

1980

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CRIMES (TAXATION OFFENCES) ~~BILLS~~ 1980

EXPLANATORY MEMORANDUM

(Circulated by authority of the Treasurer,
the Hon. John Howard, M.P.)

General outline

This Bill will introduce into the law penal sanctions to counter income tax and sales tax evasion practices under which it is arranged that tax lawfully payable cannot be collected because the taxpayer concerned is a "straw company" or "straw trustee", i.e., an entity that has been rendered incapable of paying the tax. A person convicted by the court of an offence of this kind may be sentenced to up to five years in gaol, or to a fine of up to \$50,000, or both. The person may also be ordered to pay some or all of the amount of tax involved.

The evasion practices referred to are of two main kinds; the first ensures that a company is stripped of its assets before tax due and payable or tax which will become due and payable on previously-derived income can be collected, while the second is designed to ensure that liability for tax falls from the outset on a "straw" company or trustee which or who does not have, and was never intended to have, sufficient funds to pay the income tax or sales tax liability.

In a typical case of a stripping arrangement to evade payment of income tax, the assets of a profitable company are "cashed up" (converted into cash) before payment of tax is due, indeed, before the year has ended and an income tax return prepared. The shares in the company are then sold to a company established by the promoter of the scheme at a price that represents perhaps 95 per cent of the cash value of the company, if no account is taken of the actual or pending tax liability on the company's already earned and taxable profits. The vendor-shareholders thus receive, in a capital form, the profits of the company unreduced by tax and may continue to operate the former business activities of the company through a new legal entity, e.g., through a "shelf" company provided by the scheme promoter. The assets are then removed from the first company by the new owners of the shares, using any one of a number of techniques, such as the making of a series of loans to an associate that are never to be repaid or the payment of a substantial premium to acquire worthless redeemable preference shares in another company. The result is to leave the company insolvent and with a substantial tax liability unpaid.

An example of such an arrangement is provided by the following case that has come to the notice of the Commissioner of Taxation:

- . a company controlled by a promoter borrowed \$356,898 from an independent financier and used the funds to purchase all the shares in the "target" company for that amount;
- . the vendor-shareholders lent the proceeds of sale to a new company which they then controlled (and which thereafter continued the trading

activities of the target company), and also deposited with the new company a further \$19,367 from their own funds (making a total of \$376,265);

- . the new company used these funds to purchase from the target company its total assets of \$376,265 which, as to \$352,129, represented untaxed profits of the then current year;
- . the target company then had \$376,265 in cash which it lent to another of the promoter's companys, leaving the target company with that outstanding loan as its only asset;
- . the promoter's second company on-lent the \$376,265 to the company which had purchased the shares in the target company and that purchasing company in turn used the \$376,265 to repay its original loan from the financier, with interest of 0.5% (\$1,784) for the one day the loan had been in existence;
- . an amount of \$17,583 representing fees were paid by the purchasing company to the promoter, in turn leaving that company devoid of assets and unable to repay the loan to the second company which had borrowed the \$376,265 from the target company;
- . the target company was thus left with an irrecoverable debt as its only "asset", together with a substantial unpaid tax liability - on a taxable income of \$352,129, company tax would amount to some \$162,000.

The second kind of evasion practice referred to earlier concerns (in part) sales tax. Promoters of schemes designed to escape payment of sales tax may organise the affairs of their clients so that when, as anticipated, the scheme fails to stand up to legal scrutiny the liability for sales tax falls on a "straw" company. For instance, under sales tax anti-avoidance legislation enacted in 1978, the Commissioner of Taxation is, in certain circumstances, entitled to assess sales tax payable on the basis of a fair and reasonable sale value where the apparent sale price of goods is arranged to be depressed in order to avoid the tax. To overcome that legislation, arrangements operate in such a way that when the Commissioner assesses sales tax on the fair and reasonable sale value of the goods, liability for the additional sales tax falls on a "straw" company and the tax cannot be collected.

Such schemes are known to work as follows -

- the promoter's wholesale company purchases goods (e.g., motor vehicles) at the wholesale price from a wholesale-finance company often a company associated with the retailer under quotation of a sales tax certificate, so that sales tax is not payable on that sale;
- the promoter's wholesale company sells to another promoter's company at full wholesale value (say \$4,000) again under quotation of a sales tax certificate;
- that promoter's company sells the goods to an associated company at a greatly reduced value (e.g., \$100), in circumstances in which sales tax is payable;
- tax paid on this nominal "sale value" is therefore \$15 instead of the \$600 it would otherwise have been;
- this associated company in turn retails the goods through the dealer's retail company which acts as agent (although the agency is not disclosed to the customer who purchases the goods);
- under the anti-avoidance legislation mentioned, the Commissioner increases the "sale value" of the goods to a "fair and reasonable" wholesale value, but the effect is to increase the sales tax liability of a company which has no assets;
- the dealer's retail company, which as agent received full payment for the vehicle on retail sale pays to the promoter's company the full wholesale value plus one-half of the tax saved, the difference between the retail price to the customer and this payment being an entitlement of the dealer's retail company;
- the retailer therefore gets to keep the other half of the tax saving, except that it may be used to cut retail prices and secure a competitive edge over other dealers not engaged in such schemes.

Another use of the second technique occurs to thwart recovery of income tax from corporate trustees on which liability for tax falls by the operation of anti-avoidance legislation enacted in 1979 to counter "trust-stripping" arrangements (section 100A of the Income Tax Assessment Act 1936). The following example (which omits some technical

detail) shows how it is arranged that the tax liability falls, in the context of the anti-avoidance measures, on a trustee which has no assets (some 220 trusts are known to have been stripped by one promoter using this technique):

- . the trustee of a profitable family trust appoints as a beneficiary a company under the control of the promoter and which acts as trustee for a second trust, and distributes net income of \$15,000 from the first trust to the company-trustee;
- . that company-trustee in turn distributes the \$15,000 to a further company, also as trustee of another of the promoter's trusts;
- . yet another of the promoter's companies, a beneficiary under the last trust, directs the trustee to pay \$13,200 on the beneficiary's behalf to an unrelated company, which had previously lent that amount to a further company as agent for the beneficiary; the remaining \$1,800 is paid to the beneficiary company as tax-deductible fees, leaving the trust with no assets;
- . the amount of \$13,200 is passed on through a series of loans until finally it completes a circle and ends up with the people originally intended as the "real" beneficiaries of the family trust;
- . tax liability in respect of the \$13,200 is, by virtue of the anti-avoidance measures mentioned, attached to the trustee of the last trust;
- . as that trust (and its trustee) have no assets, the tax liability is irrecoverable.

Still further evasion practices that have been employed in the past would, if continued in practice after the Bill comes in force, come within its field of operation. For example, it would have relevance in relation to any companies that continue with practices of incurring a sales tax liability in the ordinary way, but of becoming devoid of assets and going out of business before the liability is met. Similarly, it would apply where a company has deducted pay-as-you-earn deductions from salaries or wages paid to employees but is stripped of funds before it has remitted those amounts to the Commissioner of Taxation.

To overcome these various tax evasion practices, the Crimes (Taxation Offences) Bill will expose to penal sanctions persons who, to state the essentials of the matter, enter into an arrangement or transaction with a purpose of ensuring that

the company or trustee concerned will be rendered incapable of paying the sales tax or income tax. It will also be made an offence for a person to enter into an arrangement or transaction in the knowledge or belief that the arrangement or transaction will deprive a company or trustee of capacity to pay tax. A person who aids, abets, counsels or procures another person to be a party to such arrangements or transactions will similarly commit an offence.

The proposed maximum penalties on conviction for offences of this kind are a term of 5 years gaol or a fine of up to \$50,000, or both. A person convicted may also be ordered by a court to pay some or all of the amount of sales tax or income tax payment of which by the company or trustee has been escaped.

The substantial provisions are contained in Part II of the Bill, which is expressed to apply to arrangements to evade payment of sales tax. Those provisions are, by Part III of the Bill, to be made to apply also in relation to income tax evasions.

The provisions of the Bill are only to come into operation in relation to arrangements or transactions of the proscribed kinds as are entered into after the Bill receives the Royal Assent.

Detailed explanations of the Bill follow.

Clause 1 : Short title, etc.

This clause contains the citation of the proposed Act, the Crimes (Taxation Offences) Act 1980.

Clause 2 : Commencement

Under this clause the Act is to come into operation on the day upon which it receives the Royal Assent. But for this clause, the Act would, by reason of sub-section 5(1A) of the Acts Interpretation Act 1901, come into operation on the twenty-eighth day after the day on which the Act receives the Royal Assent.

Clause 3 : Interpretation

This clause contains a number of measures to assist in the interpretation of the Bill.

Sub-clause (1) first abbreviates the formal reference to the Commissioner of Taxation, a Deputy Commissioner of Taxation and a Second Commissioner of Taxation and contains the following further definitions:

"company" is defined to include all bodies or associations corporate or unincorporate, but not to include partnerships;

"income tax", in addition to its basic meaning of income tax as assessed under the Income Tax Assessment Act, means -

- . additional tax payable for late payment of income tax due and payable; for late lodgment of returns; or for understating or under-estimating income, as provided for under the nominated provisions of the Income Tax Assessment Act;
- . instalments payable in respect of company tax;
- . amounts of PAYE tax instalment deductions made from employees' wages by an employer for remittance to the Commissioner, together with any additional tax imposed for late remittance of such tax instalment deductions;
- . an amount so deducted by an employer as tax instalment deductions and required to be expended in the purchase of tax stamps and any related penalty;
- . provisional tax payable by a trustee; and

- any amounts, including amounts by way of penalties, payable to the Commissioner under provisions of the Income Tax Assessment Act relating to the collection of withholding tax on dividends and interest paid to non-residents and withholding tax on certain mining-related payments for the benefit to aboriginals;

"sales tax" means any tax imposed as sales tax by any of the Sales Tax Acts (Nos. 1 to 9) 1930;

"trustee" has of necessity been given a similar definition to that in the income tax and sales tax laws. In addition to the common meaning of a trustee, i.e., a person or company appointed as such, the term includes an executor or administrator, guardian, committee, receiver or liquidator and every person or company who has the administration or control of property or income on behalf of someone under a legal disability.

In addition, the Income Tax Assessment Act 1936 and the Sales Tax Assessment Acts (Nos 1 to 9) 1930 (together with the Sales Tax Procedure Act 1934) are, by sub-clause (1), formally identified as the Acts referred to in the Bill as the Income Tax Assessment Act and the Sales Tax Assessment Acts respectively.

For the purposes of defining the circumstances under which an offence would be committed under the Bill, sub-clause (2) of clause 3 draws a distinction between situations where sales tax is due and payable at the time an arrangement or transaction is entered into and situations where sales tax will become or can be expected to become payable after that time. (Sub-clause 13(2) makes the corresponding distinction in relation to income tax).

Paragraph (a) means that a reference to "sales tax payable" in the offence provisions of sub-clauses 5(1), 6(1) and 7(1) is a reference to some or all of the sales tax due and payable at the time that the arrangement or transaction with which a person is connected is entered into.

Sub-clause (2) of each of clauses 5, 6 and 7 deal with situations where, at the time that the relevant arrangement or transaction is entered into, sales tax is not payable. In that context, paragraph (b) means that the expression "future sales tax payable" is to be read as a reference to some or all of -

- the sales tax that will become payable after a relevant arrangement or transaction is entered into, being tax in respect of transactions, acts or operations that preceded the arrangement or transaction; and

the sales tax that may reasonably be expected to become payable after the arrangement or transaction is entered into -

- in relation to likely future taxable transactions of the company or trustee; or
- by reason of the Commissioner of Taxation altering the sale value of goods in pursuance of powers conferred by the sales tax law (for example, where anti-avoidance measures contained in the Sales Tax Assessment Acts authorise the Commissioner to assess liability for sales tax on a fair and reasonable value where the parties to a sales transaction attracting sales tax purport to sell the relevant goods at deflated prices to avoid tax).

Thus, use of the term "future sales tax payable" facilitates application of the penal sanctions proposed by the Bill in relation to schemes that are organised to ensure that such sales tax liability as may be incurred after the scheme has been entered into falls on a company or trustee having no capacity to meet that tax.

Paragraph (c) defines the term "sales tax moneys" so as to include within clauses 11 and 12 of the Bill not only sales tax payable in relation to transactions, operations or acts of a company or trustee, as imposed under one or more of the Sales Tax Assessment Acts, but also -

- further sales tax payable by the company or trustee (by reason of the Commissioner altering the sale value of goods under the terms of an Assessment Act);
- additional tax, e.g., for late payment of sales tax;
- costs awarded by a court in proceedings for the recovery of a penalty under an Assessment Act; and
- costs awarded by a court in proceedings for the recovery of sales tax, further sales tax or additional tax.

Sub-clause 3(3) makes it clear references in the Bill to "securing" the inability of a company or trustee to pay tax payable by the company or trustee are to be read as including an arrangement or transaction that secures the continuation of a pre-existing inability to pay tax.

Sub-clause (4) of clause 3 clarifies the meaning of a number of other terms used in the Bill. By paragraph (a), it is indicated that references to a "person" do not include references to a company, unless the contrary intention appears. An effect is that individual persons, but not companies, may be charged with the offences prescribed by this Bill.

Paragraph (b) ensures that the term "arrangement or transaction" carries an extended meaning so as to include both an arrangement and a transaction and to any series or combinations of arrangements and/or transactions. The term "arrangement" is itself further defined in paragraph (d).

By paragraph (c), references to a person who aids, abets, counsels or procures another person to enter into an arrangement or transaction are to be read as including references to a person who does so in concert with another or others.

Paragraph (d) contains the definition of "arrangement". An arrangement is to be read as meaning an arrangement, agreement, understanding or scheme whether formal or informal, whether express or implied, and whether or not enforceable, or intended to be enforceable, by legal proceedings.

Paragraph (e) ensures that a reference to sales tax, sales tax moneys or to future sales tax payable by a trustee is to be read as a reference to sales tax, sales tax moneys or future sales tax payable by a trustee, whether or not the trustee is personally liable.

Sub-clause (5) relates to later provisions under which it is relevant whether liability to tax has been finally determined. By the sub-clause, tax will not be taken not to be finally determined by reason only that the Commissioner of Taxation has power to determine that further tax is payable.

Clause 4 : Secrecy

The purpose of clause 4 is to ensure that where the Commissioner of Taxation, in the ordinary course of administering the income tax and sales tax laws, comes into possession of information that suggests that a breach of the proposed Crimes (Taxation Offences) Act 1980 may have been committed, the secrecy provisions of the income tax and sales tax laws will not prevent any necessary communication of that information to authorities responsible for pursuing such matters.

To this end, clause 4 will require that the secrecy provisions of section 16 of the Income Tax Assessment Act and section 10 of the Sales Tax Assessment Act (No. 1) be read as if the relevant parts of the Bill were part of the relevant Act.

Clauses 5 to 11 : Offences relating to sales taxIntroductory note

Part II of the proposed new Act, comprising clauses 5 to 11 of this Bill, contains the substantive provisions of the Bill and is expressed to apply in relation to offences concerning sales tax. It is important to observe that while Part II is expressed in terms of sales tax offences, its provisions (except clause 8) are by Part III also to apply in relation to income tax. Accordingly, the notes that follow have been written in a way that takes account of the effect of Part III and references to "tax" may generally be taken to apply equally to income tax or sales tax. The provisions of Part II will, broadly, make it a punishable offence to enter into an arrangement or transaction for a purpose of reducing the capacity of a company or trustee to pay tax that is or becomes payable, or to aid and abet another person to enter into an arrangement or transaction for that purpose. It will also be an offence to enter into, or to aid and abet another person to enter into, an arrangement or transaction knowing or believing that the arrangement or transaction will have that effect.

Notes on each of the clauses of Part II follow, on the basis just mentioned.

Clause 5 : Arrangements to avoid payment
of sales tax or income tax

Sub-clause (1) of clause 5 will make it an offence for a person to become a party to an arrangement or transaction with a purpose of either -

- . reducing the capacity of a company or trustee to pay sales tax or income tax that is then payable by the company or trustee (paragraph (a)); or
- . securing that a company or trustee will be unable or will be likely to be unable, to pay sales tax or income tax that is then payable by the company or trustee (paragraph (b)).

In the context of sub-clause (1) "tax payable" by a company or trustee is, by sub-clause 3(2) and sub-clause 13(2) defined to mean tax that is due and payable at the time when the relevant arrangement or transaction is entered into by the person charged with the offence.

It is also to be noted that the reduction in taxpaying capacity, or the securing of incapacity to pay tax, sought to be achieved by the arrangement or transaction referred to in the section need not be intended to extend generally or indefinitely but may be for a more limited period, e.g., an arrangement to ensure that a company is devoid of funds for a number of years.

Although in some cases a company (or trustee) sought to be rendered unable to pay tax (e.g., through officers acting on behalf of the company) will itself be a party to the arrangement or transaction forming the basis on which a person party to the arrangement or transaction is charged with an offence, direct participation by the company will not be a necessary pre-requisite to the committing of an offence by those who take part in the arrangement.

Paragraph (a) of sub-clause (1) is designed to cover arrangements that have a purpose of reducing the capacity of a company or trustee to pay tax. This means, for example, that if other elements of the offence exist it will be an offence to take steps to take away from a company its assets so as to leave unpayable a tax liability that could otherwise have been paid.

Paragraph (b) deals with situations where the aim is to secure that a company or trustee will be unable, or will be likely to be unable, to pay tax. In this context, sub-clause 3(3) ensures that the reference in paragraph (b) to the securing of inability or likely inability to pay is to be taken as including the securing of a continued inability or likely inability to pay. Arrangements to divert funds that it might otherwise be expected to have received away from a company currently lacking funds would fall to be considered under this paragraph.

Sub-clause (2) is in similar terms to sub-clause (1) and makes it an offence to enter into arrangements to reduce capacity or secure incapacity to pay "future sales tax" or future income tax. This term has been commented on in the notes on sub-clause 3(2), and refers to tax that will or may reasonably be expected to become payable in the future. An arrangement that involves income tax (on current-year profits of a company) that has not been assessed and subsequently becomes due and payable is one that would concern "future tax", and be within the scope of sub-clause (2).

Paragraph (2)(a) parallels in respect of future tax the elements of the offence under sub-clause (1), while paragraph (2)(b) adds an additional element that must exist before there can be an offence against sub-clause (2) in respect of arrangements in respect of future tax, and that is that after the arrangement or transaction is entered into, sales tax or income tax does in fact become payable by the company (or trustee). Thus, a person will commit an offence in respect of arrangements to defeat the collection of tax that is expected to become due and payable after the arrangement is entered into, only if tax does become due and payable. Clauses 10 and 11 are relevant to paragraph (2)(b).

Clause 6 : Aiding and abetting

Clause 6 complements clause 5 by making it an offence for a person in any way to assist or actively encourage someone else, including a company, to enter into an arrangement or transaction if the person knows or believes that the other person is entering into the arrangement or transaction for a purpose of the kind referred to in clause 5. In other words, clause 6 covers a situation where a person aids or abets someone else to be party to an arrangement where the person or company aided or abetted is known or believed to intend that a company or trustee will be rendered unable to pay tax.

While clause 6 is generally along the lines of section 5 of the Crimes Act 1914 which, broadly put, makes it an offence to aid and abet another to commit an offence against a law of the Commonwealth, it is to be noted that it will be an offence under this clause to aid or abet a company to enter into an arrangement or transaction of the kind described, notwithstanding that an offence under clause 5 can be committed by individual persons but not by companies.

Sub-clause 6(1) is complementary to sub-clause 5(1) and deals with aiding and abetting in relation to arrangements affecting the collection of tax payable at the time when the arrangement is entered into. Sub-clause 6(2) complements sub-clause 5(2) and deals with aiding and abetting in relation to future tax. In the latter case there can be no offence unless tax does become due and payable.

Clause 7 : Arrangements to reduce capacity
to pay sales tax or income tax

Clause 7 will provide for it to be an offence for persons to enter into straw company or straw trust arrangements or transactions of the kind already described where those persons do not necessarily have a positive purpose of depriving a company or trustee of capacity to pay tax when entering into the arrangement or transaction, but nonetheless enter into the arrangements when aware, or believing, that the arrangement or transaction will reduce the capacity to pay, or secure the incapacity to pay, tax payable by the company (or trustee) concerned.

The clause also provides for it to be an offence where a person aids or abets another person or company to enter into an arrangement or transaction when he or she knows or believes that the arrangement or transaction will result in, or be likely to result in, a lack of tax-paying capacity in a company or trustee.

Consistently with the distinctions drawn in framing the elements of the offences provided for by earlier clauses, sub-clause 7(1) will deal with arrangements where sales tax is payable at the time the arrangement is entered into while sub-clause (2) will deal with arrangements relating to sales

tax that becomes payable at a later time. By virtue of clause 13, clause 7 will apply correspondingly in relation to income tax.

To ensure that the provisions of sub-clauses 7(1) and (2) cannot render liable to criminal prosecution persons whose actions of a particular kind might, in a strict technical sense, be seen as falling within the scope of those provisions, sub-clause (3) excludes those actions from the ambit of sub-clauses (1) and (2).

Sub-paragraph (3)(a)(i) excludes arrangements entered into by a company or trustee that require money to be paid, for a limited period, to a creditor of the company or trustee. The paragraph would apply, for example, where a company faced with a temporary liquidity problem arranges to make payments to a creditor (or certain of its creditors), while postponing payment of tax due for payment. This might occur in circumstances where a supplier was threatening to withdraw from trading with the company until an amount owing was paid.

Sub-paragraph (a)(ii) is to the same general effect and excludes transactions of a company or trustee requiring a payment of money to a creditor.

Paragraph (3)(b) will limit the classes of arrangements and transactions placed beyond the reach of sub-clauses (1) and (2) to those entered into by a company or trustee with a purpose either of enabling the company or trustee to continue in business or of obtaining a financial benefit for the company or trustee.

Sub-clause (4) is complementary to sub-clause (3) and extends the meaning of "creditor" as referred to in that sub-clause so as to bring within the class of transactions and arrangements shielded from the sanction of sub-clauses (1) and (2), those under which payment is made to a person (including a company) by virtue of the transaction or arrangement itself. An example is a case where the person receiving payment was not a creditor prior to the transaction but became a creditor by reason of the transaction, e.g., as the vendor under a transaction for the sale of plant to a company.

Clause 8 : Offences in relation to particular transactions

The provisions of clause 8 apply only in relation to sales tax. (Clause 13 does not make them operative in relation to income tax, as it does clauses 5, 6 and 7.) The clause provides for an offence that is specifically directed at schemes under which sales tax liability arising under sales (or leasing) transactions is arranged to fall on a company or trustee that, from the outset of the scheme, is intended not to have funds sufficient to pay the tax. Clause 8 effectively applies only in relation to evasions of future sales tax.

Clause 8 will make it an offence for a person to be concerned in, or party to, the entry by a company or trustee into a transaction for the sale or lease of goods under which sales tax will become payable by the company or trustee if the person knows, or has reasonable grounds for believing, that the circumstances are such that the company or trustee will be unlikely to be able to meet its liabilities on account of sales tax, including sales tax arising under the particular transaction.

Where a company or trustee enters a transaction to sell or lease goods which will give rise to a sales tax liability (paragraph (a)) a person concerned will be guilty of an offence under clause 8 if he or she knew or had reasonable cause to believe at the time of the transaction (paragraph (b)) either that -

- . the Commissioner of Taxation would be likely to alter the sale value of the goods under authority conferred by provisions of the Sales Tax Assessment Acts directed against tax-avoidance arrangements (e.g., section 18A of the Sales Tax Assessment Act (No. 1)); or
- . that payment of the price (or a substantial part of the price) for the goods sold or leased under the transaction would be made not to the company or trustee but to someone else, such as an associated company,

and that the person charged also knew or had reasonable grounds for believing that when the sales tax arising under the transaction became due and payable the company or trustee would be unable, or would be likely to be unable to pay its sales tax debts.

By paragraph (c) it is an essential element, before an offence is committed, that sales tax must become due and payable.

Sales tax debts, in the above context, include the sales tax arising from the particular transaction, any sales tax payable in relation to previous transactions, operations or acts of the company or trustee and any sales tax reasonably expected to become payable due to the anticipated exercise by the Commissioner of a power to increase the sale value of goods for purposes of assessing tax.

Clause 8 is thus concerned with taxable transactions entered into against the background that the company or trustee is to be prevented from receiving sufficient funds to pay the tax arising from that or other transactions, e.g., by ensuring that payment for taxable goods by-passes the company concerned through the payment being made to an associated company. The offence would apply to company staff or executives, for example, who acted for the company in selling goods in the knowledge

that "by-pass" financial arrangements of the kind indicated had been set up to frustrate collection of the resulting sales tax liability.

Clause 9 : Penalties

Sub-clause (1) of clause 9 prescribes the maximum penalty that may be imposed by a court where a person is convicted of an offence under the provisions of the proposed Act. The maximum penalty is imprisonment for 5 years, or a fine not exceeding \$50,000, or both.

Sub-clause (2) makes it clear that a prosecution for an offence may be commenced at any time. This is consistent with the provisions of section 21 of the Crimes Act 1914 in relation to prosecutions for offences carrying gaol penalties in excess of 6 months.

Sub-clause (3) of clause 9 will mean that a person cannot be convicted of more than one offence under this Bill in relation to the same arrangement or transaction. This ensures, for example, that a person who is a party to an arrangement intended to frustrate collection of tax and who also aids or abets someone else to enter the arrangement could be convicted of an offence under either clause 5 or clause 6, but not both.

Clause 10 : Evidence

This clause will enable a certificate by the Commissioner of Taxation, a Second Commissioner of Taxation or a Deputy Commissioner of Taxation to be taken as evidence of tax being due and payable. It is relevant to those provisions of clauses 5, 6, 7 and 8 that make it an element of an offence that tax be due and payable, and to clause 12 which empowers a court to order a convicted person to pay some or all of the tax payable by the company or trustee concerned.

The background to clause 10 is that under the income tax and sales tax laws any dispute about whether tax notified in an assessment is payable is determined according to settled processes of objection, review by a Taxation Board of Review and/or appeal to a court. Under income tax law and practice, challenges by a taxpayer against assessed liability can only be made through such processes, because production of a notice of assessment is, by section 177 of the Income Tax Assessment Act (and except in appeal against the assessment), made conclusive evidence that the assessment is correct.

Against this background, clause 10 will, for purposes of the Bill, make a certificate by the Commissioner, a Second Commissioner or a Deputy Commissioner of the amount of income tax or sales tax payable (and of the date it became due and payable), conclusive evidence of those circumstances. This will mean that the question of tax liability is left to be

determined under the settled processes referred to earlier. However, the Bill recognises the possibility that such a certificate may be given in circumstances where it is, in such separate proceedings, determined that a lesser amount of tax (or no tax at all) is payable.

Thus, sub-clause 10(2) specifies that such a certificate has no effect to the extent that it exceeds the tax that is finally determined to be payable. In addition, clause 11 requires a stay of any prosecution proceedings if tax liability has not been finally determined.

Sub-clause (1) allows a certificate signed by the Commissioner, a Second Commissioner or a Deputy Commissioner to be introduced in proceedings under this Bill as conclusive evidence that an amount of tax stated to be payable, or to have become payable, is in fact payable, or did become payable as certified. As just noted, this sub-clause is effectively qualified by both sub-clause (2) and clause 11.

Sub-clause (2) of clause 10 qualifies sub-clause (1) and ensures that a certificate cannot be evidence that an amount of tax is payable if that amount of tax is finally determined not to be payable, consequent on the exercise of ordinary rights to have the tax liability of the relevant company or trustee reviewed under the objection, review and appeal provisions of the income tax law or sales tax law.

Sub-clause (3) restricts the power under sub-clause (1) to give a certificate to cases where an amount of tax has been assessed or notified formally to a company or trustee under one or other of the Sales Tax Assessment Acts and, accordingly, the formal objection, review and appeal processes apply. The validity of a certificate in relation to income tax is similarly restricted by paragraph (2)(d) of clause 13.

Clause 11 : Stay of proceedings

Clause 11 would apply in any case in which a prosecution under the Bill was brought and it appeared to the magistrate (at the preliminary hearing) or the court (at the actual trial) that tax liability relevant to the prosecution had not been finally determined. The clause requires the court or magistrate to stay the proceedings until such time as it is finally determined either that some tax relevant to the question of guilt is payable by the company or trustee, or that no such tax is payable. The clause has the purpose of ensuring that a person cannot be found guilty of an offence against the Bill while there remains a possibility that on review, under the normal processes available to the company or trustee under the income tax or sales tax law, no relevant amount of tax is payable.

Sub-clause (1) requires the court or magistrate to stay proceedings in the circumstances outlined. Briefly, where it appears to the court that the liability of the company or trustee to pay tax has not finally been determined, and such final determination is relevant to the question of guilt (paragraphs (a) and (b)), the court or magistrate shall stay the proceedings until the liability of the company or trustee to pay the tax has been finally determined (paragraph (c)) or it is finally determined that some of that tax is payable.

Sub-clause (2) preserves any power that a court or magistrate may have to order a stay of proceedings under any other law.

Clause 12 : Additional penalty

Conviction for an offence against the proposed Act would render a person liable to a term of imprisonment or a fine, or both, as provided for by clause 9, but would not in itself result in the tax concerned being paid.

To meet that situation, sub-clause (1) of clause 12 empowers the court, if it thinks fit, to order a person found guilty of an offence to pay to the Commonwealth an amount not exceeding the amount of sales tax moneys that has been finally determined as due and payable by the company or trustee on the date of the conviction.

Sub-clause (2) means that an amount paid pursuant to a court order under sub-clause (1) is to be offset against the sales tax or income tax moneys outstanding by the company or trustee.

Clause 13 : Offences relating to income tax

Part III of the Bill (clause 13) contains measures that will have the effect of making the substantive provisions already explained in relation to sales tax also apply in relation to income tax.

By paragraph (a) of sub-clause (1), sub-clause 3(3) and paragraph 3(4)(e) of Part I and the substantive provisions of the Bill contained in Part II (except clause 8 and sub-clause 10(3)) are to be read with the following effect in relation to income tax:

- . references to sales tax are to be read as references to income tax;
- . references to future sales tax are to be read as references to future income tax;
- . references to the Sales Tax Assessment Acts are to be read as references to the Income Tax Assessment Act;

- . a reference to sales tax moneys is to be read as a reference to income tax moneys.

Sub-clause (2) clarifies the meaning of certain references in Part II when it applies in relation to income tax. By the sub-clause -

- . in relation to a purpose of a person entering into an arrangement or transaction or to the knowledge or belief of a person concerning an arrangement or transaction, a reference to income tax payable is to be read as a reference to some or all of the income tax due and payable by the company or trustee when the arrangement or transaction was entered into (paragraph (a));
- . paragraph (b) requires a reference to future income tax payable to be read comparably as a reference to some or all of the income tax that may reasonably be expected to become payable by the company or trustee;
- . by paragraph (c), a reference to income tax moneys is to be read as a reference to -
 - income tax (as defined in sub-clause 3(1)) payable by the company or trustee; and
 - costs ordered by a court against the company or trustee in proceedings for the recovery of income tax;
- . as previously indicated, paragraph (d) will have the effect of permitting a certificate under clause 10 to be given in respect of assessed income tax only.

Finally, sub-clause (3) makes it clear that the question of whether the liability of a company or trustee to pay tax has been finally determined (as relevant for the purposes of determining the extent to which a certificate is to be admitted as evidence under sub-clause 10(2) or whether proceedings are to be stayed under clause 11) is to be decided without regard to any possibility of the Commissioner amending the assessment, except as a result of the allowance of an objection or at the direction of a Board of Review or court.