Treasury Laws Amendment (2016 Measures No. 1) Bill 2016

Purpose	Seeks to amend: the *Terrorism Insurance Act 2003* to clarify that losses attributable to terrorist attacks using chemical or biological means are covered by the terrorism insurance scheme; the *Corporations Act 2001* to provide that employee share scheme disclosure documents lodged with the Australian Securities and Investments Commission are not made publicly available for certain start-up companies, and provide protection for retail client money and property held by financial services licensees in relation to over-the-counter derivative products; the *Income Tax Assessment Act 1997* to update the list of deductible gift recipients; and the *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to provide income tax relief to eligible New Zealand special category visa holders who are impacted by disasters in Australia
Portfolio	Treasury
Introduced	House of Representatives, 1 December 2016
Right	Fair trial (see **Appendix 2**)
Previous report	1 of 2017
Status	Concluded

Background

2.138 The committee first reported on the Treasury Laws Amendment (2016 Measures No. 1) Bill 2016 (the bill) in its *Report 1 of 2017*, and requested a response from the Minister for Revenue and Financial Services by 3 March 2017.[1]

2.139 The minister's response to the committee's inquiries was received on 8 March 2017. The response is discussed below and is reproduced in full at **Appendix 3**.

Civil penalty provisions

2.140 Schedule 5 of the bill introduces a power into the *Corporations Act 2001* (Corporations Act) for the Australian Securities and Investments Commission to make rules by legislative instrument in relation to derivative retail client money.[2] The client money reporting rules may include a penalty amount for a rule, which must not

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2017* (16 February 2017) 2-4.

2 Schedule 5, item 14, proposed new section 981J.

exceed $1 000 000.[3] This penalty could apply to a natural person. Failure to comply with the rules is a civil penalty provision.[4]

2.141 The initial analysis identified that the measure raised questions as to the compatibility of the measure with the right to a fair trial, insofar as civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) where the penalty may be regarded as 'criminal' for the purposes of international human rights law. This was not addressed in the statement of compatibility.

2.142 The committee therefore sought the advice of the minister as to whether the civil penalty provision may be considered to be criminal in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*) and, if so, whether the measure accords with the right to a fair trial.

Minister's response

2.143 The minister's response applies the committee's *Guidance Note 2* in relation to whether the civil penalty provisions should be considered 'criminal' for the purposes of international human rights law. The minister identifies the following factors which she considers support the view that the client money penalty regime is not 'criminal' in nature:

- the $1 000 000 penalty is not a criminal penalty under Australian law;
- the penalty applies exclusively to licensees and not to the general public;
- there is no criminal sanction if there was a failure to pay the penalty; and
- the size of the maximum penalty is proportionate, 'given the corporate nature of the financial services industry and the amounts of client money that may be handled by licensees subject to the rules.'[5]

2.144 In her response, the minister stated that the government considers that a maximum penalty of $1 000 000 'is appropriate given the scale of potential loss that may result from a contravention', noting that '[t]he market integrity rules have an equivalent penalty regime for the same reason.'[6]

2.145 The question as to whether a civil penalty might be considered to be 'criminal' for the purposes of international human rights law may be a difficult one and often requires a contextual assessment. However, it is settled that a penalty or other sanction may be 'criminal' for the purposes of the ICCPR, despite being

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3 Schedule 5, item 14, proposed new subsection 981K(3).

4 See Schedule 5, item 14, proposed new subsection 981M(1) in conjunction with existing section 1317E of the *Corporations Act 2001*.

5 See Appendix 3, letter from the Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, to the Hon Ian Goodenough MP (received 8 March 2017) 1-2.

6 See Appendix 3, letter from the Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, to the Hon Ian Goodenough MP (received 8 March 2017) 1.

classified as 'civil' under Australian domestic law. Where a penalty is 'criminal' for the purposes of international human rights law this does not mean that it is illegitimate or unjustified. Rather it means that criminal process rights such as the right to be presumed innocent (including the criminal standard of proof) and the prohibition against double jeopardy apply.

2.146 In this particular case, on balance, although the proposed civil penalty is substantial, owing to the fact that the penalty will not apply to the general public and reflects the corporate nature of the financial services industry and the amounts of client money that may be handled by licensees subject to the rules, the penalty is unlikely to be criminal in nature.

Committee response

2.147 **The committee thanks the Minister for Revenue and Financial Services for her response and has concluded its examination of this issue.**

2.148 **The committee considers that, although the proposed civil penalty is substantial, the circumstances surrounding its application suggest that it is unlikely that it would be considered criminal for the purposes of international human rights law.**