

## **Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012**

*Introduced into the House of Representatives on 23 August 2012*

*Portfolio: Treasury*

### **Committee view**

1.2 The committee considers that the provisions in this bill that engage the right to privacy are compatible with Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

1.3 Before forming a view whether this bill is compatible with the presumption of innocence in Article 14(2) of the ICCPR, the committee seeks clarification from the Treasurer on the following matters:

- the level of risk that the provision may allow a person to be convicted of the offence despite reasonable doubt as to their guilt and why is that risk considered justifiable;
- the justification for the application of a reversed burden offence in this bill, noting that similar conduct is the subject of a full fault offence in the Australian Charities and Not-for-profits Commission Bill (ss 180-10(2)); and
- if a full-fault offence is not considered appropriate in these circumstances, whether an evidential burden may offer a less restrictive alternative for achieving the provision's purpose?

1.4 The committee also seeks clarification regarding the description in the statement of compatibility of ss 353-30(6) as providing two defences. The committee notes that the conjunctive 'and' is used to link ss 353-30(6)(a) and (b).

### **Purpose of the bill**

1.5 This bill:

- changes the 'in Australia' requirements for income tax exempt entities and deductible gift recipients to ensure that they must generally operate principally or solely in Australia (subject to some exceptions);
- standardises various other requirements that entities must meet to be tax exempt; and
- harmonises the meaning of 'not-for-profit' across various Acts.

## Compatibility with human rights

### *Right to privacy (Article 17 ICCPR)*

### *Presumption of innocence (Article 14 ICCPR)*

1.6 The statement of compatibility notes that the bill engages the right to privacy in article 17 of the ICCPR and the right to be presumed innocent in article 14 of the ICCPR.

### *Right to privacy*

1.7 Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. Collecting, using, storing, disclosing or publishing personal information amounts to an interference with privacy. In order for the interference not to be 'arbitrary', the interference must be for a legitimate objective and be reasonable, necessary and proportionate to that objective.

1.8 New section 353-30 of the bill requires certain prescribed entities to provide information relating to their status as a prescribed entity to the Taxation Commissioner upon request. The statement acknowledges that 'such information may include personal information' but considers that 'this is unlikely'.

1.9 The statement provides the following reasons for concluding that any interference with the right to privacy is not arbitrary:

- The information gathered must be relevant to the status of an entity as a prescribed entity (ss 350-30(1)).
- The Commissioner is only permitted to disclose that information to the Minister if there is a change to the principal purpose of the entity, or the entity is not complying with any rules or conditions that were required in order for the entity to remain a prescribed entity (ss 350-30(2) and 350-30(4)).
- The Minister may only disclose that information for a purpose relating to the entity's status as a prescribed entity (ss 353-30(3)).

1.10 The committee considers that these provisions are unlikely to raise issues of incompatibility with the right to privacy given that any interference with the right to privacy is likely to be related to the aim of checking the status of tax exempt entities, which can be considered to be a legitimate objective. Further, the provisions appear to be drafted with sufficient precision to ensure that the degree of interference is proportionate to that objective. In particular, the information gathered must be relevant to the status of the entity as a prescribed entity and the Minister may only disclose that information for a related purpose.

### *Presumption of innocence*

1.11 The failure to comply with the requirement to provide information to the Taxation Commissioner under new section 353-30 is an offence against section 8C of the *Taxation Administration Act 1953* (TA Act). New subsection 353-30(6) provides a defence to individuals who are prosecuted for an offence against section 8C of the TA Act. A person will not be guilty of the s8C offence if the person proves that they:

- did not aid, abet, counsel or procure the act or omission because of which the offence is taken to have been committed; and
- were not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission because of which the offence is taken to have been committed.

1.12 An offence against section 8C is punishable by a maximum fine of 20 penalty units. However, if a person has two or more previous relevant convictions, that penalty may be raised to a maximum fine of 50 penalty units or 12 months imprisonment, or both.

1.13 New section 353-30 creates a reverse burden offence because it places a legal burden of proof on the defendant in respect of the existence (or non-existence) of the facts set out in ss 360-30(6).

1.14 Article 14(2) of the ICCPR states that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

1.15 The statement of compatibility refers to paragraph 30 of General Comment No 32 by the UN Human Rights Committee and contends that article 14(2) of the ICCPR 'is normally engaged where public authorities make public statements affirming the guilt of the accused, shackle or keep defendants in cages during trials indicating that they may be dangerous criminals or allow the media to show news coverage that undermines the presumption of innocence' but 'it could be argued that where legislation places a legal burden on the defendant, this may engage [the right]'

1.16 The committee notes that paragraph 30 of General Comment No 32 clearly states that:

The presumption of innocence, which is fundamental to the protection of human rights, **imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt**, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. [emphasis added]

1.17 Generally, to be consistent with the presumption of innocence, the prosecution must prove each element of a criminal offence beyond reasonable doubt. Laws which shift the burden of proof to the defendant will engage the presumption of innocence because a defendant's failure to discharge a burden of proof or to prove or establish the absence of an element of an offence may permit their conviction despite reasonable doubt as to their guilt.

1.18 However, reverse burden offences will not necessarily be inconsistent with the presumption of innocence provided that they are within reasonable limits which take into account the importance of objective being sought and maintain the defendant's right to a defence. In other words, the reverse burden must pursue a legitimate aim and be reasonable, necessary and proportionate to that aim. Human rights case-law has established that relevant factors to consider when determining if a reverse burden provision is justified include whether:

- the penalties are at the lower end of the scale;
- the offences arise in a regulatory context where participants may be expected to know the duties and obligations;
- the offences impose only an evidential burden; and
- the burden relates to facts which are readily provable by the defendant as matters within their own knowledge or to which they have ready access.

1.19 The defence in new subsection 353-30(6) requires a person to prove that s/he did not aid, abet, counsel or procure the relevant conduct and was not in any way knowingly concerned in or party to the conduct. The facts to be proven by the defendant would therefore appear to go to the core elements of an aiding and abetting offence – since the aiding and abetting conduct is 'central' to the question of culpability for an aiding and abetting offence.

1.20 However, rather than requiring the prosecution to prove the central elements of the offence, ss 353-30(6) requires the defendant to prove that they did not engage in the alleged conduct. The committee notes that reverse legal burdens, even to the standard of balance of probabilities, which do not effectively preserve the right of the defendant to a defence, risk being an unjustifiable limitation on the presumption of innocence.

1.21 The statement of compatibility provides the following justification for placing the legal burden on the defendant in these circumstances:

Information required under section 353-30 is necessary for determining whether an entity is still meeting the conditions of its prescription. This may affect the collection of revenue. In tax provisions, the burden tends to fall on the taxpayer. It is common amongst Commonwealth revenue regimes to place the legal burden on the defendant where the defendant seeks to rely on an exception or defence to the general prohibition on

disclosure of information (an offence-specific defence). This is appropriate because the defendant (in these situations) holds all of the evidence which is uniquely in their possession.

1.22 The committee notes that an analogous offence in the Australian Charities and Not-for-Profits Commission Bill 2012 (see Part 7-4 of the ACNC Bill on 'Application of the Act to entities', subsection 180-10(2)) is drafted as a full-fault offence.