's comments in a letter dated 4 December 2008. A copy of the letter is attached to this report.

Although the bill has now been passed by both Houses and received Royal Assent on 17 October 2008, the response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 12 of 2008

Introduced into the House of Representatives and passed on 15 October 2008
Portfolio: Treasury

Introduced into the Senate and passed on 16 October 2008
Assented to on 17 October 2008

Background

This bill introduces measures to implement a Financial Claims Scheme (FCS), including a three-year 100 per cent guarantee of deposits in authorised deposit-taking institutions (ADIs), and other arrangements, to deal with 'distressed' or failing financial institutions. The bill is part of a package of three bills (also including the Financial Claims Scheme (ADIs) Levy Bill 2008 and the Financial Claims Scheme (General Insurers) Levy Bill 2008) aimed at enhancing the stability of Australia's financial system in the current global financial crisis.

Schedule 1 of the bill amends the *Banking Act 1959*, the *Insurance Act 1973* and the *Australian Prudential Regulation Authority Act 1998* to, respectively:

- establish the Early Access Facility for Depositors (EAFD) to ensure that depositors in a failed ADI have access to their deposit funds;

- establish the Policyholder Compensation Facility (PCF) to provide eligible general insurance policyholders with access to funds from insurance claims in the event of a failure of a general insurer; and

- provide the Australian Prudential Regulation Authority (APRA) with the function of administering the FCS.

Schedule 1 also makes consequential amendments to the Administrative Decisions (Judicial Review) Act 1977, the Corporations Act 2001, the Financial Institutions Supervisory Levies Collection Act 1998, the Income Tax Assessment Act 1936, the Reserve Bank Act 1959 and the Taxation Administration Act 1953.

Schedule 2 of the bill amends the Banking Act 1959 to expand the duties, powers and functions of ADI statutory managers in order to improve statutory management of ADIs and the recapitalisation of an ADI.

Schedule 3 of the bill amends the *Insurance Act 1973* to establish arrangements to provide for the judicial management of general insurers and facilitate the recapitalisation of a general insurer.

Schedule 4 of the bill amends the *Life Insurance Act 1995* to establish arrangements to improve judicial management of life insurers and facilitate the recapitalisation of a life insurer.

Schedule 5 of the bill amends the *Financial Sector (Business Transfer and Group Restructure) Act 1999* to establish enhanced arrangements to facilitate the transfer of assets and liability between institutions.

The bill also includes application, saving and transitional provisions.

Although this bill has passed both Houses of Parliament and received Royal Assent on 17 October 2008, the following comments are provided by the Committee for the information of Senators.

Wide delegation of power
Schedule 1, item 15; Schedule 1, item 26

New subsection 16AN(1) of the *Banking Act 1959*, inserted by item 15 of Schedule 1, and new subsection 62ZZT(1) of the *Insurance Act 1973*, inserted by item 26 of Schedule 1, permits APRA to delegate 'any or all of APRA's functions and powers' under a relevant Division or Part of the respective Acts to 'a person', with no limit expressed in the legislation on the attributes or qualifications of the proposed delegate.

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. There is no reference to subsection 16AN(1) in the explanatory memorandum; and paragraph 2.158 of the explanatory memorandum describes subsection 62ZZT(1), but provides no justification for it. While the Committee appreciates the need to provide APRA with greater powers to enable it to properly manage financial institutions in the current economic crisis, the Committee nevertheless **seeks the Treasurer's advice** about the reason for conferral of the unlimited delegation contained in subsections 16AN(1) and 62ZZT(1).

Pending the Treasurer's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations 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 Treasurer

> The Committee has asked me to provide advice on the reason for the conferral of unlimited delegations in subsections 16AN(1) of the *Banking Act 1959* and 62ZZT(1) of the *Insurance Act 1973.* The provisions allow the Australian Prudential

Regulation Authority (APRA) to delegate its functions under the relevant Division of the Acts to another person.

I note that the powers that can be delegated under these provisions relate only to APRA's administration of the Financial Claims Scheme (FCS), which can only be activated by a ministerial declaration following the failure of an authorised deposit-taking institution or general insurer. Of course the nature and timing of any such failure cannot be known in advance.

The ability to delegate functions to a company or a person in a company is important given there will be a number of technical roles in administering the FCS, where APRA may require expert assistance. For example, APRA may decide to outsource elements of claims processing, account aggregation, applying eligibility criteria or transferring or maintaining IT systems. Given the potential differences in the size and business structure of financial entities, it is not possible to foresee all the situations where APRA would need to delegate functions or the relevant attributes of a delegate in each of these circumstances.

Attempting to define these situations or delegates in advance may unnecessarily restrict APRA's ability to deal with a financial institution failure quickly. In dealing with a financial institution's failure, inability to outsource where necessary would have the potential to delay the administration of the scheme, which would result in delays in making payments to depositors and policyholders. Equally significant is that any delays may have adverse consequences for depositors, policyholders and financial system stability more generally.

I also note that APRA remains appropriately accountable for administering the FCS and that any delegate under these provisions must comply with a direction given by APRA.

I trust this information will be of assistance to you.

The Committee thanks the Treasurer for this response, which addresses the Committee's concerns, but notes that it would have been helpful if this information had been included in the explanatory memorandum.

Nation-building Funds (Consequential Amendments) Act 2008

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 13 of 2008*. The Minister for Finance and Deregulation responded to the Committee's comments in a letter dated 19 January 2009. A copy of the letter is attached to this report.

Although the bill has now been passed by both Houses and received Royal Assent on 18 December 2008, the Minister's response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 13 of 2008

Introduced into the House of Representatives on 13 November 2008
Portfolio: Finance and Deregulation

Background

Introduced with the Nation-building Funds Bill 2008, this bill supports the establishment of the new nation-building funds – the Building Australia Fund (BAF), the Education Investment Fund (EIF) and the Health and Hospitals Fund (HHF).

In particular, the bill:

- extends the operation of the *Future Fund Act 2006* to deal with the Future Fund Board's duties in relation to the BAF, the EIF and the HHF;
- closes the Communications Fund and the Higher Education Endowment Fund, and transfers the balance of their assets to the BAF and the EIF, respectively;
- repeals the *Higher Education Endowment Fund Act 2007* to reflect the closure of the Higher Education Endowment Fund;

- repeals Part 9C of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and amends the *Telstra Corporation Act 1991* to reflect the closure of the Communications Fund;

- allows for amounts to be transferred from the Future Fund to the BAF, EIF and HHF for the purposes of apportioning expenses that have been paid from one fund that should properly be apportioned between two or more of the funds; and

- repeals provisions of the *Income Tax Assessment Act 1997* allowing tax deductible gifts to be made to the Higher Education Endowment Fund, consistent with that fund being closed.

The bill also contains application and transitional provisions.

Legislative Instruments Act—exemptions
Schedule 2, item 44

Proposed new subitems 2(3), 3(3) and 4(3) of Schedule 2A to the *Future Fund Act 2006*, to be inserted by item 44 of Schedule 2 to the bill, declare that Ministerial directions issued under subitems 2(1), 3(1) and 4(1), in relation to transfers of amounts from the Future Fund to the BAF, the EIF and the HHF, are not legislative instruments.

As outlined in Drafting Direction No. 3.8, where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003.* Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

In this case, the explanatory memorandum does not indicate whether these subitems are included for the benefit of readers, or are an attempt to gain exemption from the *Legislative Instruments Act 2003*. The Committee **seeks the Minister's advice** whether this provision is declaratory in nature or provides for a substantive exemption and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

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

Relevant extract from the response from the Minister

The Standing Committee for the Scrutiny of Bills has sought my advice on the rationale behind the arrangements contained in item 44 of Schedule 2 of the Consequential Amendments Bill.

Item 44 inserted Schedule 2A into the *Future Fund Act 2006* (Future Fund Act) to allow amounts to be transferred from the Future Fund to the Building Australia Fund, the Education Investment Fund or the Health and Hospitals Fund. The purpose of Schedule 2A is to provide for the situation where the Future Fund pays entirely for an expense that should be apportioned between two or more Funds. The direction to transfer amounts is not a legislative instrument and is based on a similar mechanism that was in the *Higher Education Endowment Fund Act 2007* (which has now been repealed).

Similar provisions were proposed in the then *Nation-building Funds Bill 2008* (the Main Bill) for transfers from the Building Australia Fund, the Education Investment Fund and the Health and Hospitals Fund. These transfer arrangements were contained in clauses 27 to 29, 146 to 148 and 222 to 224 of the Main Bill. The Main Bill and Consequential Amendments Bill provide that these directions are not legislative instruments.

The explanatory memorandum for the Main Bill (pages 23, 78 and 116) contained an explanation on why the directions were not proposed as legislative instruments:

"These provisions are merely declaratory in nature. Directions of this type are administrative in character because they are merely the application of a legal power in a particular case; they do not determine or alter the content of the law itself."

The same reasoning is applicable to item 44 of Schedule 2 of the Consequential Amendments Bill.

An update to the explanatory memorandum of the Consequential Amendments Bill was not feasible at the time, as the Main Bill and Consequential Amendments Bill were passed by the Parliament on 4 December 2008, shortly after receiving your secretariat's letter.

I thank the Committee for its comments on the Main Bill and the Consequential Amendments Bill.

The Committee thanks the Minister for this response.

Tax Agent Services Bill 2008

Introduction

The Committee dealt with this bill in *Alert Digest No. 13 of 2008*. The Assistant Treasurer responded to the Committee's comments in a letter dated 3 February 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 13 of 2008

Introduced into the House of Representatives on 13 November 2008
Portfolio: Treasury

Background

This bill implements a new legislative regime to improve the regulatory environment in relation to the provision of tax agent services.

In particular, the bill:

- establishes a national Tax Practitioners Board as a statutory authority within the Australian Taxation Office to replace the existing state-based boards;
- requires that certain entities who are providing Business Activity Statement (BAS) services (BAS agents) be registered (in addition to tax agents);
- introduces a legislated Code of Professional Conduct to govern tax agents and BAS agents;
- provides for a wider and more flexible range of disciplinary sanctions which may be imposed by the Tax Practitioners Board; and
- introduces civil penalties and injunctions to replace criminal penalties for certain misconduct by agents and unregistered entities.

Commencement more than six months after assent
Subclause 1-5(1)

Item 2 in the table to subclause 1-5(1) provides that Parts 2 to 5 of the bill are to commence on Proclamation, but in any event within nine months after Assent. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will not generally comment where the period of delayed commencement is six months or less. Where the delay is longer, the Committee expects that the explanatory memorandum to the bill will provide an explanation, in accordance with Paragraph 19 of Drafting Direction No. 1.3.

In this instance, the explanatory memorandum gives no reason for the failure to comply with paragraph 19 of Drafting Direction No 1.3, and does not explain the reason for the period of delay of commencement being longer than six months. The Committee **seeks the Treasurer's advice** as to the reason for this delay.

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

Thank you for the letter of 27 November 2008 from the Secretary of the Senate Standing Committee for the Scrutiny of Bills to the Treasurer, drawing his attention to the comments made about the Tax Agent Services Bill 2008 in the Scrutiny of Bills *Alert Digest No. 13 of 2008*. The letter has been referred to me as I have portfolio responsibility for this matter. I apologise for the delay in responding to you.

The Tax Agent Services Bill 2008 (the Bill), which I introduced into the House of Representatives on 13 November 2008, proposes to introduce a new regulatory regime for the provision of tax agent services to the public. The Bill will replace the current law providing for the registration of tax agents in Part VIIA of the *Income Tax Assessment Act 1936* (ITAA 1936), which was introduced in 1943 and is now out of date and inconsistent with the current tax and commercial environment.

I have considered the comments made by the Committee, in particular the Committee's concern that the commencement date for Parts 2 to 5 of the Bill may be within nine months of receipt of the Royal Assent (as provided by item 2 in the table to subclause 1-5(1)), and that the reason for this delayed commencement is not explained in the explanatory memorandum to the Bill.

The nine-month period between Royal Assent and commencement of Parts 2 to 5 of the Bill is considered necessary to provide sufficient time for the Tax Practitioners Board (Board) to be established and prepare for its role of registering and regulating tax agents and BAS agents under the Bill and to ensure a smooth transition from the current law to the new regulatory regime. Unfortunately, this explanation was omitted from the explanatory memorandum to the Bill. Further details of my response are outlined below.

To understand why it is appropriate for the Proclamation date to occur within a nine-month period — rather than at most a six-month period — from Royal Assent, it would be useful to provide some context around those parts of the Bill that are proposed to commence on Royal Assent and those parts that will commence on Proclamation.

Broadly, Parts 1 and 8 and other specific clauses of the Bill (being clauses 60-1 to 60-90 and clauses 70-25 to 70-45) provide for the establishment, functions and powers of the Board, including the appointment of Board members, Board procedures and committees and other miscellaneous provisions relating to the Board. Parts 1 and 8 also contain the broader foundation provisions to the Bill that allow the Bill to operate, such as the commencement and application provisions and the dictionary applicable to, and the rules for interpreting, the Bill. These provisions are proposed to commence on Royal Assent.

Parts 2 to 5 and other specific clauses of the Bill (being clauses 60-95 to 70-20 and clauses 70-50 and 70-55) provide for the regulatory provisions of the Bill, including registration under the Bill, the Code of Professional Conduct and the administrative sanctions applicable for failing to comply with the Code, the grounds and process for terminating registrations, the civil penalties applicable for certain misconduct, and other provisions relating to investigations conducted by the Board and the public reporting obligations of the Board. These provisions are proposed to commence on Proclamation.

As you would appreciate, allowing the Board to be established shortly after Royal Assent, and delaying the commencement of the regulatory provisions in the Bill, will enable the Board to prepare for its role registering tax agents and BAS agents and regulating compliance with the Bill. Indeed, paragraph 5.26 in Chapter 5 of the explanatory memorandum to the Bill states that:

> ‘Enabling the Board to be established on the day on which the Bill receives Royal Assent allows the Board time to perform preparatory work prior to the commencement of its functions [...]. The preparatory workload of the Board to effect a smooth transition to the new framework is expected to be significant.’

A nine-month delay between Royal Assent and commencement of the regulatory provisions in the Bill is necessary to, among other things, advertise positions on the Board, appoint successful candidates and commence drafting legislative instruments to issue as guidelines under the Bill. The time will also permit internal processes and procedures to be established (including development of information technology

systems) to enable the Board to function effectively in its regulatory role from Proclamation.

In addition, if Proclamation occurs in early 2010 (industry's preferred start date expressed during consultation would be 1 January 2010), the proposed nine-month delay will also allow the Board to prepare to assess and process the significant number of applications for renewal of registration expected to be received by the Board in April 2010. Advice from the Australian Taxation Office suggests that approximately 9,600 tax agents' renewal applications will be due at that time.

Given the expected workload of the Board upon establishment and advice from the current state Tax Agents' Boards during earlier consultation on the tax agent services framework that an even longer period would be preferable, the Government considers that a nine-month delay is a reasonable balance in the circumstances.

I trust this information will be of assistance to you.

The Committee thanks the Assistant Treasurer for this very comprehensive response, which addresses the Committee's concerns.

Senator the Hon Helen Coonan
Chair

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22 DEC 2008

Senator the Hon Helen Coonan
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan

Thank you for the letter of 27 November 2008 from the Secretary of the Standing Committee for the Scrutiny of Bills concerning the *Corporations Amendment (Short Selling) Bill 2008*.

The Committee has expressed concerns about the commencement of Schedule 3 of this Bill, and in particular, the fact that Schedule 3 commences on Proclamation, but in any event within 12 months of Royal Assent. The Committee has indicated that potentially delaying commencement by up to 12 months may be considered to delegate legislative powers inappropriately. The Secretary to the Committee has requested that I write to you on this matter.

Schedule 3 of the Bill contains amendments to require the disclosure of covered short sale transactions. Consultation with industry as part of developing the proposed disclosure regime indicated that the requirements will involve changes to IT and other administrative systems in order to enable electronic reporting of these transactions. Industry indicated that these changes may take up to 12 months to complete. In order to provide industry with sufficient time to transition to the new disclosure regime, it was decided appropriate for Schedule 3 to commence on Proclamation, but no later than 12 months after Royal Assent. Delaying the commencement of Schedule 3 by a period less than 12 months (for example, 6 months) could potentially result in industry having insufficient time to put in place the systems necessary to allow for compliance with the requirements imposed by the Bill.

These issues are outlined in paragraph 1.3 of the Explanatory Memorandum to the Bill.

I trust this information will be of assistance to you.

Yours sincerely

WAYNE SWAN

THE HON JULIA GILLARD MP
DEPUTY PRIME MINISTER

Parliament House
Canberra ACT 2600

15 JAN 2009

Senator the Hon Helen Coonan
Chair of the Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for the opportunity to respond to comments noted in the Scrutiny of Bills *Alert Digest No. 14 of 2008* (3 December 2008) in relation to the Fair Work Bill (the Bill).

The Committee has sought my advice concerning subclause 702(6), which creates a strict liability offence for failure by a fair work inspector to return an identity card. I confirm that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers — 2007 Interim New Edition* (the Guide) was considered in drafting that subclause 702(6) of the Bill. The provision was also discussed with the Criminal Law Branch of the Attorney-General's Department. As noted in the Alert Digest, the explanatory memorandum provides that 'it is appropriate that this offence is one of strict liability because of the consequences of a person who is not an inspector misusing an identity card'.

Subclause 702(6) of the Bill effectively replicates subsection 168(4) of the *Workplace Relations Act 1996* (Cth) (WR Act) in relation to the offence of failing to return an inspector's identity card within 14 days. In each case, the offence is strict liability, and attracts a penalty of one penalty unit. Subsection 168(4) was introduced into the WR Act in 2005. Consistent with the Guide and the views of the Attorney-General's Department, a new defence of accidental loss or destruction of the identity card was included in subclause 702(7) of the Bill.

I trust that my response addresses the Committee's comments in relation to subclause 702(6); however, please do not hesitate to contact my Office if you have any further queries.

Yours sincerely

Julia Gillard
Minister for Employment and Workplace Relations

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Senator Helen Coonan
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

4 DEC 2008

Dear Senator Coonan

I am writing in response to Ms Julie Dennett's letter of 13 November 2008 concerning the Standing Committee for the Scrutiny of Bills' comments on the *Financial System Legislation (Financial Claims Scheme and Other Measures) Act 2008*.

The Committee has asked me to provide advice on the reason for the conferral of unlimited delegations in subsections 16AN(1) of the *Banking Act 1959* and 62ZZT(1) of the *Insurance Act 1973*. The provisions allow the Australian Prudential Regulation Authority (APRA) to delegate its functions under the relevant Division of the Acts to another person.

I note that the powers that can be delegated under these provisions relate only to APRA's administration of the Financial Claims Scheme (FCS), which can only be activated by a ministerial declaration following the failure of an authorised deposit-taking institution or general insurer. Of course the nature and timing of any such failure cannot be known in advance.

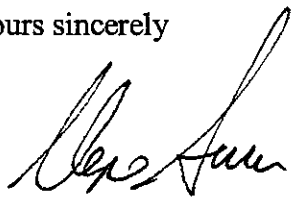
The ability to delegate functions to a company or a person in a company is important given there will be a number of technical roles in administering the FCS, where APRA may require expert assistance. For example, APRA may decide to outsource elements of claims processing, account aggregation, applying eligibility criteria or transferring or maintaining IT systems. Given the potential differences in the size and business structure of financial entities, it is not possible to foresee all the situations where APRA would need to delegate functions or the relevant attributes of a delegate in each of these circumstances.

Attempting to define these situations or delegates in advance may unnecessarily restrict APRA's ability to deal with a financial institution failure quickly. In dealing with a financial institution's failure, inability to outsource where necessary would have the potential to delay the administration of the scheme, which would result in delays in making payments to depositors and policyholders. Equally significant is that any delays may have adverse consequences for depositors, policyholders and financial system stability more generally.

I also note that APRA remains appropriately accountable for administering the FCS and that any delegate under these provisions must comply with a direction given by APRA.

I trust this information will be of assistance to you.

Yours sincerely



WAYNE SWAN

THE HON LINDSAY TANNER MP

Minister for Finance and Deregulation
Member for Melbourne

Senator the Hon Helen Coonan
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan

I refer to the Scrutiny of Bills *Alert Digest No. 13 of 2008* (26 November 2008) concerning item 44 of Schedule 2 of the then *Nation-building Funds (Consequential Amendments) Bill 2008* (the Consequential Amendments Bill).

The Standing Committee for the Scrutiny of Bills has sought my advice on the rationale behind the arrangements contained in item 44 of Schedule 2 of the Consequential Amendments Bill.

Item 44 inserted Schedule 2A into the *Future Fund Act 2006* (Future Fund Act) to allow amounts to be transferred from the Future Fund to the Building Australia Fund, the Education Investment Fund or the Health and Hospitals Fund. The purpose of Schedule 2A is to provide for the situation where the Future Fund pays entirely for an expense that should be apportioned between two or more Funds. The direction to transfer amounts is not a legislative instrument and is based on a similar mechanism that was in the *Higher Education Endowment Fund Act 2007* (which has now been repealed).

Similar provisions were proposed in the then *Nation-building Funds Bill 2008* (the Main Bill) for transfers from the Building Australia Fund, the Education Investment Fund and the Health and Hospitals Fund. These transfer arrangements were contained in clauses 27 to 29, 146 to 148 and 222 to 224 of the Main Bill. The Main Bill and Consequential Amendments Bill provide that these directions are not legislative instruments.

The explanatory memorandum for the Main Bill (pages 23, 78 and 116) contained an explanation on why the directions were not proposed as legislative instruments:

"These provisions are merely declaratory in nature. Directions of this type are administrative in character because they are merely the application of a legal power in a particular case; they do not determine or alter the content of the law itself."

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The same reasoning is applicable to item 44 of Schedule 2 of the Consequential Amendments Bill.

An update to the explanatory memorandum of the Consequential Amendments Bill was not feasible at the time, as the Main Bill and Consequential Amendments Bill were passed by the Parliament on 4 December 2008, shortly after receiving your secretariat's letter.

I thank the Committee for its comments on the Main Bill and the Consequential Amendments Bill.

Yours sincerely

Lindsay Tanner

19 JAN 2009

The Hon Chris Bowen MP
Assistant Treasurer
Minister for Competition Policy and Consumer Affairs

Senator the Hon Helen Coonan
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Helen Coonan

Thank you for the letter of 27 November 2008 from the Secretary of the Senate Standing Committee for the Scrutiny of Bills to the Treasurer, drawing his attention to the comments made about the Tax Agent Services Bill 2008 in the Scrutiny of Bills *Alert Digest No. 13 of 2008.* The letter has been referred to me as I have portfolio responsibility for this matter. I apologise for the delay in responding to you.

The Tax Agent Services Bill 2008 (the Bill), which I introduced into the House of Representatives on 13 November 2008, proposes to introduce a new regulatory regime for the provision of tax agent services to the public. The Bill will replace the current law providing for the registration of tax agents in Part VIIA of the *Income Tax Assessment Act 1936* (ITAA 1936), which was introduced in 1943 and is now out of date and inconsistent with the current tax and commercial environment.

I have considered the comments made by the Committee, in particular the Committee's concern that the commencement date for Parts 2 to 5 of the Bill may be within nine months of receipt of the Royal Assent (as provided by item 2 in the table to subclause 1-5(1)), and that the reason for this delayed commencement is not explained in the explanatory memorandum to the Bill.

The nine-month period between Royal Assent and commencement of Parts 2 to 5 of the Bill is considered necessary to provide sufficient time for the Tax Practitioners Board (Board) to be established and prepare for its role of registering and regulating tax agents and BAS agents under the Bill and to ensure a smooth transition from the current law to the new regulatory regime. Unfortunately, this explanation was omitted from the explanatory memorandum to the Bill. Further details of my response are outlined below.

To understand why it is appropriate for the Proclamation date to occur within a nine-month period — rather than at most a six-month period — from Royal Assent, it would be useful to provide some context around those parts of the Bill that are proposed to commence on Royal Assent and those parts that will commence on Proclamation.

Broadly, Parts 1 and 8 and other specific clauses of the Bill (being clauses 60-1 to 60-90 and clauses 70-25 to 70-45) provide for the establishment, functions and powers of the

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Board, including the appointment of Board members, Board procedures and committees and other miscellaneous provisions relating to the Board. Parts 1 and 8 also contain the broader foundation provisions to the Bill that allow the Bill to operate, such as the commencement and application provisions and the dictionary applicable to, and the rules for interpreting, the Bill. These provisions are proposed to commence on Royal Assent.

Parts 2 to 5 and other specific clauses of the Bill (being clauses 60-95 to 70-20 and clauses 70-50 and 70-55) provide for the regulatory provisions of the Bill, including registration under the Bill, the Code of Professional Conduct and the administrative sanctions applicable for failing to comply with the Code, the grounds and process for terminating registrations, the civil penalties applicable for certain misconduct, and other provisions relating to investigations conducted by the Board and the public reporting obligations of the Board. These provisions are proposed to commence on Proclamation.

As you would appreciate, allowing the Board to be established shortly after Royal Assent, and delaying the commencement of the regulatory provisions in the Bill, will enable the Board to prepare for its role registering tax agents and BAS agents and regulating compliance with the Bill. Indeed, paragraph 5.26 in Chapter 5 of the explanatory memorandum to the Bill states that:

> 'Enabling the Board to be established on the day on which the Bill receives Royal Assent allows the Board time to perform preparatory work prior to the commencement of its functions [...]. The preparatory workload of the Board to effect a smooth transition to the new framework is expected to be significant.'

A nine-month delay between Royal Assent and commencement of the regulatory provisions in the Bill is necessary to, among other things, advertise positions on the Board, appoint successful candidates and commence drafting legislative instruments to issue as guidelines under the Bill. The time will also permit internal processes and procedures to be established (including development of information technology systems) to enable the Board to function effectively in its regulatory role from Proclamation.

In addition, if Proclamation occurs in early 2010 (industry's preferred start date expressed during consultation would be 1 January 2010), the proposed nine-month delay will also allow the Board to prepare to assess and process the significant number of applications for renewal of registration expected to be received by the Board in April 2010. Advice from the Australian Taxation Office suggests that approximately 9,600 tax agents' renewal applications will be due at that time.

Given the expected workload of the Board upon establishment and advice from the current state Tax Agents' Boards during earlier consultation on the tax agent services framework that an even longer period would be preferable, the Government considers that a nine-month delay is a reasonable balance in the circumstances.

I trust this information will be of assistance to you.

Yours sincerely

CHRIS BOWEN

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