SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FOURTEENTH REPORT

OF

2011

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Fifield (Chair)
Senator C Brown (Deputy Chair)
Senator M Bishop
Senator S Edwards
Senator G Marshall
Senator R Siewert

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

FOURTEENTH REPORT OF 2011

The Committee presents its Fourteenth Report of 2011 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:

Coal Mining Industry (Long Service Leave) Legislation Amendment Bill 2011

Introduced into the Senate on 21 September 2011
Portfolio: Education, Employment and Workplace Relations

Introduction

The Committee dealt with amendment to the bill in *Alert Digest No. 12 of 2011*. The Minister responded to the Committee's comments in a letter dated 10 November 2011. A copy of the letter is attached to this report.

Alert Digest No. 12 of 2011 - extract

Background

This bill amends the *Coal Mining Industry (Long Service Leave Fund) Act 1992;* the *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992;* the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992; and* the *Coal Mining Industry (Long Service Leave Funding) Amendment Act 2009* to:

- legislate minimum long service leave entitlements for all eligible employees in the black coal mining industry based on the precursor award entitlement;
- change the basis on which the levy is imposed and to facilitate changes to the employer reimbursement arrangements;
- provide for a greater compliance role for the Coal Mining Industry (Long Service Leave Funding Corporation;
- make changes to the structure and representation of the Board of Directors of the Corporation; and
- establish a regime for transition from the award-derived long service leave scheme.

Possible trespass on personal rights
Clause 39F

Clause 39F provides that any benefits or rights in respect of long service leave are subject to cancellation, revocation, termination or variation under legislation and no compensation is payable in that event. The rights are being granted by legislation and it is possible for future legislation to modify or revoke them. While this does not automatically give rise to a

problem, the explanatory memorandum merely repeats the effect of this provision and does not indicate the need for it and whether it could be the basis of amendments that could trespass unduly on personal rights and liberties. As employees may justifiably act on the basis of an understanding of the statutory rights intended to be granted by this Bill, the Committee **seeks the Minister's advice as to the reasons for the proposed approach**.

> *Pending the Minister's reply, 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.*

Minister's response - extract

Possible trespass on personal rights - clause 39F

Clause 39F provides that any benefits or rights in respect of long service leave are subject to cancellation, revocation, termination or variation under legislation and no compensation is payable in that event. The policy position is that if the long service leave entitlements were legislated, there may be a need to alter the entitlements in the future (in the same way that long service leave entitlements in industrial instruments are subject to potential change through re-negotiation).

Clause 39F will mean that the new statutory long service leave entitlement will be treated in the same way as the existing long service leave entitlements that are preserved by statute, that is, the current award entitlement to long service leave in the black coal mining industry preserved by the *Fair Work Act 2009.*

Committee Response

The Committee thanks the Minister for this response and requests that the key aspects of the information are included in the explanatory memorandum.

Alert Digest No. 12 of 2011 - extract

Reversal of onus
Clause 49CB

Clause 49CB imposes an evidential burden on a person who wishes to rely on the mistake of fact defence to avoid the imposition of a civil penalty order. As the explanatory memorandum does not justify this approach, the Committee **seeks the Minister's advice as to the justification for the provision**.

> *Pending the Minister's reply, 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.*

Minister's response - extract

Reversal of onus - clause 49CB

I considered it appropriate for the particular offences contained in the Bill that if a person sought to rely on the defence of mistake of fact then that person should have the evidential burden for proving that there was a mistake of fact.

This approach was taken because; if such a defence is relied on, the particular circumstances and evidence that will need to be relied on to establish the existence of a mistake of fact will be peculiar to the knowledge of the defendant.

Committee Response

The Committee thanks the Minister for this response and requests that the key aspects of the information are included in the explanatory memorandum.

Alert Digest No. 12 of 2011 - extract

Strict liability
Clause 49CC

Clause 49CC, in effect, makes civil penalty provisions strict liability offences. As the explanatory memorandum does not justify this approach, the Committee **seeks the Minister's advice as to the justification for the provision**.

> *Pending the Minister's reply, 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.*

Strict liability
Subclause 52A(6)

Subclause 52A(6) provides that the offence of failing to comply with a notice to produce information or documents is one of strict liability. Although similar provisions appear in other Commonwealth legislation, the Committee expects that the justification for the use of strict liability is in accordance with the *Guide to framing Commonwealth Offences* and is outlined in the explanatory memorandum. In this case the explanatory memorandum does not address in the issue and the Committee therefore **seeks the Minister's advice as to the justification for the proposed approach**.

> *Pending the Minister's reply, 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.*

Minister's response - extract

Offences of strict liability: clause 49CC; subclause 52A(6)

Strict liability offences are necessary and appropriate for the Bill. These offences have been made strict liability offences consistent with the criteria specified in the AGO Guide. Notably these offences, consistent with the AGO Guide, are not punishable by imprisonment; the penalty level does not exceed 60 penalty units; the punishment of these offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring non-compliance with the scheme; and, there are legitimate

grounds for penalising a person lacking fault, in this case it is that it places persons on notice to guard against contraventions of the scheme.

Committee Response

The Committee thanks the Minister for this response and requests that the key aspects of the information are included in the explanatory memorandum.

Alert Digest No. 12 of 2011 - extract

Strict liability
Schedule 3, item 11; and item 14 subsections 10(2) and 10A(4)

Item 11 of Schedule 3 proposes to substitute a new subsection 5(3) in the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992*. The proposed subsection makes it an offence of strict liability for a person to contravene the requirement for an employer to make a return within 28 days of the end of the month in which they employ an eligible employee. The explanatory memorandum does not address why a strict liability offence is necessary in the circumstances.

The same issue also arises in relation to item 14 of Schedule 3, proposed subsections 10(2) and 10A(4).

The Committee therefore **seeks the Minister's advice as to the justification for the proposed** approach in these provisions.

> *Pending the Minister's reply, 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.*

Minister's response - extract

Schedule 3, item 11; and item 14 subsections 10(2)and 10A(4)

It is necessary and appropriate to provide that failure to make a return on eligible wages is an offence of strict liability again consistent with the AGO Guide, further noting that returns are an integral part of the long service leave scheme and that timely returns help ensure the financial viability of the scheme.

The Bill also provides that failure to give a report to the Corporation (prepared by an auditor in respect of eligible employees) within 6 months of the end of a financial year is a strict liability offence as these reports are essential for the Corporation to effectively monitor compliance. This provision similarly meets the AGO Guide criteria for a strict liability offence, and I note that 6 months is a generous time frame to allow for an employer to give the report to the Corporation. The same reasoning applies to an auditor that is required to give such a report to the Corporation, and it was judged that 28 days was a reasonable timeframe in which to require a professional auditor to produce the report.

Committee Response

The Committee thanks the Minister for this response and requests that the key aspects of the information are included in the explanatory memorandum.

Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011

Introduced into the House of Representatives on 19 September 2011
By: Mr Katter

Introduction

The Committee dealt with amendment to the bill in *Alert Digest No. 12 of 2011*. The Mr Katter has responded to the Committee's comments in an email received on 9 November 2011 advising of the attached explanatory memorandum. A copy of the email together with the explanatory memorandum is attached to this report.

Alert Digest No. 12 of 2011 - extract

Background

This bill amends the *Competition and Consumer Act 2011* to provide for a code of conduct for the horticulture industry.

No explanatory memorandum

This bill, introduced as a non-government bill, was not accompanied by an explanatory memorandum. The Committee prefers to see an explanatory memorandum for every bill and recognises the manner in which such documents assist in the interpretation of bills, and ultimately, Acts. The Committee therefore **requests that the Private Member** provides an explanatory memorandum to the bill.

Member's response - extract

Dear Chair of the Committee Senator Mitch Fifield,

In response to a letter sent to our office from the Standing Committee for the Scrutiny of Bills, attached is an explanatory memorandum, as requested, on Mr Katter's Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011.

Committee Response

The Committee thanks the Mr Katter for providing the Committee with a copy of the explanatory memorandum to the bill.

Tax Laws Amendment (2011 Measures No.8) Bill 2011

Introduced into the House of Representatives on 13 October 2011
Portfolio: Treasury

Introduction

The Committee dealt with amendment to the bill in *Alert Digest No. 13 of 2011*. The Assistant Treasurer responded to the Committee's comments in a letter dated 22 November 2011. A copy of the letter is attached to this report.

Alert Digest No. 13 of 2011 - extract

Background

This bill amends various taxation laws as follows:

Schedule 1 amends the *Income Tax Assessment Act 1997* to provide the Commissioner of Taxation with discretion to disregard certain events that would otherwise trigger the assessment of certain income for a primary production trust in the year of the event.

Schedule 2 amends the *Petroleum Resource Rent Tax Assessment Act 1987* to clarify the location of the 'taxing point' for the purposes of the petroleum resource rent tax.

Schedule 3 amends the *Taxation Administration Act 1953* to allow the Commissioner of Taxation to commence proceedings to recover director penalties in certain circumstances without issuing a director penalty notice. The bill amends the *Income Tax Assessment Act 1997, Taxation Administration Act 1953* and *Taxation (Interest on Overpayments and Early Payments) Act 1983* to make directors and their associates liable to pay as you go withholding non-compliance tax in certain circumstances. The bill also provides for directors to be personally liable for their company's unpaid superannuation guarantee amount.

Schedule 4 amends the *Excise Act 1901* and *Fuel Tax Act 2006* to clarify taxation arrangements for gaseous fuels.

Retrospective application
Schedule 2

The amendments in Schedule 2 clarify what constitutes a 'marketable petroleum commodity' under the *Petroleum Rent Tax Assessment Act 1987* (*PRRTAA*). This

clarification is said to confirm 'long established application' of the relevant provisions and to be consistent with the interpretation given to the provisions in a recent Federal Court decision. The explanatory memorandum at page 17 notes that although the 'narrow' interpretation (rejected in the recent Federal Court case) may have reduced the PRRT payable on the Bass Strait project, 'the impact on other PRRT taxpayers would have been less certain, and potentially increased their tax liability'.

The relevant provisions are complex, but the issue from a scrutiny perspective is that it is proposed that the amendments apply retrospectively from 1 July 1990, the date from which the application of the *PRRTAA* was extended to the Bass Strait project (see Schedule 2, item 3). The justification given at page 26 of the explanatory memorandum for the retrospective application of the amendments is that they: (1) will 'remove any uncertainty regarding the long-established operation of the PRTT' and (2) will not 'impose any new tax burden, as they merely clarify and confirm the current application of the PRRT'.

Broadly, the Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole. However, given that the proposed clarification of the law may have a detrimental effect on some taxpayers (insofar as the 'narrow' interpretation is thereby rejected) the Committee **seeks the Treasurer's further advice about whether the amendments are intended to apply to any cases or appeals which are currently pending before the courts and, if so, the justification for this approach.**

> *Pending the Treasurer's reply, 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.*

Minister's response - extract

Schedule 2
Issue

The Committee seeks the Treasurer's further advice, given that the proposed clarification of the law may have a detrimental effect on some taxpayers (insofar as the 'narrow' interpretation is thereby rejected, about whether the amendments are intended to apply to any cases or appeals which are currently pending before the courts and, if so, the justification for this approach.

Response

The issue of how the 'taxing point' is determined for the purposes of the Petroleum Resource Rent Tax (PRRT) was a central issue in a dispute between the participants in the Bass Strait project and the Australian Taxation Office. The PRRT taxing point is normally where a 'marketable petroleum commodity' (MPC) becomes an 'excluded commodity', usually by being sold. The point defines the boundary of a PRRT project, and so is central to calculating project receipts, expenses and profits.

On 13 April 2011, the Federal Court ruled on this matter *(Esso Australia Resources Pty Ltd v The Commissioner for Taxation [2011] FCA 360)*, finding in favour of the Commissioner's position and the long established administration of the PRRT. The Court rejected the companies' argument that the taxing point for a project should be determined in a purely mechanistic way, having regard only to substances' chemical and physical properties and not to the actual circumstances and objectives of the project.

While the Bass Strait project would unambiguously benefit from an earlier taxing point due to its unique circumstances relating to when it transitioned to the PRRT in 1990 (that being the inability to deduct project expenditures incurred prior to that time), the impact on other PRRT taxpayers would be less certain, and could potentially increase their tax liability. This is because, for those projects, having an earlier taxing point than the one intended could well reduce their allowable deductions by more than their assessable receipts.

Subsequently, on 10 May 2011, as part of the 2011-12 Budget, the Government announced it would seek to amend the law to put beyond doubt the way the Commissioner has always administered the PRRT with effect from 1 July 1990 (so as to cover the period related to the amendments that transitioned the Bass Strait project into the PRRT). The Government's Budget announcement noted that the measure has no revenue impact because it merely confirms the rights and liabilities imposed by the current application of the PRRT law. Clarifying the taxing point ensures that PRRT taxpayers are not detrimentally impacted by a narrow interpretation of the taxing point.

On 1 June 2011 the companies lodged an appeal to the Full Federal Court.

On 13 October 2011, the amendments to give effect to the Budget measure were introduced into the House of Representatives.

The Full Federal Court heard the companies appeal during the week beginning 7 November 2011 and has not nominated a judgement date.

The amendments provide statutory support for the Federal Court's decision in *Esso Australia Resources Pty Ltd v The Commissioner for Taxation* and provide certainty for all PRRT taxpayers by putting beyond doubt that a marketable petroleum commodity is only produced when it is in its final form for its intended purpose (within the context of a

particular project), and not at some earlier point part-way through the production process. The amendments are consistent with the original policy intent of the PRRT as a profits-based tax, and the way it has applied for over 20 years. They do not impose any new or additional tax liability on any PRRT taxpayers.

Committee Response

The Committee thanks the Assistant Treasurer for the detailed reply, notes the explanation provided and notes that a judgement on the appeal to the Full Federal Court is pending. In the circumstances the **Committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate**.

Senator Mitch Fifield
Chair

Senator Chris Evans
Leader of the Government in the Senate
Minister for Tertiary Education, Skills, Jobs and Workplace Relations

Senator Mitch Fifield
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to correspondence of 13 October 2011 from Toni Dawes, Committee Secretary, regarding the Coal Mining Industry (Long Service Leave) Legislation Amendment Bill 2011 (the Bill) on behalf of the Senate Standing Committee for the Scrutiny of Bills.

I note that the provisions have been drafted to be consistent with the Attorney-General's Department's 'Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (the AGD Guide). I trust that the following responses will satisfy the Committee's concerns.

Possible trespass on personal rights – clause 39F

Clause 39F provides that any benefits or rights in respect of long service leave are subject to cancellation, revocation, termination or variation under legislation and no compensation is payable in that event. The policy position is that if the long service leave entitlements were legislated, there may be a need to alter the entitlements in the future (in the same way that long service leave entitlements in industrial instruments are subject to potential change through re-negotiation).

Clause 39F will mean that the new statutory long service leave entitlement will be treated in the same way as the existing long service leave entitlements that are preserved by statute, that is, the current award entitlement to long service leave in the black coal mining industry preserved by the *Fair Work Act 2009*.

Reversal of onus – clause 49CB

I considered it appropriate for the particular offences contained in the Bill that if a person sought to rely on the defence of mistake of fact then that person should have the evidential burden for proving that there was a mistake of fact.

This approach was taken because; if such a defence is relied on, the particular circumstances and evidence that will need to be relied on to establish the existence of a mistake of fact will be peculiar to the knowledge of the defendant.

Offences of strict liability: clause 49CC; subclause 52A(6)

Strict liability offences are necessary and appropriate for the Bill. These offences have been made strict liability offences consistent with the criteria specified in the AGD Guide. Notably these offences, consistent with the AGD Guide, are not punishable by imprisonment; the penalty level does not exceed 60 penalty units; the punishment of these offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring non-compliance with the scheme; and, there are legitimate grounds for penalising a person lacking fault, in this case it is that it places persons on notice to guard against contraventions of the scheme.

Schedule 3, item 11; and item 14 subsections 10(2) and 10A(4)

It is necessary and appropriate to provide that failure to make a return on eligible wages is an offence of strict liability again consistent with the AGD Guide, further noting that returns are an integral part of the long service leave scheme and that timely returns help ensure the financial viability of the scheme.

The Bill also provides that failure to give a report to the Corporation (prepared by an auditor in respect of eligible employees) within 6 months of the end of a financial year is a strict liability offence as these reports are essential for the Corporation to effectively monitor compliance. This provision similarly meets the AGD Guide criteria for a strict liability offence, and I note that 6 months is a generous time frame to allow for an employer to give the report to the Corporation. The same reasoning applies to an auditor that is required to give such a report to the Corporation, and it was judged that 28 days was a reasonable timeframe in which to require a professional auditor to produce the report.

Ms Jillian Kaleb is the contact office for this matter in the Department. She can be contacted on (02) 6121 7262 or at jillian.kaleb@deewr.gov.au.

I trust the information provided is helpful.

Yours sincerely

CHRIS EVANS

10 NOV 2011

Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011
Explanatory Memorandum

The Competition and Consumer Amendment (Horticultural Code of Conduct) Bill 2011 has been written to replace the current code Trade Practices (Horticulture Code of Conduct) Regulations 2006

The replacement code has been written because of wide-spread discontent over shortcomings in the 2006 code which was intended to improve clarity and the transparency of transitions in the supply chain. This code fixes this and other issues by extending transparency from beyond the farmgate to the merchant/agent, where the 2006 code stopped, to include retailers, exporters processors and sales beyond.

It also introduces a market-based trust account, a Horticultural Code Management Committee to increase protection to growers while establishing clear terms of trade with regards to dispatching produce and transfer of ownership.

51AED Application of the code
The 2011 Code of Conduct will replace the existing code and once it is enacted it will regulate all seller transactions, with the exception of Western Australian potato growers, including those transactions made under agreements made prior to December 15, 2006. This means Merchant/agents will not be able to backdate agreements to avoid code compliance.

51AEE Terms of Trade
Clear trading terms must be put in writing and be agreed to by sellers and merchant/agents.

1. It must be consistent with the requirements of this Code
2. Identify the trading relations as being either a merchant or agent relationship
3. Set out the terms and conditions of the trading relationship
4. If there is more than one trading relationship a default trading relationship must be set
5. If a merchant/Agent amends the terms of trade the seller must agree and be given a copy of the amended Terms of Trade

51AEF Grower intent to dispatch Produce Notification
A seller must not send produce without contacting the Merchant/Agent. Initial contact can be made by telephone but it must be followed up in writing, which could include a facsimile or email, and this notification must include the quantity and quality of produce to be sent.

51AEG Seller failure to give Intent to Dispatch Produce Notification
If the seller fails to notify the Merchant/Agent the Merchant/Agent must inform the seller within eight hours that the produce has been received and indicate, within this timeframe if the consignment will be accepted.

If the Merchant/Agent rejects the produce the seller must within eight hours tell the Merchant/Agent if the produce is to be destroyed, delivered to a third party or retuned to the seller. The seller must cover all cost incurred by the Merchant/Agent.

51AEH Merchant/Agent's obligation to respond to a Seller's Intent to Dispatch Produce Notification

If a Merchant/Agent receives and notice of an intent to dispatch by a seller, the Merchant/Agent must respond within in the timeframe agreed on in the Terms of Trade, which must not exceed 12 hours, and inform the seller if they want the produce.

The Merchant/Agent must accept the consignment if contact with the seller is not made within the timeframe agreed on it the Terms of Trade.

51AEI If a Merchant/Agent does not accept an Intent to dispatch Produce Notice
If the Merchant/Agent informs the seller within timeframe set out in the Terms of Trade that they don't want the produce the seller must not send the consignment.

51AEJ If a Merchant or Agent does accept and Intent to Deliver Produce Notification
If a Merchant/Agent agrees to accept produce from a seller, the consignment cannot be refused or rejected unless it doesn't meet agreed quality or quantity standards.

The seller can lodge an appeal with the Producer Fairness Tribunal.

51AEK Merchant/Agent/Seller Dispute Contract details
Details of the Producer Fairness Tribunal must be disclosed to the Seller by the Merchant/Agent in the Terms of Trade.

51AEL Agent Relationship
Sections 51AEL to 51AES shall apply when an Agent and a Seller are in an Agent relationship. This relationship is also governed by sections 51AEF and 51AER

51AEM Transfer of Ownership of Horticultural Produce (Agency Relationship)
Ownership of produce remains with the seller unit the Agent sells it to a third party. Once it is sold, ownership immediately passes to the third party.

51AEN Payment of proceeds of sale
An Agent must deposit all proceeds from the sale of a sellers produce into the relevant Market Authority Trust Account to be distributed to the Seller less the Agents commission

The seller must receive the money within 7 days of it being deposited into the trust account.

51AEO Commission
An agent can only charge commission on the basis set out in the agreed Terms of Trade but if no agreement is made, the Agent cannot set the commission higher than 12.5 per cent.
The relevant Market Authorities managing the trust account should receive 2.5 per cent commission.

51AEP Extra Costs
A Merchant/Agent cannot charge to recover any extra costs unless these costs have been set out in the Agreed Terms of Trade.

51AEQ Evidence of Sale

An Agent must give the seller a duplicate copy of the sales docket (invoice/statement) from the sale of the produce to a third party and this docket must include:

a) the total proceeds of sale of the consignment; and
b) the date or dates of the sale; and
c) the type, quantity and count of the Horticultural Produce sold; and
d) the price received for each grade of Horticultural Produce sold; and
e) the details of the buyer of the Horticultural Produce; and
f) the name of the purchaser.

The Seller must be given this sales docket within the period specified in the Agreed Terms of Trade or within in 28 days of the finalised sale.

51AER Due care and skill

An Agent must exercise due care and skill when handling and storing a Sellers produce and disputes Regarding due care can be referred to the producer Fairness Tribunal.

51AES Trust Account

1. The relevant Market Authority must maintain the trust account Agents must deposit a sellers monies following a sale and this account must comply with the following:
   a) the trust account must be in the name of the relevant Market Authority (whether individual, firm or corporation);
   b) the trust account name must start with the name of the relevant Market Authority, and include the words “Trust Account”;
   c) the words “Trust Account” must appear on all cheques drawn on the trust account;
   d) monies may be paid out of the trust account only by cheque or direct deposit;
   e) the relevant Market Authority should receive 2.5 per cent commission to manage the Trust Account.
2. All monies received from a third party for Horticultural Produce by an Agent must be placed in the relevant Market Authority’s trust account.
3. Costs refundable to the Agent are specified in sections 51AEO and 51AEP.
4. The remainder of the proceeds of each sale are to be distributed to the Seller.
5. The relevant Market Authority must pay all fees, taxes and charges in relation to the Trust Account.
6. The relevant Market Authority must:
   a) keep all records relating to the Trust account for five years; and
   b) have the account independently audited in each financial year.
7. The Producer Fairness Tribunal may require an audit report and relevant records to be made available to it for inspection.

51AET Merchant Relationship

Sections 51AEU to 51AEW shall apply to all transactions by a Merchant and a Seller and this Merchant Relationship also includes sections 51AEF to 51AER.

51AEU Transfer of Ownership of Horticultural Produce (Merchant Transactions)

Ownership from a seller to a Merchant occurs when the price of the produce had been agreed to by both parties prior to delivery or immediately at the time the Merchant and the Seller agree on a price which must occur within 24 hours of the Merchant receiving the produce.

This time period can be extended if both parties agree in writing.

The Merchant will be deemed an Agent if the price has not been agreed within the time specified set out in the Agreed Terms of Trade.

51AEV Payment of Horticulture Produce

The Merchant must pay the Seller the price negotiated and it must be within the timeframe set out within in the Agreed Terms of Trade. This period must not exceed 28 days from when the Merchant receives the produce.

51AEW Summary price information

A merchant must provide a Seller with a statement for each consignment of produce accepted and it must include the quality and grades of the produce and the price. It must be provided within the Agreed Terms of Trade, which must not exceed 28 days. If there is no time specified in the agreed terms of trade this must be provided within 14 days.

Only growers can pool and only where the pooling body is totally owned and controlled by the growers involved and pooling regulations must be given to each grower in writing.

51AEX Dispute Resolution

A Merchant/Agent or Seller can initiate a dispute. It must be done in writing and it must outline the nature of the dispute, the outcome the complainant seeks and the action the complainant wants to settle the dispute.

51AEY Horticultural Inspectors

A seller or Agent/Merchant can appoint a Horticultural Inspector at any time. An appointment does not require a dispute to be officially notified. Once appointed the inspector must receive full cooperation from all parties to enable a complete and accurate report to be compiled. The inspector can report on any aspect of the code including but not limited to financial transactions or quality/grade disputes.

Once appointed, the inspector can inspect any produce supplied by the Seller to a Merchant or Agent and in the case of an Agent, an inspector can inspect their financial records that relate to the Seller.

The inspector must complete a report within 48 hours of their appointment. The report, which must be given to both parties, must not include information outside of the parameters set out in the Agreed Terms of Trade.

The report is not legally binding.

The cost of appointing a horticultural inspector will initially be paid by the party requesting the inspection. If the finding if found in the instigators favour, they are entitled to a reimbursement of these costs or a portion of these costs and the matter may be directed to the Producer Fairness Tribunal.

51AEZ Mediation

A Seller or Merchant/Agent can request that a dispute be referred to mediation. If both parties agree the Producer fairness Tribunal will act as the official mediator

The tribunal has the power to delegate mediation to another mediator appointed by the producer Fairness Tribunal, make determinations and award costs. The parties are bound by any determination made unless it is over turned by the courts.

Within seven days of accepting the mediation the mediator must set a date and place for mediation and inform the relevant parties. Mediation must take place within fourteen days from the date of referral to the mediator. If both parties agree mediation can be done via teleconferencing or videoconferencing.

Each party must cover their own costs for representation during mediation unless an alternative agreement is made.

51AEZA Oversight by the Horticultural Code Management Committee.

A Horticultural Code Management Committee will be appointed by the minister, which will be assisted by a secretariat appointed by the Minister. The committee will include an independent chairperson, 3 sellers, 3 Merchants/Agents and 2 independent members.

The committee will facilitate the introduction of the code, establish guidelines, procedures and accreditation for Horticultural Inspectors as well as appointing Horticultural Inspectors.

It will also establish guidelines for the accreditation of the Producer Fairness Tribunal, which will be known as the Horticultural Code Producer Fairness tribunal, appointed by the Minister.

ASSISTANT TREASURER
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22 NOV 2011

Senator Mitch Fifield
Chair
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Mitch

Dear Senator

I refer to the letter of 3 November 2011 from the Secretary of the Standing Committee for the Scrutiny of Bills to the Deputy Prime Minister concerning the Tax Laws Amendment (2011 Measures No.8) Bill 2011. As this matter has been referred to me by the Deputy Prime Minister, I am responding on his behalf.

The Committee has requested further advice about whether the amendments are intended to apply to any cases or appeals which are currently pending before the courts and, if so, the justification for this approach. In relation to this, please find attached my response to the Committee.

I trust this information addresses the concerns raised by the Committee.

Yours sincerely

Bill Shorten

BILL SHORTEN

Tax Laws Amendment (2011 Measures No. 8) Bill 2011

Schedule 2

Issue

The Committee seeks the Treasurer's further advice, given that the proposed clarification of the law may have a detrimental effect on some taxpayers (insofar as the 'narrow' interpretation is thereby rejected, about whether the amendments are intended to apply to any cases or appeals which are currently pending before the courts and, if so, the justification for this approach.

Response

The issue of how the 'taxing point' is determined for the purposes of the Petroleum Resource Rent Tax (PRRT) was a central issue in a dispute between the participants in the Bass Strait project and the Australian Taxation Office. The PRRT taxing point is normally where a 'marketable petroleum commodity' (MPC) becomes an 'excluded commodity', usually by being sold. The point defines the boundary of a PRRT project, and so is central to calculating project receipts, expenses and profits.

On 13 April 2011, the Federal Court ruled on this matter (*Esso Australia Resources Pty Ltd v The Commissioner for Taxation [2011] FCA 360),* finding in favour of the Commissioner's position and the long established administration of the PRRT. The Court rejected the companies' argument that the taxing point for a project should be determined in a purely mechanistic way, having regard only to substances' chemical and physical properties and not to the actual circumstances and objectives of the project.

While the Bass Strait project would unambiguously benefit from an earlier taxing point due to its unique circumstances relating to when it transitioned to the PRRT in 1990 (that being the inability to deduct project expenditures incurred prior to that time), the impact on other PRRT taxpayers would be less certain, and could potentially increase their tax liability. This is because, for those projects, having an earlier taxing point than the one intended could well reduce their allowable deductions by more than their assessable receipts.

Subsequently, on 10 May 2011, as part of the 2011-12 Budget, the Government announced it would seek to amend the law to put beyond doubt the way the Commissioner has always administered the PRRT with effect from 1 July 1990 (so as to cover the period related to the amendments that transitioned the Bass Strait project into the PRRT). The Government's Budget announcement noted that the measure has no revenue impact because it merely confirms the rights and liabilities imposed by the current application of the PRRT law. Clarifying the taxing point ensures that PRRT taxpayers are not detrimentally impacted by a narrow interpretation of the taxing point.

On 1 June 2011 the companies lodged an appeal to the Full Federal Court.

On 13 October 2011, the amendments to give effect to the Budget measure were introduced into the House of Representatives.

The Full Federal Court heard the companies appeal during the week beginning 7 November 2011 and has not nominated a judgement date.

The amendments provide statutory support for the Federal Court's decision in *Esso Australia Resources Pty Ltd v The Commissioner for Taxation* and provide certainty for all PRRT taxpayers by

putting beyond doubt that a marketable petroleum commodity is only produced when it is in its final form for its intended purpose (within the context of a particular project), and not at some earlier point part-way through the production process. The amendments are consistent with the original policy intent of the PRRT as a profits-based tax, and the way it has applied for over 20 years. They do not impose any new or additional tax liability on any PRRT taxpayers.