SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

EIGHTH REPORT

OF

2013

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator Helen Polley (Chair)
Senator Anne Ruston (Deputy Chair)
Senator Cory Bernardi
Senator the Hon Kate Lundy
Senator the Hon Ian Macdonald
Senator Rachel 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

EIGHTH REPORT OF 2013

The committee presents its *Eighth Report of 2013* 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:

Financial Framework Legislation Amendment Bill (No. 2) 2013

Introduced into the House of Representatives on 13 March 2013 *(received Royal Assent 28 May 2013)*
Portfolio: Finance and Deregulation

Introduction

The committee dealt with this bill in the amendment section of *Alert Digest No.5 of 2013*. The former Minister responded to the committee's comments in a letter dated 12 July 2013 during the previous Parliament. A copy of the letter is attached to this report.

Alert Digest No. 5 of 2013 - extract

Background

This bill amends various Acts across three portfolios including:

- the *Financial Management and Accountability Act 1997* (FMA Act) to authorise the Commonwealth to form or participate in forming companies and to acquire shares in, or become a member, of a company so long as the proposed company is specified in the *Financial Management and Accountability Regulations 1997*;

- the *Administrative Decisions (Judicial Review) Act 1977* to include decisions made under the proposed amendment to the FMA Act in the relevant schedule of decisions not subject to review under that Act;

- the *Judges' Pensions Act 1968*, the *Remuneration Tribunal Act 1973* and the *Social Security Act 1991* to establish a 'recoverable payments' framework for dealing with administrative overpayments, and to address instances where the relevant agency makes payments from appropriations to recipients that are consistent with the requirements or preconditions imposed by legislation; and

- to enable deferred tax asset relief to be provided to the Commonwealth Superannuation Corporation in relation to the transfer of assets from the Military Superannuation and Benefits Fund to the ARIA Investments Trust that occurred in May 2012.

Exclusion of Judicial Review
Schedule 1, item 1, proposed paragraph (eh) of Schedule 1 of the Administrative Decisions (Judicial Review) Act 1997

Item 2 of Schedule 1 of the bill proposes (new section 39B) to amend the *Financial Management and Accountability Act 1997* to expressly provide for statutory authority for the Commonwealth to form and participate in the formation of companies. As explained in the explanatory memorandum, Commonwealth governments have long considered that such a power exists without express legislative authority as part of the executive power of the Commonwealth. The explanatory memorandum indicates that the proposed amendment to the FMA Act is enacted 'in the interests of abundant caution following the High Court's decision in *Williams v Commonwealth* [2012] HCA 23' and is 'designed to put beyond any argument the capacity of the Executive Government to form or participate in the formation of companies' (p. 5).

Proposed paragraph (eh) of the *AD(JR) Act* will have the effect of excluding decisions made pursuant to new section 39B of the *FMA Act* from judicial review under the *AD(JR) Act*. The explanatory memorandum offers the following reasons for this exclusion from review pursuant to the *AD(JR) Act*:

> Decisions under the proposed amendment to the FMA Act to form or participate in forming companies would be policy decisions regarding how the Commonwealth organises its bodies and governance arrangements. These decisions would not be administrative in nature and would not impact upon the interests of an individual. Accordingly, it is appropriate to exempt decisions under the proposed section 39B of the FMA Act from review under the AD(JR) Act.

Only decisions of an 'administrative character' are reviewable under the *AD(JR) Act*, and this requirement has been held by the courts to exclude the review of decisions of a 'legislative' or 'judicial' character. However, there is no clear basis in the case law for the conclusion that policy decisions or decisions relating to governance arrangements should be excluded from review for the reason that they are not decisions of an *administrative* nature. Further, whether or not decisions made under the proposed new section 39B of the *FMA Act may* in some circumstances impact upon the interests of a legal person is difficult to predict with certainty. Decisions made under proposed section 39B of the FMA Act must conform with a number of statutory conditions. As such the basis for excluding *AD(JR) A*ct review to ensure that the power is exercised lawfully requires further explanation.

In this regard, two further matters should be noted. First, the mere fact that no attempt to exclude other sources of judicial review jurisdiction has been made is not in itself sufficient to justify the exclusion of *AD(JR) Act* review. This is because the *AD(JR) Act* has a number of remedial and procedural advantages over applications for the constitutional writs. Second, the strength of the case for excluding review under the *AD(JR) Act* in its entirety will be diminished to the extent that any unlikelihood that decisions will affect individual interests may well mean that any judicial review action

would fail because (1) the applicant would lack standing (that is, would not be a 'person aggrieved') or (2) the applicant would not have a right to a fair hearing (as the decision would not affect them in a direct or immediate way) or the decision-maker would not be bound to consider their individual circumstances in the making of the decision. **The committee therefore seeks the Minister's further advice as to the justification for the proposed exclusion of judicial review under the AD(JR) Act.**

> *Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.*

Former Minister's response - extract

I understand that the Committee requires an explanation for the exclusion of certain decisions from judicial review under the *Administration Decisions (Judicial Review) Act 1977* (ADJR Act), and the appropriateness of specifying the companies (and related objects and proposed activities) through which the Commonwealth may pursue its objectives in the *Financial Management and Accountability Regulations 1997* (FMA Regulations).

As context to the amendments, the FFLA Act inserted a new section 39B into the *Financial Management and Accountability Act 1997* (FMA Act) to expressly authorise the Commonwealth to form and participate in the formation of companies, provided the company is specified in the FMA Regulations. This arose out of the *Williams v Commonwealth* [2012] HCA 23 *(Williams)* case, where a majority for the High Court held that legislative authority is necessary for certain activities.

Judicial Review - Schedule 1**,** Item 1

Prior to the High Court's ruling in *Williams,* decisions by the Government to form or participate in forming companies were not subject to judicial review under the ADJR Act.

These types of decisions are executive decisions, similar in nature to entering a contract. These types of decisions have never been subject to judicial review under the ADJR Act, given their executive nature. These decisions relate to how the Government manages the governance arrangements of its bodies.

In *Williams,* the majority of the High Court held that certain activities require legislative authority. As stated in the explanatory memorandum to the FFLA Act, the Commonwealth has always believed, and still believes that it may, without legislative authority, form or participate in the formation of a company and acquire shares in or become a member of a company to carry out activities. Despite this, the FFLA Act inserted section 39B into the

FMA Act as a cautionary measure, designed to make it explicitly clear that the Executive Government is able to form or participate in the formation of companies.

Accordingly, item 1 of Schedule 1 to the FFLA Act maintained the status quo that an executive decision to form or participate in the formation of a company, or acquire shares in or become a member of a company, is not subject to judicial review under the ADJR Act. This amendment did not exclude decisions from review that had previously been subject to review under that ADJR Act.

Committee Response

The committee thanks the former Minister for this response.

Alert Digest No. 5 of 2013 - extract

Insufficient Parliamentary Scrutiny of Legislative Power
Item 1, Schedule 1, proposed section 39B

The explanatory memorandum indicates that the proposed amendment, the insertion of section 39B, to the FMA Act is enacted 'in the interests of abundant caution following the High Court's decision in *Williams v Commonwealth* [2012] HCA 23' and is 'designed to put beyond any argument the capacity of the Executive Government to form or participate in the formation of companies' (p. 5).

Subsections 39B(1) and 39B(2) are said to 'confirm that the Commonwealth has the power to form a company, participate in the formation of a company, acquire shares in a company or become a member of a company' (p. 5). Proposed paragraphs 39B(1)(b) and 39B(2)(b) provide that the Commonwealth has the identified powers only in circumstances where the company in question has been specified in the regulations and the objects or proposed activities of that company have also been specified in the regulations. The statutory powers conferred by proposed section 39B 'may be exercised on behalf of the Commonwealth by the Finance Minister' (proposed subsection 39B(3)) and may only be delegated to Chief Executives (item 3).

It is apparent that the statutory powers granted by proposed section 39B to empower the Commonwealth to form a company, participate in the formation of a company, acquire shares in a company or become a member of a company are framed broadly (though the explanatory memorandum claims that the powers must be exercised 'within the limits of the legislative powers of the Parliament under the Constitution') (p. 5). Although the

power may be exercised only if the company in question and its objects or proposed activities are specified in the regulations, the precise nature of the requirement that these objects or proposed activities be specified is unclear.

The question of whether it is appropriate for Commonwealth purposes to be furthered through the formation of a company or through other institutional arrangements (eg through government departments, statutory corporations or agencies and so on) raises important questions. It is difficult, however, for the Parliament to assess the appropriateness of pursuing Commonwealth purposes through the formation of, or participation in, a company (as opposed to using alternative institutional arrangements) unless the purposes to be pursued by the company are specified to an appropriate level of detail.

This difficulty can be illustrated by reference to proposed Schedule 1B of the *FMA Regulations* (item 2 of Schedule 2 to the bill), which lists existing Commonwealth owned companies for the purpose of removing 'any doubt over the Commonwealth's capacity to engage in the formation, share acquisition or membership (where relevant) of these companies (p. 4). This list also specifies each company's 'objects or proposed activities'. Perusal of this list illustrates the fact that the specification of a company's objects and activities may contain little detail about the actual purposes and activities to be pursued by the Commonwealth through that company. For example, the Australian Institute for Teaching and School Leadership Limited will 'provide national leadership for the Commonwealth, state and territory governments in promoting excellence in the profession of teaching and school leadership'. Without further information, it is difficult for the Parliament to assess the appropriateness of the purposes being pursued through a Commonwealth owned company. Thus, although the requirement for objects and activities to be specified in a disallowable instrument does facilitate parliamentary scrutiny of the appropriateness of the exercise of these legislative powers, a serious question arises as to the adequacy of such scrutiny. It is emphasised that the explanatory memorandum for the bill contains no information which enables close scrutiny of the appropriateness of the Commonwealth utilising companies to pursue the objectives or activities specified in proposed Schedule 1B of the *FMA Regulations.*

While it is acknowledged that the amendments reflect the Commonwealth's view that the proposed statutory powers are not strictly necessary, because they fall within the existing limits of the executive powers of the Commonwealth (explanatory memorandum, p. 5), it is important to note that a clear theme of the High Court's judgment in the *Williams* case was the importance of adequate parliamentary control of executive government. It is therefore suggested that merely placing executive powers on a statutory basis may not, of itself, necessarily facilitate adequate control, unless the Parliament has before it sufficient information to enable it to assess the appropriateness of the Commonwealth pursuing particular objects or engaging in specified activities through the formation, or participation in the formation, of a company or by acquiring shares in a company or becoming a member of a company.

The importance of ensuring adequate parliamentary scrutiny is of particular concern in this case as it seems likely that a Commonwealth company that acted inconsistently with the objects and activities specified by the *FMA Regulations* would not be acting unlawfully, due to its status as a legal person separate from the Commonwealth (see Nick Seddon and Stephen Bottomley, 'Commonwealth Companies and the Constitution (1998) 26 *Federal Law Review* 271). The prospect that a Commonwealth corporation once formed might therefore potentially act outside its specified objects arguably undermines, at least in a practical sense, the justification given in the explanatory memorandum (p. 5) that the powers exercised pursuant to section 39B are to be exercised 'within the limits of the legislative powers of the Parliament under the Constitution'.

In light of these concerns regarding Parliament's ability to adequately assess the appropriateness of the Commonwealth pursuing objectives through the formation or participation in a company, it is appropriate to question whether the Executive should be empowered to specify, via regulation, the companies and their objects or proposed activities as the bill proposes. However, if the general scheme of specifying corporations and their objects and proposed activities via regulation were to proceed, it is prudent to ask whether it is intended (and by what legal mechanism) that those objects and activities constrain the activities of the listed company to which they pertain, and whether consideration should be given to enacting legislative requirements to ensure that any future regulation contains sufficient information to support effective parliamentary scrutiny of Executive decisions to pursue Commonwealth purposes through the formation or participation in companies. **The committee therefore requests additional information from the Minister about these matters and, in particular, about the appropriateness of specifying via regulation the companies (and related objects and proposed activities) through which the Commonwealth may pursue its objectives.**

> *Pending the Minister's reply, 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.*

Former Minister's response - extract

I understand that the Committee is concerned about the level of parliamentary scrutiny regarding the inclusion of a list of wholly-owned Commonwealth companies, and their associated objects and proposed activities, specified in the FMA Regulations as required under the new section 39B of the FMA Act.

In this instance, regulation 22AB of the FMA Regulations was included in primary legislation. It was open to the Parliament to decide whether the level of detail was sufficient. However, the FFLA Bill was passed without amendment.

Further, the table of wholly-owned Commonwealth companies, and their associated objects and proposed activities, was prepared on the basis of advice from the Australian Government Solicitor (AGS). I understand that AGS advised that the information provided was sufficient. Additionally, the FFLA Bill, as a whole, was reviewed by the AGS prior to being introduced to Parliament.

Thank you for the opportunity to provide more detailed reasons for the amendments in the FFLA Act. I trust that the above information provides sufficient explanation for the matters that you have raised.

Committee Response

The committee thanks the former Minister for this response.

Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Bill 2013

Introduced into the House of Representatives on 15 May 2013 *(received Royal Assent 28 June 2013)*
Portfolio: Treasury

Introduction

The committee dealt with this bill in the amendment section of *Alert Digest No.6 of 2013*. The former Minister responded to the committee's comments in a letter received 8 July 2013 during the previous Parliament. A copy of the letter is attached to this report.

Alert Digest No. 6 of 2013 - extract

Background

This bill amends various taxation laws.

Schedule 1 amends the *Income Tax Assessment Act 1997* and the *Income Tax (Transitional Provisions) Act 1997* to increase the concessional contributions cap temporarily to $35,000 for the 2013-14 financial year for individuals aged 60 years and over, and to $35,000 for the 2014-15 financial year and later financial years for individuals aged 50 years and over. The temporary cap will cease when the general cap indexes to $35,000.

Schedule 2 amends the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* to make technical changes to ensure the low income superannuation contribution operates effectively.

Schedule 3 amends the income tax and superannuation law and the *Taxation Administration Act 1953* to reduce the tax concession for concessionally taxed superannuation contributions of very high income earners by 15 per cent.

Schedule 4 makes consequential amendments to legislation concerning some of the Commonwealth defined benefit superannuation plans where members of those plans are affected by the reduction in the tax concession for concessionally taxed superannuation contributions.

Trespass on personal rights and liberties—retrospectivity
Schedule 3

This Schedule makes a number of amendments associated with a reduction in the tax concession for concessionally taxed superannuation contributions of very high income earners by 15 per cent. The changes take effect to concessionally taxed superannuation contributions for the 2012-13 income year and later income years. Although the explanatory memorandum indicates that this proposal was announced in the Minister for Financial Services and Superannuation's media release No. 24 of 8 May 2012, it is noted that it has taken over 12 months for the bill to enact the proposal to be brought before the Parliament. Neither the reasons for the delay nor the justification for retrospective application given the delay are dealt with in the explanatory memorandum.

It is also noted that some of the provisions within Schedule 3 enable the making of regulations to take effect retrospectively, although the explanatory memorandum does provide a justification for the necessity of this approach (e.g. at 54).

The committee has in the past been prepared to accept that amendments proposed in the Budget will have some retrospective effect when the legislation is introduced, and this has usually been limited to publication of a draft bill within six calendar months after the date of that announcement. Where taxation amendments are not brought before the Parliament within 6 months of being announced the committee usually expects the delay to be explained and justified. The problem that committee is concerned to avoid is the practice of 'legislation by press release'.

It is regrettable that it has taken well over six months from the announcement of this legislative change for the bill to be brought before the Parliament **and the committee seeks the Minister's explanation for the delay.**

> *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.*

Former Minister's response - extract

This schedule effectively reduces the superannuation tax concession received by individuals with combined income and concessional contributions above $300,000, from 30 per cent to 15 per cent. This ensures the tax concessions received by higher income earners is more closely aligned with the concession received by average income earners.

The Standing Committee for the Scrutiny of Bills has requested an explanation for the delay between the announcement of legislative change contained in Schedule 3 to the Bill and its introduction in Parliament.

A number of factors contributed to the length of time between announcement and introduction of the Bill into Parliament.

Firstly, to ensure as equitable treatment as possible between individuals with accumulation interest and individuals with defined benefit interests (both funded and unfunded schemes), concessional contributions for the purpose of this Bill includes notional employer contributions to defined benefit interests. This made the drafting task necessarily complex as is demonstrable by the length of the Schedule 3 and the associated explanatory material which run to 127 pages.

Secondly, substantial amendments to multiple Acts, including the *Income Tax Assessment Act 1997* and the *Superannuation (Resolution of Complaints) Act 1993*, were required. Consequential amendments were also required to a range of other Acts such as the *Governor-General Act 1974* and *Parliamentary Contributory Superannuation Act 1948*, which are contained in Schedule 4 to the Bill. This necessitated extensive cross-portfolio consultation and cross-portfolio policy approvals, including from the Department of Finance and Deregulation, the Department of Defence and the Attorney-General's Department and their respective Ministers.

In relation to the Committee's concerns around the retrospectivity of Schedule 3 to the Bill, I note that the proposed changes were announced in my media release No. 24 of 8 May 2012, which explicitly states that the policy would apply to contributions made from 1 July 2012.

Furthermore, immediately following my announcement, Treasury conducted a round of targeted consultations to give industry the opportunity to provide feedback on the high level policy design and implementation of these changes prior to the commencement of drafting. As a result of the feedback received from industry a number of key features of the policy were changed. Notably, the administrative model adopted in the legislation is an individual-based model, (rather than a fund-based model), where the Australian Tax Office (ATO) will issue assessments directly to individuals. This provides individuals with greater flexibility in terms of payment and significantly reduces the compliance costs for funds.

Between this first round of consultation and the release of the exposure draft legislation on 1 May 2013, Treasury developed legislation with several agencies, including the Office of Parliamentary Counsel, the ATO, the Department of Finance and Deregulation, the Department of Defence and the Attorney-General's Department. This collaborative approach was adopted to refine and clarify the operation of the reduced tax concession, which lowers both implementation and compliance costs. Further, I note that while this approach assisted with legislative it also contributed to the delay in the release of the exposure draft and introduction to Parliament.

I trust this information will be of assistance to you.

Committee Response

The committee thanks the former Minister for this response.

Senator Helen Polley
Chair

SENATOR THE HON PENNY WONG
Minister for Finance and Deregulation
Deputy Leader of the Government in the Senate

REF:C13/1474

Senator the Hon Ian Macdonald
Chair
Senate Standing Committee for the Scrutiny of Bills
S1.111
Parliament House
CANBERRA ACT 2600

12 JUL 2013

Dear Chair

I refer to the letter sent to my office on 16 May 2013 from the Committee Secretary to the Senate Standing Committee for the Scrutiny of Bills (the Committee). The letter directed me to comments contained in the Committee's *Alert Digest No.5 of 2013* (15 May 2013) concerning the *Financial Framework Legislation Amendment Bill (No. 2) 2013* (the FFLA Bill).

The FFLA Bill was passed by the Senate on 16 May 2013, and commenced on 29 May 2013 as the *Financial Framework Legislation Amendment Act (No. 2) 2013* (FFLA Act).

I understand that the Committee requires an explanation for the exclusion of certain decisions from judicial review under the *Administration Decisions (Judicial Review) Act 1977* (ADJR Act), and the appropriateness of specifying the companies (and related objects and proposed activities) through which the Commonwealth may pursue its objectives in the *Financial Management and Accountability Regulations 1997* (FMA Regulations).

As context to the amendments, the FFLA Act inserted a new section 39B into the *Financial Management and Accountability Act 1997* (FMA Act) to expressly authorise the Commonwealth to form and participate in the formation of companies, provided the company is specified in the FMA Regulations. This arose out of the *Williams v Commonwealth* [2012] HCA 23 (*Williams*) case, where a majority for the High Court held that legislative authority is necessary for certain activities.

Judicial Review – Schedule 1, Item 1

Prior to the High Court's ruling in *Williams*, decisions by the Government to form or participate in forming companies were not subject to judicial review under the ADJR Act.

These types of decisions are executive decisions, similar in nature to entering a contract. These types of decisions have never been subject to judicial review under the ADJR Act, given their executive nature. These decisions relate to how the Government manages the governance arrangements of its bodies.

In *Williams*, the majority of the High Court held that certain activities require legislative authority. As stated in the explanatory memorandum to the FFLA Act, the Commonwealth has always believed, and still believes that it may, without legislative authority, form or participate in the formation of a company and acquire shares in or become a member of a company to carry out activities. Despite this, the FFLA Act inserted section 39B into the FMA Act as a cautionary measure, designed to make it explicitly clear that the Executive Government is able to form or participate in the formation of companies.

Accordingly, item 1 of Schedule 1 to the FFLA Act maintained the status quo that an executive decision to form or participate in the formation of a company, or acquire shares in or become a member of a company, is not subject to judicial review under the ADJR Act. This amendment did not exclude decisions from review that had previously been subject to review under that ADJR Act.

Specifying companies in the FMA Regulations

I understand that the Committee is concerned about the level of parliamentary scrutiny regarding the inclusion of a list of wholly-owned Commonwealth companies, and their associated objects and proposed activities, specified in the FMA Regulations as required under the new section 39B of the FMA Act.

In this instance, regulation 22AB of the FMA Regulations was included in primary legislation. It was open to the Parliament to decide whether the level of detail was sufficient. However, the FFLA Bill was passed without amendment.

Further, the table of wholly-owned Commonwealth companies, and their associated objects and proposed activities, was prepared on the basis of advice from the Australian Government Solicitor (AGS). I understand that AGS advised that the information provided was sufficient. Additionally, the FFLA Bill, as a whole, was reviewed by the AGS prior to being introduced to Parliament.

Thank you for the opportunity to provide more detailed reasons for the amendments in the FFLA Act. I trust that the above information provides sufficient explanation for the matters that you have raised.

Yours sincerely

Penny Wong

THE HON BILL SHORTEN MP
MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION

Senator the Hon Ian MacDonald
Chair
Senate Scrutiny of Bills Committee
S1.111
Parliament House
CANBERRA

Ian

Dear Senator ~~MacDonald~~

Thank you for Ms Toni Dawes' letter of 20 June 2013 on behalf of the Standing Committee for the Scrutiny of Bills (Committee), concerning Schedule 3 to the Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Bill 2013 (Bill).

This schedule effectively reduces the superannuation tax concession received by individuals with combined income and concessional contributions above $300,000, from 30 per cent to 15 per cent. This ensures the tax concessions received by higher income earners is more closely aligned with the concession received by average income earners.

The Standing Committee for the Scrutiny of Bills has requested an explanation for the delay between the announcement of legislative change contained in Schedule 3 to the Bill and its introduction in Parliament.

A number of factors contributed to the length of time between announcement and introduction of the Bill into Parliament.

Firstly, to ensure as equitable treatment as possible between individuals with accumulation interests and individuals with defined benefit interests (both funded and unfunded schemes), concessional contributions for the purpose of this Bill includes notional employer contributions to defined benefit interests. This made the drafting task necessarily complex as is demonstrable by the length of the Schedule 3 and the associated explanatory material which run to 127 pages.

Secondly, substantial amendments to multiple Acts, including the *Income Tax Assessment Act 1997* and the *Superannuation (Resolution of Complaints) Act 1993,* were required. Consequential amendments were also required to a range of other Acts such as the *Governor-General Act 1974* and *Parliamentary Contributory Superannuation Act 1948*, which are contained in Schedule 4 to the Bill. This necessitated extensive cross-portfolio consultation and cross-portfolio policy approvals, including from the Department of Finance and Deregulation, the Department of Defence and the Attorney-General's Department and their respective Ministers.

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In relation to the Committee's concerns around the retrospectivity of Schedule 3 to the Bill, I note that the proposed changes were announced in my media release No. 24 of 8 May 2012, which explicitly states that the policy would apply to contributions made from 1 July 2012.

Furthermore, immediately following my announcement, Treasury conducted a round of targeted consultations to give industry the opportunity to provide feedback on the high level policy design and implementation of these changes prior to the commencement of drafting. As a result of the feedback received from industry a number of key features of the policy were changed. Notably, the administrative model adopted in the legislation is an individual-based model, (rather than a fund-based model), where the Australian Tax Office (ATO) will issue assessments directly to individuals. This provides individuals with greater flexibility in terms of payment and significantly reduces the compliance costs for funds.

Between this first round of consultation and the release of the exposure draft legislation on 1 May 2013, Treasury developed legislation with several agencies, including the Office of Parliamentary Counsel, the ATO, the Department of Finance and Deregulation, the Department of Defence and the Attorney-General's Department. This collaborative approach was adopted to refine and clarify the operation of the reduced tax concession, which lowers both implementation and compliance costs. Further, I note that while this approach assisted with legislative it also contributed to the delay in the release of the exposure draft and introduction to Parliament.

I trust this information will be of assistance to you.

Yours sincerely

Bill Shorten

BILL SHORTEN