



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

SELECT COMMITTEE ON SUPERANNUATION AND
FINANCIAL SERVICES

Reference: Taxation Laws Amendment (Superannuation Contributions) Bill 2000

MONDAY, 27 NOVEMBER 2000

CANBERRA

BY AUTHORITY OF THE SENATE

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **<http://www.aph.gov.au/hansard>**

To search the parliamentary database, go to: **<http://search.aph.gov.au>**

SENATE
SELECT COMMITTEE ON SUPERANNUATION AND FINANCIAL SERVICES
Monday, 27 November 2000

Members: Senator Watson (*Chair*), Senator Sherry (*Deputy Chair*), Senators Allison, Chapman, Conroy, Hogg and Lightfoot

Senators in attendance: Senators Allison, Chapman, Conroy, Hogg and Watson

Terms of reference for the inquiry:

Taxation Laws Amendment (Superannuation Contributions) Bill 2000.

WITNESSES

BROOKES, Mr Nicholas Duncan Jeremy, Chief Executive, Corporate Superannuation Association.....	34
COLES, Mr Tony, Director, Australian Taxation Office.....	66
ELLIS, Mr Paul Anthony, Principal, Human Capital, Arthur Andersen	42
FITZPATRICK, Mr Kevin James, First Assistant Commissioner, Australian Taxation Office.....	66
LORIMER, Mr Michael Dale, Director and Chair of Policy Development Committee, Small Independent Superannuation Funds Association Ltd.....	37
MONTANO, Ms Elizabeth Maria, Director, AUSTRAC.....	27
ORCHARD, Mrs Susan Janet, Superannuation Technical Consultant, Institute of Chartered Accountants in Australia	2
PETROULIAS, Mr Nick (Private capacity)	11
PETROULIAS, Mr Nick (Private capacity)	51
PRAGNELL, Mr Bradley John, Acting Director, Intellectual Capital, Australian Society of Certified Practising Accountants.....	2
RYAN, Mr Paul Michael, Senior Manager, AUSTRAC	27
THOMAS, Mr Trevor John, Assistant Commissioner, Superannuation, Australian Taxation Office	66

Committee met at 3.23 p.m.

CHAIR—I declare open this public hearing of the Senate Select Committee on Superannuation and Financial Services. On 1 November, the Senate referred the **Taxation Laws Amendment (Superannuation Contributions) Bill 2000** to the committee for inquiry and report by 4 December. The aim of today's hearing is to take evidence from some groups and individuals involved in the superannuation and taxation planning industry as well as officials from the Australian Taxation Office. All of the witnesses who appear before the committee are protected by parliamentary privilege with respect to evidence given before the committee. This means that they are given broad protection from action arising from what they say, and the Senate has power to protect them from any action which disadvantages them on account of the evidence given before the committee.

I would like to draw to the attention of both the committee and all witnesses here that there are some matters which are presently the subject of legal proceedings and, as such, are covered by the Senate's sub judice principles. The committee would not wish to be a cause or a contributing factor to a judge dismissing a possible prosecution or aborting a trial because of prejudice arising from pre-trial publicity. The committee understands that there is a greater danger of prejudice to a trial in criminal cases because of pre-trial publicity and that the courts are more sensitive to that danger in such cases. However, the committee labours under the difficulty of not knowing what issues are likely to be vital in the course of such a trial or potential trial and that seemingly innocuous matters of fact may actually be at issue between the prosecution and the defence and that publicity about them may cause the miscarriage of a trial or possible trial.

In any discussion of proposals to close loopholes in the superannuation and taxation areas great care is needed. I therefore seek the cooperation of all witnesses in confining your evidence to the committee to issues which are relevant to the bill. In that way you will assist me and my committee to ensure that no other matters are raised which might impact in any way on any legal proceedings and potentially prejudice a trial because of pre-trial publicity. I welcome all participants to today's hearing. A copy of this statement will be given to each witness as they arrive this afternoon.

ORCHARD, Mrs Susan Janet, Superannuation Technical Consultant, Institute of Chartered Accountants in Australia

PRAGNELL, Mr Bradley John, Acting Director, Intellectual Capital, Australian Society of Certified Practising Accountants

CHAIR— I welcome representatives from the Institute of Chartered Accountants in Australia and the Australian Society of Certified Practising Accountants. On behalf of this committee, Susan, we congratulate you on the birth of your daughter. We note that in your absence you were ably represented by your other colleagues, but welcome back.

Mrs Orchard—Thank you.

CHAIR—I now invite you to make an opening statement.

Mr Pragnell—CPA Australia and the Institute of Chartered Accountants in Australia appreciate the opportunity to give evidence before this committee on [Taxation Laws Amendment \(Superannuation Contributions\) Bill 2000](#). We will deal very briefly with a few of the issues of note where we have, both in our written submissions to the committee and in our consultations with the Australian Taxation Office, raised certain matters of interest with respect to this proposed measure.

First of all, regarding the deductibility of employer contributions to overseas superannuation funds, the Institute of Chartered Accountants in Australia in its written submission to the committee raised its concerns, and both CPA Australia and, I believe, the institute have raised concerns in consultation with the Australian Taxation Office. I know that other bodies such as the Taxation Institute of Australia, plus many of the other written submissions, have raised their concerns regarding the removal of deductibility for employer contributions to overseas funds, particularly with regard to affecting legitimate remuneration paid by multinational employers within Australia. In many instances where contributions are made to employees who are situated overseas, those contributions are often compulsory under local law. By denying employers deductibility, they are then locked into a situation where they may be required by local law to make such contributions but are unable to deduct the contributions, as such, within Australia.

For many employers with overseas employees, there will be some modest costs and inconvenience in having to make changes to current arrangements. In many instances these will be arrangements where it was agreed between an employer and an employee who is resident outside of Australia that contributions be made to a superannuation or retirement income fund in the country where that person happens to be working. In a sense this was often done to make things more convenient and was done at the mutual agreement of both parties involved. More often than not, these arrangements are very legitimate.

Secondly, there is the slightly related issue of the Assistant Treasurer's media release of 4 October 2000 regarding residency for trustees and members of self-managed superannuation funds. I noted in one of the other written submissions, I believe it was the Arthur Andersen

submission, the comment that the two-year period for being overseas and then being able to claim residency for a self-managed fund, trustees and members was a bit too compressed. CPA Australia would endorse an extended period of time. I note that in the Arthur Andersen submission they propose five years, and we would definitely endorse reviewing the two-year rule proposed in the Assistant Treasurer's media release No. 49. I will turn over to my colleague, Mrs Orchard.

Mrs Orchard—I have nothing further to add to Brad's opening statement.

CHAIR—You indicate that these matters have been raised with the Assistant Treasurer and others. What was the response?

Mr Pragnell—We have had some discussions with the Australian Taxation Office, particularly regarding the deductibility of employer contributions to overseas funds. We did raise our concerns in those consultations regarding some of the costs involved and employers having to make adjustments. We did note that the changes were not necessarily insurmountable but that there would be costs involved and that there would be significant inconvenience. The tax office did take on board those comments, and I guess it is within their domain to determine how they wish to proceed with that information.

CHAIR—Given the need to close the loophole and at the same time resolve your concerns about deductibility where there is a genuine overseas resident issue—and I think it also has particular relevance to do-it-yourself funds and small managed investment funds—have you a solution? Can you give some guidance to the committee as to how it could be resolved at the same time as not opening up the previous wound?

Mrs Orchard—In the submission of the Institute of Chartered Accountants we provide some alternatives that would allow a deduction to continue where there is a legislative requirement to make that contribution in the country so that it is covered by legislation similar to our own superannuation guarantee legislation or where there is a corporate policy to meet that requirement or some longstanding arrangement that can be shown—for example, all employees are members of a corporate plan for that company and, hence, have those contributions made and that they distinguish between employees who are expatriates.

CHAIR—If a company can do this for one individual, would it not open up the problem that currently exists? You could have a contrived arrangement with the company involved, couldn't you?

Mr Pragnell—As to the proposal that came from the institute—I do not claim to speak on behalf of the institute—I guess there is really a twofold task in finding a solution. One would be to what degree are the contributions required by that employer compulsory? If they are compulsory in that country, then there would be an allowance for the employer to claim a deduction. The second would be on the basis of residency. In the institute's submission there was discussion about residency of an employee. If they happened to be a permanent resident or resident for tax purposes in another country, then there would be some ability to claim a tax deduction. Again, as I say, it is more based on my reading of their submission.

CHAIR—You are suggesting only to the extent of the equivalent of a superannuation guarantee charge and nothing more?

Mr Pragnell—If there were a requirement on the basis of compulsion, yes; if there were a superannuation guarantee equivalent. For example, I know that in Hong Kong as of a few weeks ago employers and employees are required to make five per cent contributions to mandatory provident funds in Hong Kong. If the employee is resident in Hong Kong, there is a requirement to make certain contributions. There are certain instances where those jurisdictions do not provide carve-outs for non-resident employers. If you are a resident employee then you are actually captured in their loop, so there would be some instances where an Australian based employer may be required to make compulsory contributions to employees who happen to be domiciled elsewhere.

I guess the other issue is that of residency. If an individual is resident in a foreign jurisdiction—again, I do not claim to be an expert at all on international taxation—the issue of residency should be looked at. If the employee happens to be a resident in that foreign jurisdiction there may be some scope to enable the Australian employer to claim a deduction. Again, these are very high-level proposals that I know are in both the institute and the Arthur Andersen submissions. I am not aware whether or not they have been formally raised with the tax office. I could not comment in terms of their response at that level.

Senator SHERRY—The legislation we are dealing with—as I am sure you are aware—deals with a crackdown on non-complying superannuation funds which have been identified by some as a mechanism for laundering hundreds of millions of dollars and being a significant risk to Commonwealth revenue. Are you aware that that is at least a large intent of this legislation?

Mr Pragnell—Yes, we are. I would have to comment from the position of the CPA. We recognise that the Commonwealth does have the prerogative to protect revenue. Our concern is more about inadvertently capturing legitimate arrangements involving employers with overseas employees. We are looking for a reasonably well defined and specified carve out so that those legitimate remuneration arrangements are not captured in a relatively wide-sweeping proposal.

Senator SHERRY—I want to concentrate on what would be regarded as the illegitimate schemes. You would have members who would be involved in advice to persons who seek to take advantage of these schemes.

Mr Pragnell—I could not comment on that.

Senator SHERRY—Why can't you comment?

Mr Pragnell—I have no knowledge of my members on an individual basis advising in such a manner.

Senator SHERRY—Do you have knowledge of how these schemes operate?

Mr Pragnell—Only from what I read in the media.

Senator SHERRY—Which is what?

Mr Pragnell—That contributions are made and a deduction is claimed in Australia for a contribution made to an overseas fund. Then you take advantage of the tax and preservation in that foreign jurisdiction and then basically round robin the money back to Australia. I think we would have some concerns about any arrangement that is designed specifically as a round robin to ‘effectively launder money’, that is designed specifically as a tax avoidance requirement.

Senator SHERRY—From your knowledge and expertise—which I know is extensive, because we have talked before and I have always been impressed by your level of technical expertise—do these schemes work?

Mr Pragnell—There was a view—and again this is second-hand—in parts of the industry that they did work.

Senator SHERRY—Do you have any idea of, firstly, the sums of money that are contributed to these schemes and, secondly, the revenue losses?

Mr Pragnell—I would have absolutely no idea.

Senator SHERRY—Are you aware that the tax office in its annual report—you may not be aware of the exact comments in the annual report, but you may be aware of it in general—identified this on page 70:

Employee-benefit arrangements continued to be marketed by some even after we made clear that, in our view, these arrangements were not effective under the existing law ...

We are dealing with legislation to amend the existing law now. Are you aware that people in the industry continue to market these arrangements?

Mr Pragnell—I was aware that people were continuing to market those arrangements, despite such warnings in the marketplace.

Senator SHERRY—Are you aware of any court cases taken by the tax office to prevent these schemes from operating?

Mr Pragnell—Not personally, no.

CHAIR—The sorts of schemes we are referring to are controlling interest superannuation schemes and to defeat the offshore superannuation arrangements.

Mr Pragnell—The tax office may be progressing certain aspects but I could not claim knowledge of them.

Senator SHERRY—Is the organisation you represent involved in formal consultations with the tax office about tax matters?

Mr Pragnell—We do have consultative forums where we do meet with various officials of the tax office, yes.

Senator SHERRY—What are those consultative forums?

Mr Pragnell—They are numerous. On the superannuation side, there is a superannuation advisory committee convened by Mr Bator. Murray Wyatt, who is the chair of our superannuation centre of excellence attends that meeting. There is the superannuation industry liaison group and then there is a whole raft of tax practitioner forums that other representatives from our organisation are involved with.

Senator SHERRY—What about the technical liaison committee?

Mr Pragnell—I do believe we have representation on that but I am not sure who represents us on that.

Senator SHERRY—The sitting stands suspended until a quorum can be formed..

Senator SHERRY—Mr Pragnell, in your view has the superannuation surcharge which was introduced back in 1996 acted as an impetus for some of these contrived arrangements? Is it one of the incentives to avoid tax on superannuation in this country and minimise tax in general?

Mr Pragnell—I think that, when you levy a new tax, that is perceived as being unfair within the community. There will be a certain degree of thought given to ways in which to try to not pay it.

Senator SHERRY—So for those high wealth individuals that are able to take opportunity of these tax minimisation schemes, that 15 per cent tax was an added incentive to ‘launder’—to use your phrase earlier—money overseas?

Mr Pragnell—One would think that that would be a behaviour you would see in the community.

Senator SHERRY—Just going back to these tax office consultative committees. Are you aware whether the laundering that has gone on has been raised at any of these consultative committees meetings?

Mr Pragnell—They may have been. I do not claim to have knowledge of all of the committees or all of the forums. They may have been raised but I am personally not aware.

Senator HOGG—Mr Pragnell, do you attend the meetings?

Mr Pragnell—I attend some of the meetings—superannuation, industry liaison group, and superannuation advisory committee on an occasional basis.

Senator HOGG—Are there reports generated out of those meetings?

Mr Pragnell—I believe so, yes.

Senator HOGG—Would they refer to any matters raised?

Mr Pragnell—They should.

Senator HOGG—In your recollection of reading those reports, has that issue come up?

Mr Pragnell—That particular issue has generally not been raised, but I must caution that our consultations with the tax office on superannuation matters generally have been restricted to issues regarding the superannuation surcharge and its administration, the transfer of self-managed funds from APRA to the ATO, PAYING, et cetera. Quite often they have been focused on administering existing law.

Senator HOGG—Could you take it on notice and check any minutes arising out of those reports to see if there is any reference to the issue?

Mr Pragnell—Yes.

Senator SHERRY—Just further to Senator Hogg's question, could you come back to us and let us know who from your organisation is represented on the technical liaison committee of the Australian Taxation Office, and perhaps provide us with a full list of who the representatives are on the other tax consultative committees, and also were or not minutes of those meetings are circulated?

Mr Pragnell—Yes.

Senator SHERRY—Also, Mr Pragnell, are you aware whether or not the tax office has issued any private binding rulings relating to the issues under consideration in this legislation?

Mr Pragnell—Only what I read in the media. As much as I can say is that my understanding would be that—

Senator SHERRY—Ms Orchard, I have put a number of questions to Mr Pragnell, and he has been reasonably informative. What about your knowledge? Do you have any knowledge of the particular issues that I have raised with Mr Pragnell?

Mrs Orchard—Nothing in addition to what Brad has said.

Senator SHERRY—I did not ask you that. I asked if you, in your knowledge, have any knowledge about any of the issues which I have raised with him?

Mrs Orchard—Only that which has been publicly available in the media.

Senator SHERRY—Thank you.

Senator CONROY—Mr Pragnell, given you described these schemes as 'laundering' and 'contrived', do you believe that in those circumstances retrospective legislation is a reasonable response from the government?

Mr Pragnell—I think my comments on the laundering and the contrivance of these measures was based more on my reading of the publicly available material in regard to that. I could not claim a deep technical understanding of which aspects of tax law are at work. Introducing the amendment through legislation would then impact on any rulings decisions that have previously been made. Like I say, when I used those words I was commenting more on what was being generally raised in public reports.

Senator CONROY—I thought you gave quite a good technical description of the ‘round robin’ elements, you might say.

Senator HOGG—I thought you did very well too.

Mr Pragnell—Thank you.

Senator CONROY—I thought you showed quite an understanding.

Mr Pragnell—Again.

Senator SHERRY—You are a witness of significant standing before this committee.

CHAIR—Just be careful.

Mr Pragnell—I agree.

Senator CONROY—So you do not know whether or not this legislation will actually stop it; is that what you are saying?

Mr Pragnell—I could not comment. The intent of the legislation is to prevent it going forward.

Senator CONROY—Going forward?

Mr Pragnell—Yes.

Senator CONROY—And you support that intent?

Mr Pragnell—As long as it does not adversely impact on legitimate remuneration policies by employers.

Senator CONROY—Sure. So you support the intent going forward? What I am asking is: do you support the intent if it was to be going backwards to capture the money that has been laundered?

Mr Pragnell—I would have to say we have not developed a position on that basis, and I would have to do further consultation with my members.

Senator CONROY—Is there a better example that you could find? I mean when you describe it so colourfully as ‘laundered’, is there a better example of the need for a retrospective legislation, in your view?

Mr Pragnell—We do not have a position on that and I cannot make a comment from our organisation’s position.

Senator HOGG—How quickly could you get a position on that, Mr Pragnell?

Senator CONROY—In about three years?

Mr Pragnell—We try to widely consult with our members. We would have to take the issue under review and we could come back with a position but by that time I am sure we all would have moved onto another topic.

Senator HOGG—I thought you could work faster than that!

CHAIR—I remind the Senate of course that the operative date is the date it receives royal assent so there is not a retrospective—

Senator CONROY—I am not suggesting this was retrospective. I was just asking Mr Pragnell if he thought it should be.

CHAIR—I am just clarifying the intent of the bill.

Senator SHERRY—On that issue of retrospectivity: Mr Pragnell, the sums of money involved in this crackdown have been compared to bottom-of-the-harbour schemes, which I am sure you are familiar with, which as I recall were dealt with by retrospective legislation.

Senator LIGHTFOOT—I recall that too.

Senator SHERRY—Yes, I know you might recall it Senator Lightfoot for other reasons. In that case, there were very serious issues of tax evasion, massive amounts of money. Apparently we have a similar circumstance. Don’t you think a retrospective crackdown is justified?

Mr Pragnell—I would not want to comment again on this particular issue. I think the general position of our organisation has been that retrospective legislation must be entered into with a considerable amount of thought going through about the ramifications, particularly if people have been making what they thought at the time were very legitimate decisions. Generally, our view has been that tax legislation should generally try to go forward.

Mrs Orchard—One of the things to consider is that in our submission—this applies also to the submissions of some of the other people here today—we have highlighted some circumstances where people have entered into, in good faith, employment arrangements in a country where there is a compulsory superannuation contribution amount. They then need to pay back tax which they have claimed as a deduction which they believed to be within the scope of the legislation at the time. We need to consider those aspects. While there may be other

arrangements which this legislation is trying to look at, there are also circumstances where employers have entered into arrangements in good faith that we need to consider.

CHAIR—So the institute's view is that the bill has desirable features in terms of good tax law, and you are seeking an amendment to pick up the situation where there are obligations by expatriates in terms of their resident overseas country.

Mrs Orchard—What we looked at in our submission was that, (1), there is a compulsory element and, (2), the person is actually working in that country, so that there is a nexus with the country in which the contribution is being made. That would help highlight that the person has entered into this arrangement in good faith.

CHAIR—There being no other questions, I thank you both for appearing.

[3.57 p.m.]

PETROULIAS, Mr Nick (Private capacity)

CHAIR—Welcome, Mr Petroulias. I have asked that the statement you have been handed be given to all the witnesses and everybody attending the hearing. I understand you have read it; thank you very much. In relation to your submission, there were a couple of features that we should deal with before I declare it to be available for publication. Under item 7 there were three words that the committee had some problem with. We did not want it to cause some problems. Also, in paragraph 11, the last five lines, commencing with ‘At the same time’, will have to be excised.

Senator CONROY—How does that reflect on the court case?

CHAIR—It was believed that it could, given the potential for a criminal trial.

Senator CONROY—It is an opinion.

CHAIR—It is an opinion which has the potential to reflect on a possible future trial.

Senator CONROY—It is an opinion on an individual.

CHAIR—It contains adverse comment that is not essential to a bill.

Senator CONROY—The person who is adversely commented on has the right of reply and has the right to come and attend to respond.

CHAIR—Yes, but at the same time I think it is the responsibility of this committee to ensure that the prime purpose of this inquiry today is to examine a bill which is currently before the parliament, rather than to go into wider issues, some of which have been canvassed by other committees.

Senator CONROY—But this is commentary on the lack of action over the time it took to bring the bill in. This is not a commentary about a court case.

CHAIR—Senator, if you have problems with the extent to which it has been suggested that some of the submission be excised, if it is the wish of the committee that we go into private session, we will do so.

Senator ALLISON—I think we need to, Chair.

Senator SHERRY—Before we do that, does the witness stand by the comment?

CHAIR—At the moment I do not want the matter discussed, that is, not until we have concluded our private hearing.

Mr Petroulias—Can one of the members show me a highlighted copy of what it is that we are talking about?

CHAIR—No problem.

Mr Petroulias—This is definitely my view.

CHAIR—I suggest we go into private committee. If the committee would like to meet in the other room, we will do so.

Proceedings suspended from 4.01 p.m. to 4.03 p.m.

CHAIR—It has been unanimously agreed by the committee that those words be excised. With those words being excised, the document will be available for publication. That refers to paragraph 7 and paragraph 11.

Senator CONROY—Starting with the word ‘at’.

CHAIR—The document has been authorised for publication, providing that those words in paragraphs 7 and 11 are deleted. I thank the committee. Mr Petroulias, do you have any further comments to make on the capacity in which you appear?

Mr Petroulias—Although I appear in a private capacity, I am a barrister and solicitor who has some expertise in this area.

CHAIR—I now invite you to make your opening statement.

Mr Petroulias—My concern in addressing the committee is largely in relation to the provision where the parliament—with the bill in its current form—would make a statement of fact that the law as it is going to be was the way it always has been, which I think is a matter that should be subject to some discussion. Later I will talk about a further concern: the blatant way in which the availability of deduction has been denied in these cases, and whether that is entirely reasonable or whether the existing legislation provides reasonable limits for which the objectives can be achieved without necessarily any amendment at all, and, if amendment is desirable, whether there are means of capping it and thereby avoiding the adverse consequences which the tax office is now apparently concerned with.

CHAIR—Would you like to—

Mr Petroulias—Shall we start at the start? A good place to start is at the beginning and go to the end and stop, I suppose.

Senator SHERRY—Provided there is sufficient time to ask questions.

CHAIR—Yes.

Senator SHERRY—The witness should be aware we have restricted time, unfortunately.

Mr Petroulias—Certainly. If I may pick up from Senator Sherry's observations to the previous witness, which indicate a certain interest which I can address quickly. There are essentially two types of superannuation schemes which the ATO have been concerned with—those where it is just a general contribution to an offshore fund on behalf of members of a group and those where it is on behalf of a person with a controlling interest in a private company. It is beyond doubt that these are matters which the ATO has been giving a favourable view to for well over a decade.

In the case of controlling interest superannuation, the first such example was on 5 April 1991. Unlike with the current version of the legislation, at that point in time there were no age based limits, so what the tax office was agreeing to was that a controller could make unlimited contributions to a complying fund—and at that time there was no contributions tax or surcharge, not unlike what is being complained about now. The matter had been with the ATO for some time, but owing to the popularity of other tax avoidance arrangements there wasn't any need for the tax advisory community to really push that particular strategy—there were other things available. A paper was produced later—and I table that—by the Superannuation Technical Committee of the ATO, and in particular by Mr Graham Collie who is the head—

CHAIR—Is that a publicly available document?

Mr Petroulias—It is available to me. There is nothing that refers to a taxpayer or could prejudice any adviser. In fact all references are to pretend names—for example Tim who is aged 40 and a medical specialist. They are hypothetical cases.

CHAIR—We may have to review these in the light of what I mentioned earlier.

Mr Petroulias—I am not disposed towards giving anyone any private affairs of any taxpayer. That is certainly not what is being considered here.

CHAIR—No.

Mr Petroulias—What is being considered here is the level of knowledge of and the level of research which was being conducted by the tax office at that time. These are publicly funded positions and they are undertaking research using the public dollar, so I think it would be fair to say that we would like to know what we are paying for as members of the community. The paper by Mr Graham Collie dated 27 July 1998 refers to three versions of the controlling super arrangement—

Senator ALLISON—Excuse me, Chair, if this document is being tabled, could we all have a copy of it since it is being referred to?

CHAIR—I am not quite sure. There is a lot of information in this.

Senator SHERRY—It is not up to you to determine that, it is for the committee to determine, so we should have a copy of the document and, as a committee, determine what to do with it at the appropriate time.

CHAIR—I intend to give the committee an opportunity to look at it, but there may be other documents and I thought we could deal with them all together.

Senator SHERRY—Thank you.

Mr Petroulias—I agree. I will refer to some salient features upon which I can then be either questioned or brought in to deal with at a later time, if the committee feel so inclined. The salient feature here that Mr Collie is referring to is in *SIA Snippets*, May-June 1998. That is an internal ATO publication which the intelligence area has mailed out to the ATO, so it is making it publicly known to the ATO what is going on. The May-June 1998 edition refers to the various controlling super arrangements which allow for double dipping of superannuation. Mr Collie pointed out that it had been mis-described, and he redescribed the arrangement, but agreed on the controlling interest position. The controlling interest superannuation position is referred to in arrangement 2 in a different format and again in arrangement 3, so there are three different variants. The conclusion Mr Collie comes to is that, technically, the interpretations are effective. On a literal interpretation of law, the arrangements are effective, but he does note that they do seem to be inconsistent with parliamentary intention.

CHAIR—Inconsistent with parliamentary intention?

Mr Petroulias—They are inconsistent with parliamentary intention underlying the law, but on a literal interpretation of the law they are technically effective. That was his position on 27 July 1998. I speak of Mr Collie not because I am suggesting that he is incorrect—in fact, I quite agree with his interpretation of the law—but because Mr Collie has considerable prominence in the superannuation community, having been deputy commissioner of the Insurance and Superannuation Commission and having a very wide following amongst the profession. To put it bluntly, he is highly respected. Since that day, we have had all sorts of rulings given. Again, the controlling interest was brought up, the superannuation thing was brought up, in Dandenong, on behalf of a major accounting firm—I am not, of course, disclosing any names—where it was considered in the FBT context and considered favourably by the tax office. Since then there were six positive rulings from Bankstown and other places approving controlling interest super.

In the commissioner's public statements, he says that there were at least three officers involved in every ruling. Six times three would be 18 officers, if my maths is correct. There were other rulings subsequent to the controlling interest super rulings which extended beyond controlling interest, because they were talking about borrowings to fund the controlling interest superannuation contributions. The issue raised by the taxpayers and their advisers was whether or not interest paid on the borrowings to fund the deduction would be available. From the commissioner's report, he obviously has a concern about borrowing, and yet these rulings are talking about the interest also being deductible. Further, there were another six rulings given from the national office in Canberra to an Adelaide financial planner, and I will allow Mr Carmody to tender those if he is ever asked to do so. There would again have been—six times three—18 ATO officers involved. Then there was a discovery of various abuses of these arrangements. I tender a handwritten comment in which Joseph Isouard of the Australian Taxation Office was asked to send to Graham Collie the 1991 ruling that was enclosed behind that letter and, if the ruling should no longer be continued, the instruction to Mr Isouard was to withdraw the ruling.

CHAIR—Excuse me, Mr Petroulias, we do not mind your concerns coming through, but I think we have to be careful about using people's names in the inquiry.

Mr Petroulias—These are tax officers; I am not referring to taxpayers. They are tax officers who would no doubt stand by their position—or one would expect them to, at least. So then we reach October 1998, when the tax office produced some minutes which were available to all its officers, where it has publicly sanctioned these arrangements. This is in response to the concern being raised by the tax profession. The profession was concerned that the ATO, if it does not make a public ruling on the matter, given the proliferation of private rulings and the popularity of these arrangements, is bound to do something—to use the word of the profession—draconian. In fact, that is pretty much what happened.

Don't forget that we are now into October 1998 and taxpayers have already lodged their 1998 returns; a lot of them are claiming high risk refunds on their tax returns and others are claiming what we call 221D instalment variations so that the employer does not take out tax owing to the fact that there is going to be a large deduction claim for controlling interest superannuation. One situation occurred in Newcastle. Taxpayers would say to the Newcastle office, 'Look, I am going to do one of those controlling super things and make a loss. Can I have a refund cheque?' The response from the Newcastle office was, 'Yes, yes, we know all about these,' and the cheque went out. In September 1998 Mr Adam Tooth in Sydney also gave another controlling interest super ruling with the consent and authorisation of Graham Colley. Mr Tooth went into some considerable research—

CHAIR—Again, I am not interested in the personalities. We want to know the problem. We want to know the need for the legislation to be changed and—

Mr Petroulias—I was merely suggesting that as a ready identification because there may be some difficulty—

Senator CONROY—You were trying to help Senator Watson with his concerns.

Mr Petroulias—We then have a range of disputed rulings which I will not talk to obviously as per the chairman's opening statement.

CHAIR—Thank you.

Mr Petroulias—Then we have on 15 February 1999 a letter to a publisher where it is made clear—this is a publisher of a superannuation newsletter that goes to 1,500 accountants and financial planners. The editor of this superannuation newsletter wants to make clear to the head of the Superannuation Technical Unit whether in fact the ATO accepts these controlling interest arrangements. The exact words of the ATO are:

The ATO has been advising clients that a taxpayer with a controlling interest in a company can make contributions to a super fund for his/her benefit as an eligible employee of that company, whether it is under 82AC, complying super funds, or 82AAE non-complying super funds.

It is rather unambiguous one would say. There were certain briefs that I instigated to Professor Richard Vann, to Chris Bevan and to Tony Pagone—

CHAIR—As I mentioned earlier, we are interested in the principle as to why it is necessary to put in the bill. It is not going to help the committee as to whether we should pass the bill or not pass the bill.

Senator CONROY—I think the paper trail is very helpful. This is the paper trail to create this bill.

CHAIR—It is quite possible that there could be matters arising from what is raised today which might be the subject of further inquiry. I do not think it is the role of this committee at the moment to conduct a further inquiry. We want to know the bona fides of the bill and why it is necessary to pass it in its present form or with any amendments that the committee feels it might be desirable to make.

Mr Petroulias—I am happy to accept that. If you like, the salient point of the advice sought was that, at this time—the start of 1999—there was a concern that perhaps an alternative view of the law could be developed. Until such time there was no alternative view other than to accept the arrangement. The first time there was a change of view was in the commissioner's press release of 19 May 1999, which had the public ruling TR99/5 which contained what is publicly known in the profession as the Churchillian speech—'We shall fight them on the beaches and never surrender.' Subsequent to that press release of 19 May 2000—

CHAIR—We do have a time constraint in respect of other witnesses. Again, if we can—

Mr Petroulias—Sure. The only interesting point to note is that, after that speech where the ATO has now said that it has made clearly known what its new position is, another six rulings were issued out of the Canberra national office after the commissioner's speech, which is strange in itself. If the committee wants copies of those—I do not carry all of them with me—there are plenty there.

CHAIR—The issue is a lack of consistency. Is that the point you are making?

Mr Petroulias—Not even after the public announcement of the commissioner, when he stated that he would take anyone to the High Court who dares take him on. The first point in relation to a controlling interest in superannuation is that it is unfair for those who have relied on a longstanding ATO policy to now be told that, somehow or other, the law is different from what it always has been. That addresses the first point in the bill, which I do not think this parliament should be party to—accepting a statement of fact in a bill. Second of all, it is very important to the idea of any suggested retrospectivity, particularly given that it was rather commonplace for people to ask for the ATO's views on it, to be told quite widely that it was all okay.

The other more general offshore super arrangement was founded on similar principles, but its history is even greater. We can go through a similar exercise, but this time it is far more extensive. It is sufficient to say, however, that the rules in this area are far more extensive in the general employee benefit offshore super arrangement. There is some handicap in not being able to refer to names; suffice to say that in mid-1997, before I had anything to do with the tax office in terms of my former position, a ruling was given. I draw the committee's attention to the reasons for the decision of the ruling, which favours the employee benefit trust—exactly the

same principle that has been adopted in relation to the offshore super funds. The reasons for the decision are:

With their request for advance opinion, the agents forwarded copies of two earlier requests with two copies of our replies.

CHAIR—I do not think this is germane to the bill.

Mr Petroulias—All I am suggesting is the next sentence, which says:

It is not proposed to change our policy and for this reason a reply has been prepared along the same lines.

In other words, the writer considers that there is a policy in 1997 of accepting these arrangements and does not propose to change it. I tender that ruling in evidence and, of course, it does not refer to any taxpayer.

There are, essentially, two types: the discretionary trust version and the unit trust version. The ATO took a dim view of the original discretionary trust version in 1990, although it had originally approved it in 1989. That was an arrangement designed by a remuneration planning company and bought by a large superannuation fund. The ATO then changed its view but gave them a moratorium to allow them to keep marketing it until March 1991, when the new interpretation would be taken into effect. Yet, despite this change of view, the rest of the ATO would continue to give positive rulings regardless of the change of view in Melbourne and Brisbane. I tender a few examples of these rulings.

CHAIR—Perhaps we might have had enough of the history. Can you highlight whether you think the legislation is good legislation or what amendments you have?

Senator SHERRY—I agree. But, at this point, perhaps Mr Petroulias, given the impressive array of evidence he has presented so far, can write to the committee with further documents if he wishes. I think that would be very useful for our deliberations.

Mr Petroulias—Certainly.

CHAIR—That is the wish of the committee. Mr Petroulias, you can embark on the course of action of writing to the committee, and then we will not have to pressure you so much for time now because I am sure a lot of committee people have questions for you.

Mr Petroulias—Okay. Perhaps we should turn to questions, because you have thrown me off line.

CHAIR—Have we? Mr Petroulias, you are in favour of the legislation, are you?

Mr Petroulias—I think the legislation is unnecessary. And, if it is necessary, might not proper reasonable limits be put into place by which a reasonable amount of superannuation can be provided for?

CHAIR—If the legislation continues, have you any comment in relation to the matters raised by the Institute of Chartered Accountants, the CPAs and others that there could be people

disadvantaged who are resident overseas who have to comply with an overseas fund in terms of compulsory obligations?

Mr Petroulias—I quite agree with that. But there will also be the self-employed and the smaller companies who, for one reason or another, have their senior staff who do wish to move overseas in the near future, and to make a reasonable allowance for their superannuation would not be excessive.

CHAIR—What do you call a reasonable allowance?

Mr Petroulias—The legislation already states in sections 65 and 109 that, if there is an amount of deduction which is excessive, it would be disallowed anyway and be treated as a dividend to that individual. So there are already limits in the legislation prescribing reasonableness.

Senator CONROY—Is there a legal definition of excessive?

Mr Petroulias—No, because it is not an area that has been particularly well tested, which it should have been. Most of the examples which the commissioner has given are given to horrify us. It is something that would be more than sufficiently catered for by existing legislation.

Senator SHERRY—What is the bottom line: what sort of amounts of money have been channelled through the schemes that you have outlined and what are the tax implications in terms of revenue lost by these types of schemes and arrangements, in your expert estimate?

Mr Petroulias—My estimate would be that there would be approximately 10,000 non-complying super funds, with contributions of, let's say, between \$150,000 and \$250,000 on average, and there have been some large ones. Offshore funds became increasingly popular in 1999-2000, largely because of the awareness created by the commissioner. One individual firm concerned is known to have put about \$2 billion into offshore, New Zealand, super.

Senator SHERRY—Two billion?

Mr Petroulias—Yes, \$2 billion worth of funds contributed. When you add the other two or three major—

Senator SHERRY—This \$2 billion is in one year for one company?

Mr Petroulias—No, in two years.

Senator SHERRY—In two years?

Mr Petroulias—In 1999 and 2000. That is one firm.

Senator SHERRY—One firm?

Mr Petroulias—One firm. But whether or not that is actually a problem depends on—

Senator CONROY—Your definition of the word ‘excessive’, perhaps?

Senator SHERRY—You are sure it is \$2 billion, not \$2 million?

Mr Petroulias—No, \$2 billion is for one firm involved in offshore superannuation.

Senator SHERRY—Okay. I just find this figure staggering.

Mr Petroulias—It is a considerable sum of money.

Senator CONROY—You are very modest, Mr Petroulias.

Mr Petroulias—The point, however, is that the examples that have been illustrated as to the arrangements being inappropriate, in the sense that there is money contributed and it is loaned back and used in the ordinary course of business, is not effective. I do not think there is anyone with any credibility who would argue that it is effective. That sort of money is not lost. That sort of abuse would always be subject to audit and would be struck down anyway.

The only things that would escape, on my interpretation of the law, are those that are actually legitimate provisions for superannuation, albeit that they may be large but are actually used for the purposes of superannuation and invested properly. So there is a bit of a tautological problem when we say how much money is lost. If it was available to people in the first place, it really has not been lost; if it has been abused, then it will be struck down.

Senator CONROY—Two billion sounds like it was not going into what you are describing as legitimate.

Mr Petroulias—I am hamstrung here because I am not permitted to explain the history. The history colours the emotional language. For example, where there is a loan funded contribution that is invested into a life insurance bond offshore, that might now look aggressive and somewhat bizarre. If I could show you the history, in 1988, 1989 and 1990 that was something that was rather commonplace with large well-known institutions. If you can compare history, it ain't that bad, to use rather colloquial language. You asked upon which benchmark we are operating. I was trying to provide the history so that we could have this benchmark but that is obviously now not pursued.

Senator SHERRY—What are the tax advantages for putting these sums of money in these schemes?

Mr Petroulias—There is a deduction for the amount of the contribution without the surcharge. Once the amount goes into an offshore fund, invariably that jurisdiction will be one that is favourable in that it will not have the tax burden imposed on the investment. There will be a large tax deduction and that money will then be invested for the next 10 or 20 years with no tax. There is a code for the return of that money to Australia. It is already provided for in the tax act. Essentially, that code provides that the amount that has already been deducted comes back tax free. The growth in the 10-year period is supposed to be taxed when it is brought back but that code does not work and, invariably, that whole amount will be brought back tax free.

Senator SHERRY—What taxes are they avoiding? Is it surcharge, income tax, FBT?

Mr Petroulias—That is right, and contributions tax.

Senator SHERRY—And super contributions tax. Has the incentive to be more creative and put more moneys into these schemes been driven, in part, by the super surcharge?

Mr Petroulias—Absolutely. It is not so much that the super surcharge provides a moral justification for it. What it does is provide a market for advisers to be able to suggest that particular arrangement.

Senator CONROY—Providing moral support for it only if you believe taxation is theft.

Mr Petroulias—That is a view that exists.

Senator SHERRY—Are the sorts of people putting money into these schemes your average wage earner on \$38,000 a year?

Mr Petroulias—No. It is usually small business, large business and small to medium business.

Senator SHERRY—What sort of income range are we talking about here?

Mr Petroulias—I would like to use the example of \$150,000 to \$200,000, with probably \$200,000 being the average. I cannot decide but somewhere around that is the average. That would be someone who would have that sort of figure as taxable income in a year. We are looking at something with a turnover of about \$800,000 or \$900,000, leaving a taxable income of about \$300,000 a year.

Senator SHERRY—If the average wage and salary earner—the PAYE taxpayer—cannot get away with not paying income tax, FBT, super contributions tax and super surcharge, why should these people be allowed to get away with not paying tax? The law apparently allows them to do so.

Mr Petroulias—It is not so much that the law allows them. That is one area. I cannot properly answer without going into the history of it. We undertook some serious research as to what was the intention. There has been so much amendment that the whole intention behind these provisions seems to have been blurred. On my personal interpretation, there was a repeal of some part of the contributions tax which provided the opportunity for this to occur. That is in relation to controlling interest super. I just make one comment here. The 10,000 controlling super type funds that I think are out there are based on evidence I discovered after going into private practice where information is a lot more forthcoming than it would be to the Australian Taxation Office.

Senator SHERRY—So you leave the Australian Taxation Office to get more detailed information about tax evasion?

Mr Petroulias—The tax office culture has not been conducive to getting the profession to talk to them about what they are doing. I tried to change that culture, to my detriment—

CHAIR—I think we would be better not pursuing that, if you wouldn't mind.

Senator SHERRY—With the 10,000 figure you mentioned, we were trying to establish some quantum of money: what was the average amount going into these 10,000 funds?

Mr Petroulias—I would say between 150 and 200.

Senator SHERRY—Given what you have outlined, did you at any time approach anyone in the tax office about changing the law and/or the rulings?

Mr Petroulias—Certainly. What is difficult to appreciate is that, if we were talking about reasonable amounts, we would not be having this discussion now. If there were a benchmark for determining what is a reasonable employee benefit arrangement type of figure, then really we would not be panicking about revenue being lost. The example is in the UK, where they do have an employee benefit trust which is published and widely available. I was working to reach that sort of position so—I think I have lost your question.

Senator SHERRY—My question was: did you develop a concern about the massive amounts of money and did you express this concern to anyone in the tax office about changing the law and/or the rulings in this area?

Mr Petroulias—Yes. First, I thought the best way to handle that would be to find some agreement as to what are reasonable amounts and to have that publicly available. Failing that, in the existing law, when it became obvious that these things were being abused, there was an attempt to amend the law—which was not met with great enthusiasm.

CHAIR—I think we have got to watch our time, because other witnesses are starting to look at their watches.

Senator SHERRY—I understand that we have got to watch the time.

CHAIR—We have laid down a timetable and, if other witnesses are to catch planes, it is a bit unfair.

Senator SHERRY—I know it is difficult, but this is evidence critical to the basis of the bill we are considering; so I think we have got to give him some latitude. It is pretty important evidence.

Mr Petroulias—As I said, the FBT law as it stands is unfortunate in that it will not catch these employee benefit arrangements; and an amendment, if it were required, would be there. There was also some external advice sought. I am not allowed to mention names, but there was some external advice sought—

Senator SHERRY—When?

Mr Petroulias—September onwards.

Senator SHERRY—September of which year?

Mr Petroulias—Of 1998. I am sorry: I live in my own little world time frame.

Senator SHERRY—It is okay, we understand it is difficult. So in September of 1998, did you approach someone in the tax office about possible changes to the law or the rulings?

Mr Petroulias—That had been knocked backed.

Senator SHERRY—What do you mean by ‘knocked back’? By whom?

CHAIR—We are not having any names.

Senator SHERRY—He is not giving a name.

CHAIR—If he is asked ‘By whom?’—

Senator SHERRY—So you proposed a change?

Mr Petroulias—That is right.

Senator SHERRY—And you proposed this change?

Mr Petroulias—Personally, yes.

Senator SHERRY—And it had been ‘knocked back’, to use your words?

Mr Petroulias—That is correct.

Senator SHERRY—Okay. We will not worry about the names for the moment.

Senator CONROY—In which unit?

CHAIR—We do not really need to know who had policy involvement, either.

Mr Petroulias—The legislative policy area.

Senator SHERRY—Why was it knocked back?

Mr Petroulias—Because the view was that the existing law should be able to cater for it, and because there were other priorities at the time.

Senator CONROY—I thought the tax office’s own rulings, which are in tabled documents, said that the intent of parliament was one thing but the literal reading of the law said another.

Mr Petroulias—Yes.

Senator CONROY—So how could they say the existing legislation captured this?

Mr Petroulias—I think I am getting caught up in the same sort of mistake. Controlling interest is one thing; that is what that paper was addressing. I was about to turn to the more general one. I have not discussed that.

CHAIR—That would be subject to a different submission to the committee, which we have given you permission to make.

Mr Petroulias—Yes.

Senator SHERRY—So this was your first attempt. Were there any other attempts to change the law and/or the rulings?

Mr Petroulias—Put it this way: in any organisation there invariably is politics involved, and it was some satisfaction that—

CHAIR—I do not know that it is germane to talk about the internal politics of the Taxation Office.

Senator SHERRY—It is germane because it does give us some history, without naming names, regarding what the problem was and why it was not dealt with. That is germane to the bill we are considering this afternoon.

CHAIR—I must refer you to the fact that, as I mentioned in my opening statements, seemingly innocuous matters of fact may actually be an issue between prosecution and defence.

Senator CONROY—Matters of fact are matters of fact. They are not actually subject to debate.

CHAIR—Yes, but I do not know whether this is the appropriate forum for those matters of fact to be brought out. This is a committee that is just looking at the need for amending the bill. Mr Petroulias has expressed the view that he does not feel the amendments are necessary. Other witnesses have agreed to the amendments. Again, we do have limited time and there may be other senators who wish to ask questions. Therefore, I think the history and what goes on in the tax office could well be the subject of a further inquiry at a later date, but not today.

Senator SHERRY—There were other occasions in the tax office when you drew it to people's attention that these matters needed correcting?

Mr Petroulias—Yes. Since about November 1998 a significant overhaul had been instigated. The problem always was that there would be a revenue leak. You would try to close that leak, only to create another leak somewhere else. What we wanted was something more systemic. There was an intense amount of work being done to understand the policy, in getting the

consultant and barristers involved and in having a proper policy response to this whole area. That obviously did not eventuate.

Senator SHERRY—Were there a number of people in private practice actively promoting these schemes?

Mr Petroulias—Yes. Now this is an important question here because I have noticed from the commissioner's most recent speech that he used an example of one promoter showing a ruling and that somehow we are supposed to be outraged with the idea that 300 clients have gone into the same arrangement.

Senator CONROY—That is what they do for a living, isn't it?

Mr Petroulias—If you like, it is the peek-a-boo approach to the interpretation of law: 'Somehow or other if I keep a ruling in my pocket it is okay, but if I show it to somebody it somehow has a different interpretation'—which I think is bizarre. I have never been able to fully understand, if what you are promoting is consistent with reasonableness and its appropriateness is measured, why it is that promotion itself is such a nasty thing.

Senator SHERRY—I ask you to give us a list of people you have knowledge of who promoted these sorts of schemes. Obviously you cannot do that now, but could you could take that on notice?

Senator CONROY—I understand your query in terms of why, if a set of arrangements are in place and get a tick for one taxpayer, that would not be consistently applied across—

Mr Petroulias—We all do have the one law.

Senator CONROY—Yes. I guess Mr Sherman has been looking at that.

Senator SHERRY—I notice in a comment to the House of Representatives Standing Committee on Employment, Education and Workplace Relations, Mr D'Ascenzo gave public evidence referring to a figure of \$1.5 billion being the sum of money associated with particular schemes such that this legislation deals with. Do you have any comment to make about that figure?

Mr Petroulias—That could well be more correct. At that point in time he would be more likely to have a more up-to-date view of it, at least from the ATO's point of view.

Senator SHERRY—In your answer you seem to be expressing some doubt. Are you saying it is too low or too high?

Mr Petroulias—I would have thought that he, from private practice, would be in a better position to count the numbers than I would. But, on the other hand, from private practice you tend to see things that the ATO does not necessarily see.

CHAIR—Any other questions? Senator Conroy?

Senator CONROY—No.

Senator SHERRY—Sorry, Chair, could I give notice at this stage? I think, notwithstanding the legal actions, Mr Petroulias's evidence raises very serious issues about the internal conduct of the tax office in its approach to this massive laundering. They are not my words; they are the words of the previous witness.

CHAIR—Order! We have a witness—

Senator SHERRY—I will only take a second. Can I put you on notice that Mr Petroulias's evidence raises very serious concerns about the tax office's lack of effective monitoring in dealing with, to use a previous witness's evidence, 'laundering' of what amounts to billions of dollars and that these matters, from the Labor Party's point of view, will have to be taken further, either in this committee or in other venues, because these are very serious issues.

CHAIR—Yes. I remind the committee that our next witness has a plane booking, has children at home waiting and cannot wait, so can we continue.

Senator CONROY—We can call Mr Petroulias back after the next witness.

CHAIR—We could lose the opportunity of hearing from a valuable witness this afternoon. I think it would be quite unfair to bring somebody from interstate and not hear them.

Senator CONROY—We are happy to release Mr Petroulias now if he is available to hang around. We would not want to hold the next witnesses up.

CHAIR—The intent therefore is to proceed with Corporate Superannuation, because other witnesses may well be in the same position. It would probably be best to bring Mr Petroulias in as the last witness before the tax office.

[4.46 p.m.]

MONTANO, Ms Elizabeth Maria, Director, AUSTRAC

RYAN, Mr Paul Michael, Senior Manager, AUSTRAC

CHAIR—Welcome. Would you like to make an opening statement.

Ms Montano—Thank you very much for inviting us to appear before the committee. AUSTRAC's role in any tax work is in relation to being a support agency providing financial intelligence. We do that in a number of ways. We always look for opportunities to assist and to comment where we can in relation to these issues. In relation to superannuation, we have made a submission and commented on the kinds of services we can offer the tax office and are happy to answer any questions.

CHAIR—What is your connection with the tax office? Are you part of it?

Ms Montano—No.

CHAIR—What is your status and how do you interrelate, then?

Ms Montano—AUSTRAC is an agency created under the Financial Transaction Reports Act. It is independent and is not part of the tax office. It actually reports to the Minister for Justice and Customs under the Attorney-General's portfolio. The Financial Transaction Reports Act sets out Australia's anti money-laundering regulatory framework and provides for AUSTRAC to be both a specialist anti money-laundering regulator and a financial intelligence unit. So we regulate all of the financial services industry and others in relation to some kinds of transactions. That product of regulation is then analysed and disseminated by us to 26 agencies, of which the tax office is our biggest partner agency in terms of number of users and obviously in terms of some aspects of profile. The relationship is one of partner agencies where we try to support them in doing their work and try to help them as much as we can.

CHAIR—Mr Ryan, have you any comments in relation to the bill?

Mr Ryan—No comments at the moment.

CHAIR—So, basically, you are in favour of the legislation.

Ms Montano—We find it hard to comment in substance on the legislation per se, simply because we are not tax experts. Our role is not to give advice in relation to that.

CHAIR—But there is a revenue leakage problem that you are concerned about.

Ms Montano—It would certainly appear from the feedback we have received from the tax office that this is an issue. In relation to this sort of matter, we rely on the feedback we get from the tax office. Our submission refers to a fairly serious matter, which the tax commissioner commented on last year and which we noted in our last but one annual report, in relation to

some schemes that have been discovered which had been first detected through the money trail—that is, the leakage of funds overseas.

One of the financial transaction types that we collect and make available to agencies generally—not only the tax office but to law enforcement agencies—is all the international transfers that are made into and out of the country. When in fact the funds are moved, we have a record of that. As to whether it is understood to be that is a matter of analysis to be made by the tax office and us, using the tools that we have.

Senator CONROY—A lot of your work is in the drug money-laundering area—and I know this because I have been lucky enough to have been on the National Crime Authority committee and visited your work—so the volumes you are looking for are usually quite substantial.

Ms Montano—We look for patterns. Some of those patterns comprise very large sums of money going off very quickly, or it may be that they are structured so that they try to look small and inconsequential but in fact they are a pattern of quite a large stream. With tax evasion, whether you are moving money that should be paid in tax or whether you are moving the proceeds of drugs, often the methodologies are the same. Often the tools that we develop are useful for both the law enforcement and the revenue agencies.

Senator CONROY—When you saw these volumes moving off, did it immediately occur to you at the time that it was tax evasion or that it was more likely to be drugs?

Ms Montano—Because we are the analysis unit, there are some matters which we refer on to the actual agencies but, because the agencies themselves have online access, we develop tools for them to analyse the database. We actually do not know in advance about a lot of the things they look for. We find out through our feedback mechanisms under our memoranda of understanding. Often, while we know in general terms what they are looking for, we will not actually know the particular ones. We have hundreds of thousands of hits on our database every year and, being an agency of a very small number of people, obviously, we actually do not know about all of those. We find out about those in terms of the feedback later.

We have audit trails and they can all be traced, but we do not positively disseminate that information out on every case. For example, if we had a suspect transaction report—which is one of the categories of reports we get—which said that bank X is concerned about professional Y because it is thought they are moving funds offshore and it might be super, then that would immediately ring the alarm bells and go off to Tax. But they tend not to know that that is the underlying purpose. The way we deal with that is to provide a range of tools where the agencies themselves can drill down if there are some particular words that they are looking for: ‘superannuation’, ‘as per agreement’ and certain sorts of key words. They vary, depending on which agency is looking for what sort of thing.

Obviously, particular groups have a different kind of language which they use for what they are doing. That can be searched also. The free text of all the reports can be searched, including the location and the destination of where it is going to—particular tax havens, particular countries of concern. Obviously there are industry types. There is a whole datamart facility, and you can basically slice and dice it in a million different ways to find the information you are looking for. They do that themselves with the tool we provide them.

Senator SHERRY—You have identified key words such as ‘destination’, ‘superannuation’ and ‘trust’, which I suppose is ‘trust scheme’. Do you know of the volumes of money in a year or in a period associated with that particular word heading overseas?

Ms Montano—We have not done that analysis. It would be of limited value, because we could not tell from that alone whether they were in fact legitimate or illegitimate. For example, the best way—

Senator SHERRY—I am not asking whether they are legitimate or illegitimate, but do you know the total volume of that category?

Ms Montano—No, we have not analysed it. We could go and have a look, but we have not done it because it is not of much use unless we have the other information to weed out—what is of interest because it is not legitimate and what is not. We get all the messages, so it does not matter what their source is or what they are about. We get everything from \$1 to whatever.

Senator SHERRY—When you say you get all the messages, what about cash?

Ms Montano—We get large cash transactions—

Senator SHERRY—No, I am talking about cash in a suitcase and not cash over an electronic transfer or cheque?

Ms Montano—No, I was talking about cash. We get cash in two different ways, or three potentially. The straight cash objective test is \$10,000 or more with which you walk into or out of a bank, casino or whatever, plus we also get \$10,000 or more that walks out in suitcases. When you are cross-border and you fill in your customs forms and you see the big signs hanging up ‘Are you carrying \$10,000 or more?’ that is a report for AUSTRAC, and similarly when you bring it into the country. Obviously, one of the classic ways of moving it is to just walk it out. So we get cash reports and we get the cash going into and out of financial institutions. As to how this sort of money would move, it depends, I suppose, on which way they are given it to actually go into the schemes.

The other way we could get it, the third category, is through a suspect transaction report. The institutions report to us something that might be unusual and they might name a particular professional group—I do not want to name any—and a particular adviser who is doing this or that, and they think it is a bit odd. We have detected quite a few cases for other regulators in relation to some kinds of activities going on with particular groups, where it looks pretty obvious from the language of the report that something funny is going on. It is usually because the bank has made a judgment call about something looking odd for a particular person’s business.

Senator SHERRY—Have you been able to identify increased activity in respect of these overseas transactions, compared with five years or 10 years ago?

Ms Montano—The number of international reports generally increases substantially every year. Mr Ryan might have the increase from last year.

Mr Ryan—They are not in the estimates that we have. Certainly our annual report would carry those figures of the increases in international funds transfers over the past five years.

Ms Montano—We get over \$5 million international funds transfers a year.

CHAIR—Have you been able to identify superannuation moneys coming back that have been the subject of—

Ms Montano—If it comes back in as an international transfer and if it was in the free text, for example, that it was for a deposit into a superannuation account or whatever, then that free text search would pick up those words and could identify that. But without that, if it was just a sum of money per se, you do not know what it is. It is a combination of using that financial transaction and whatever extra information the free text will give you in those sorts of messages. Some people put a lot in their free text because they use it as part of their record keeping and some do not. So there is that, but it is usually that, combined with other intelligence. From the tax office's point of view, it is data matching. If they have—

CHAIR—You are not able to get a figure about there being \$500,000 or \$1 billion that has come back into Australia?

Ms Montano—I could not give you one, simply because we do not know; we have nothing to compare it against.

Senator SHERRY—You did offer earlier to obtain that information. That would be useful for the committee. There might be a form in which it is confidential—

Ms Montano —I would have to check because we have secrecy provisions. I think aggregating in this way—

Senator SHERRY—We are talking about an aggregate total figure in this category. The other area that particularly interests some members of the committee is New Zealand—and there has been some discussion about this. I understand that New Zealand has been a favourite destination in respect to superannuation. Do you have any comments to make about that?

Ms Montano—Certainly the one that the tax commission identified and which we were then given feedback on was about New Zealand.

Senator CONROY—So, you picked it up first?

Ms Montano—What we do—

Senator CONROY—They talk about \$1.5 billion.

Ms Montano—What happened is that it is on their database. Someone has gone in and done the search and found that unusual stream of activity and then used that with the other ATO intelligence and gone, 'Bingo, we have a hit here.' They have done their usual searches and

found that. There may well be others, but we cannot tell on our own. We need the ATO to provide their input.

Senator SHERRY—I take it that you are here supporting the legislation to crack down in this area?

Ms Montano—The principle in the sense of anything that will help deal with what may well be huge sums of money leaving which should not be leaving, yes. As to the merits of the particular bill, I am not a tax lawyer. I have no expertise in the area. I am a lawyer, but I am not a tax lawyer. I am enough of a lawyer to know that you do not talk about tax matters unless you really understand them. In the sense of getting professional opinion, it is such a complicated area.

Senator SHERRY—I am a bit puzzled. The ATO annual report on page 70 says, ‘Employee benefit arrangements continue to be marketed by some even after we made clear that, in our view, these arrangements were not effective under the existing law including by virtue of general anti-avoidance provisions. This has been our consistent position in our advice to government. It also remains our position. However, because of this continued marketing and participation, the government announced in June this year that it would introduce legislative amendments to address controlling interests in offshore superannuation schemes.’ That is what this bill is dealing with. I am just puzzled as to why the Australian Taxation Office has said there is not a problem but there is a problem. You have identified a problem. Why now?

Ms Montano—I cannot comment on what they have identified because I am not the Australian Taxation Office and I am not qualified to talk about that. I do not even know that much per se about why you would need specific legislation if it does come under the general anti-avoidance provisions. What we do is identify money flows. We can take a view as to whether the money flows are legitimate or not, but unless the agency that is operational, whether it be the NCA to see whether it is drug money going to Colombia or whether it is super money going to New Zealand, the agency has to add the background and the expertise as to whether this is bad or good. We just get everything; we get the whole range. It is a good guy database. About 95 per cent or more of the transactions on the database are totally normal commercial and personal transactions.

We can do some analysis which highlights suspiciousness as to whether they are not, given the feedback we have received about the way people do things, the sorts of destinations the agencies are interested in, and the sorts of identifiers where the particular professional groups or occupation groups are suspect in activities as couriers or middle people or whatever. We can then say that our analysis when we do our profiling shows this is an unusual stream which may be of interest to you, a particular agency. We do those sorts of referrals. We refer a lot of things to the tax office as we do to lots of other agencies.

When they want specific stuff about particular kinds of activity, we provide tools through a data warehouse that can give everything that has the word ‘superannuation’ in it that goes to New Zealand. It involves these particular groups between these time frames. They could get a group of that. As to whether that is useful and how much that tells them about legitimate and illegitimate activity, they would have to add their own intelligence sources. This is a tool. There

is not a screen that comes up saying, 'Warning! Warning! Illegitimate funds here' or 'Proceeds of drugs' or whatever. It is just a tool they can use with their other holdings.

Senator SHERRY—But do you believe the Australian Tax Office is right to be concerned now about the significant amounts of money in respect to superannuation, whether it is to New Zealand or elsewhere?

Ms Montano—I would have thought they should always be concerned about funds going out that should not be going out. I cannot make a comment historically because it is not something that we have really looked at or been involved in historically.

Senator SHERRY—So it is only in recent years that the tax office have asked you to look at or provide data in this area or given you feedback?

Ms Montano—I think there is a basic assumption in what you are saying. That is that somehow we only give them what they ask for. They have online access to everything. They can go into all the tools; they can use them. They can ask for anything and they do not, necessarily, tell us individual cases. We rely on the feedback from them as to what they have done with it and how useful it is. We develop tools for them in a generic sense. We will say, 'Do you need to be able to drill down to particular groups using particular criteria?' If that is a yes, we will develop a tool and they will use it.

Senator SHERRY—Has the tax office given you feedback on this area of superannuation funds that we are dealing with in this legislation?

Ms Montano—They have given very general feedback. Mr Ryan can probably talk in detail because I think he actually did the research.

Mr Ryan—It has been general feedback in terms of just telling us that they have detected some instances of large funds movements out of Australia in relation to superannuation contributions that have helped them to detect some schemes. But in terms of providing case histories and that sort of thing, we do not get that detail.

Senator SHERRY—What about an historical overview? Has it been more this year than last or more this year than 10 years ago?

Mr Ryan—No. You are talking about feedback from the tax office historically?

Senator SHERRY—Yes.

Mr Ryan—No, we do not get any historical overview or analysis from year to year in terms of the extent to which money is being moved offshore and whether it represents superannuation funds and what percentage that represents of possible tax evasion. No; we do not get that detail.

Senator SHERRY—I do not know whether there is a resourcing issue: do you believe you are correctly resourced in terms of funding and staff, given the significant increase in transactions, movements of money, new technology and new tax minimisation schemes?

Ms Montano—All IT oriented organisations could always ask for more money for IT. There are always new products. We do the best we can. We actually have very sophisticated IT, in international terms, in terms of how we collect the information: 99 per cent electronically, with very little paper reporting, very sophisticated analysis tools and online dissemination. There is a lot of material already there and there is a lot of capability already there. The real issue is how well it is used, and that is an educational exercise for everyone who uses this. Financial intelligence, as an art, is relatively young, and a lot of agencies are still coming to grips with how you use it in the best way, in terms of how you experiment with it to see what it can give you that may not be apparent on the surface and how you combine it with other intelligence sources. We could always have more thinking power, but you also have to make the best use of what you have, and we are trying to do that.

Senator SHERRY—Do you believe you have sufficient resources to do an effective job?

Ms Montano—AUSTRAC does, in the sense of doing its analytical work at the moment; but, as I said, all IT organisations, to stay at the front, have to keep on doing it and replace and update. There are new matching techniques coming up all the time which make you more efficient. Do you use them or do you stay with the old ones?

Senator SHERRY—Are you involved in the government's outsourcing program?

Ms Montano—AUSTRAC's IT was outsourced from day one, which was a cabinet decision when it was created in 1988. It was a special case, in the sense that it was going to be electronic reporting and the first time it was done in the world. To date, we are the only country in the world that does it the way we do it, in the sense of full integration of IT and external resources with public servants. Our IT facilities are owned by the agency, but the personnel and the expertise is contracted. If we need, for example, a developer to develop us a web based application because we are going into online data collection from the banks and so forth that we get data from, we will go out and hire someone and they will come in on a 12-month contract. They will do the development work and then they will leave. We have the same sort of contract base with all the maintenance IT people and the development people. We have already had that in place, but it is very in-house oriented. They report to me and they go under our normal security and privacy obligations and all those sorts of issues. They are directly contracted IT skills.

CHAIR—Thank you very much. I hope we have given you enough time to catch your plane.

Ms Montano—Thank you, I appreciate that very much.

CHAIR—Thank you very much for coming.

[5.09 p.m.]

BROOKES, Mr Nicholas Duncan Jeremy, Chief Executive, Corporate Superannuation Association

CHAIR—Welcome. Would you like to make an opening statement?

Mr Brookes—Yes. I thank you for the opportunity of appearing today. I am going to be brief and crisp, and hopefully Churchillian, and save you some time. I will rattle through this in about one minute. I appreciate the time today but I need not stay long.

CHAIR—Don't feel you are pressured for time.

Mr Brookes—It is very simple from our point of view. Basically, the association speaks on behalf of roughly 75 per cent of the total assets in the corporate super sector in Australia. Significantly, that is only two per cent in terms of the numbers of schemes—assuming they are roughly 2,000-odd or even corporate schemes in Australia. From our point of view, several of our members are large employers who are interested in overseas businesses, either subsidiaries or as part of their global business. Broadly speaking, our position on the bill—again without knowing all the fine detail about what has been happening and looking at it with tunnel vision—is that we would support any legislation that seeks to address apparent areas of tax evasion. I think it is a matter of decency and ethics.

We are a little worried that probably one of the unforeseen effects of the proposed bill would be to penalise the good guys as well as the bad guys. The good guys are bona fide corporates. There are two situations there that have a common problem: firstly, global businesses and Australian taxpayers and, secondly, Australian taxpayers who have foreign subsidiaries. In both cases, we have positions there where, for either the local employee or the expat who is brought in here, the corporate is obliged to contribute to the local superannuation fund of that employee. Local is non-resident. Non-resident means non-complying fund according to the definition here. The non-complying fund would say that there would be no tax deduction for the contribution, and there may or may not be FBT on the contribution. So that is our worry.

If you would like, I could move on to the recommendations of what we would like to see in terms of perhaps an amendment to the bill, which we support in principle. The suggestion is that in order to levy this bill at where it is meant to be, to avoid throwing the baby out with the bath water, we would have to say: bona fide corporates would be exempt from provisions but they would get tax deductions for contributions. If you want to go further, you could then say that that should be within the age limits.

CHAIR—How do you define 'bona fide'?

Mr Brookes—It is difficult. There are several variations there. You could say that it could be according to size, perhaps with the public listing of the companies. But the safer test, to avoid any variation of that, would be to go for the age based limits. That brings you back to a structure that has already been tried and tested and approved in Australia.

CHAIR—An earlier witness suggested that it be limited to the equivalent to the superannuation guarantee, the compulsory component. If you use your age based formula, that would give a more generous deduction, wouldn't it?

Mr Brookes—It could do.

CHAIR—Why do you ask for that more generous deduction?

Mr Brookes—I think it is the reality of what we are looking at. Perhaps for senior executives the requirement may be to make a contribution that is in excess of SGC, but in no way whatsoever would our members seek to be using this as anything other than a contribution to superannuation.

CHAIR—You haven't got the forms of an amendment—some words that might—

Mr Brookes—I am sorry. I could send this—

CHAIR—Would you like to take some counsel on that and get back to us fairly quickly?

Mr Brookes—Yes, I would be delighted to. Like you, I am a little short of time.

Senator SHERRY—Have you had any discussions with the tax office about this legislation?

Mr Brookes—Yes, we have.

Senator SHERRY—Have they responded to your organisation's concerns?

Mr Brookes—We have had no positive response, no.

CHAIR—How long ago did you put it in?

Mr Brookes—We have had three meetings with them in the last couple of months and we have had no direct response on this particular issue—direct response being a positive response, I should say, to this issue.

Senator SHERRY—When did they first consult with your organisation?

Mr Brookes—Just after June or, I believe, in early July.

Senator SHERRY—This year?

Mr Brookes—Yes.

Senator SHERRY—Have they stated to your organisation the reasons for the change in the law?

Mr Brookes—They have expressed concern about the rorting or tax evasion that was happening and the need to introduce legislation to address that issue.

Senator SHERRY—Looking at the tax office's annual report for 1999-2000, and I have read it out previously, they make it clear that the arrangements that we are dealing with in this legislation are not effective under existing law, including by virtue of general anti-avoidance provisions. This has been our consistent position. Therefore, I am puzzled as to why we have legislation before us. Do you have a view?

Mr Brookes—Look, to be quite direct, as ever, about it, I think in that regard you would need a tax expert to answer that question, and I am not a tax expert. So, forgive me—I am not trying to avoid your question.

Senator SHERRY—No, I understand.

CHAIR—Thank you very much, Mr Brookes, for your presentation.

[5.15 p.m.]

LORIMER, Mr Michael Dale, Director and Chair of Policy Development Committee, Small Independent Superannuation Funds Association Ltd

CHAIR—Welcome. I invite you to make an opening statement.

Mr Lorimer—Firstly, I would like to thank you for seeking our participation once again in another one of the committee's inquiries. I guess at the outset the terms of reference in respect of this inquiry refer to the principal issue being the use of offshore superannuation schemes for tax evasion.

CHAIR—Control.

Mr Lorimer—Sorry?

CHAIR—Control of superannuation.

Mr Lorimer—The principal issue as set out in the initial terms of reference was specifically focused on the offshore schemes. I realise that the bill deals with other sorts of arrangements but from a purely technical perspective it would appear to us that the bill will give effect to the intended measures as stated. I have been present for a number of the earlier witnesses today, and it seems quite apparent that the real issue here is the appropriateness or otherwise of the manner in which this bill deals with these identified arrangements. In fact, I suppose the issue is whether or not this legislation is necessary. That seems to be the common thread. Having said that, as a general rule SISFA will certainly support any policy initiative that sets about clarifying any aspect of taxation legislation, particularly focusing on superannuation legislation, or indeed to defeat any identified exploitative tax evasion practices.

There are two identified issues that we raised in our submission that I would like to draw your attention to. Whilst they are not specifically relevant to the identified areas that this bill addresses, we do think that they warrant immediate further inquiry, whether through this forum or otherwise. Those are, in particular, the circumstances in which small superannuation funds become non-resident under our current tax laws, and, consequently, non-complying—and I will refer you to our submission in that regard—and, secondly—

CHAIR—You might just wish to spell that out for the *Hansard* record.

Mr Lorimer—Certainly. I think, principally in a lot of the media that was hanging off this superannuation contributions bill, there were concerns expressed that this bill itself was going to cause certain superannuation funds to become non-resident and therefore non-complying and all those sorts of things. Certainly from our perspective we had identified the superannuation fund residency issue under Australian income tax laws as being quite a separate policy measure. It had nothing to do, really, with what this current bill is all about.

The situation that I am referring to involves small superannuation funds that are principally self-managed superannuation funds—which, as you are all now aware, require all members to be trustees. The situation arises where one or more of those trustees, due to work commitments,

is posted overseas and may become a non-resident for tax purposes. Under the current residency rules that apply to superannuation funds, that could deem that superannuation fund to become non-resident, and non-resident funds cannot be complying funds for tax purposes. There are very punitive consequences under our current regime in that particular instance. As I said, that particular issue is quite independent of the operation of this bill. We also acknowledge that the government, through the Assistant Treasurer, has announced that it will be prepared to look at that particular issue and we would like to reaffirm our commitment to that issue to the committee and to ensure that it is dealt with sooner rather than later.

The other particular issue we would like to see pursued, and it has been referred to in the explanatory memorandum to this current bill, is the portability of benefits as between Australian superannuation funds and their overseas counterparts. The background there is that, at present, regulated complying superannuation funds in Australia are permitted to accept transfers of retirement benefits from foreign pension schemes and the like, but regulated Australian superannuation funds are unable to transfer members' benefits to overseas superannuation schemes. What I am talking about there is not the type of offshore superannuation arrangements identified in the aggressive tax planning schemes, but situations where Australian residents have accumulated substantial superannuation assets over time and decide to pack their bags and permanently leave Australia to take up residence overseas. Under our current laws, they are required to preserve their superannuation benefits in their Australian fund, typically until they attain the age of 55 years.

For the younger people potentially affected by that situation, you are looking at, in a lot of cases, a significant time frame before those Australian superannuation benefits become available to them in their new permanent place of residence. Once again, we acknowledge that the government has indicated—and this is referred to in the explanatory memorandum to this current bill on pages 10 and 11—that it favours in that regard bilateral negotiations with other countries to facilitate reciprocal agreements for the transfer of super funds by non-residents, on permanent departure from Australia. We would endorse that approach, but I believe that a firmer commitment on that particular issue is required and is something that needs to be dealt with immediately. Essentially, it deals with the portability of superannuation benefits.

In closing my own comments, a couple of questions that I would consider should be posed are these. It would appear that there were a number of these aggressive tax planning schemes identified—I think the figure mentioned was 10,000 or something like that. One of the witnesses earlier might have mentioned that there were 10,000 superannuation funds caught up in the controlling shareholder arrangements. A question from our perspective would be: of those 10,000 how many actually took up the tax office's voluntary settlement offer in May 1999, which came out with the commissioner's press release of 19 May? I am not aware of any statistics that have been gathered in that regard. It is one thing to say that 10,000 arrangements were identified; it is another thing to see how many actually took up the voluntary settlement offer or, alternatively, decided to continue with their position and face potential litigation.

Coming back to the point I made at the outset, it really does seem to come down to an issue of whether or not this legislation is necessary. It is probably fair to say that, in the absence of these particular amendments, some of the arrangements at the extreme of the spectrum would not have held up, particularly looking at superannuation arrangements where it appears quite clearly that the purpose of the contributions was other than for the provision of retirement

benefits and those sorts of things. I think the existing tax legislation, as it relates to super contributions in that regard, would be robust enough. Obviously, a number of these arrangements would appear to be contrived from the various positions identified by the tax office and others. They are contrivances upon contrivances upon contrivances; that would be my personal observation. Certainly, at the extreme end, my personal view is that the current legislation would adequately deal with them.

There seems to be a consensus shared in relation to the potential unintended consequences of this current bill—in particular, arrangements involving various scenarios of contributions being paid by Australian companies to non-resident funds in respect of their Australian employees or foreign employees—and, as a result of this legislation, those sorts of contributions facing adverse consequences. Typically, it is not an issue that we have been confronted with from SISFA's membership base. The previous witness referred to larger corporations, which may come across those instances more than the small business sector of the market, that we represent.

My question in that regard—I am not a tax practitioner; I am a superannuation practitioner wearing my commercial hat—is: under which provisions are contributions to genuine non-resident employee benefit funds currently permitted? Are they under the superannuation deduction provisions, or do they fall under some other deductibility provision under the tax act? I do not know the answer to that question, but it is one that I would seek to have resolved before deciding on the extent of the unintended consequences. I welcome any questions.

CHAIR—Would you like to comment on Senator Kemp's two-year residency test and the effectiveness of that?

Mr Lorimer—I suggest that Senator Kemp's two-year proposal would be a reasonable starting point. We have spoken to Senator Kemp's office in relation to that press release and have recommended very strongly that, prior to any draft legislation—or legislation, for that matter—being presented, a comprehensive consultation process take place so that what gets presented will not fall over during the process. I cannot say unequivocally at this point whether two years is the right benchmark or not, but it seems an appropriate starting point and consistent with other guidelines in relation to residency generally, as I understand it. Perhaps there is the opportunity, in that regard, to have a look at clarification of the residency rules from a general taxation perspective at the same time. I know that might be an enormous task, but perhaps the focus on the superannuation funds might be the starting point for a broader clarification.

CHAIR—Once the legislation is passed though there is an immediate imperative, isn't there?

Mr Lorimer—Absolutely.

Senator SHERRY—On the issue of what is legitimate, what is your view of an arrangement in respect to superannuation where the contributor is able to avoid super surcharge, income tax, contributions tax, FBT? Do you see that as a legitimate arrangement?

Mr Lorimer—If I could for a moment put on my superannuation practitioner's hat, the answer to your question is that that type of thing does not smell right—I think that is the best

way that I can answer that—and would not accord with the general thrust of the accumulation of superannuation retirement benefits under our Australian tax system.

Senator SHERRY—So whether it is through a large company or a small company or a small self-managed fund, large or small, you believe that as far as this legislation goes that is fair enough but you would like to see dealt with the other issues you have raised?

Mr Lorimer—Yes.

Senator SHERRY—I was a bit puzzled. I looked at your last paragraph which referred to the explanatory memorandum on pages 10 and 11 and I have looked at pages 10 and 11 and I cannot find reference to these negotiations which you—

Mr Lorimer—Perhaps I have a different version.

Senator SHERRY—It might have been. We have got the House of Representatives version and there might be a Senate one, and I understand sometimes the page numberings change. I just could not find the reference. Apparently if it comes on the Internet there are different page numbers as well.

Mr Lorimer—The copy I have now was obtained off the Internet.

Senator SHERRY—Okay.

Mr Lorimer—It is actually referred to in table 2.1 which follows paragraph 2.13.

Senator SHERRY—Okay.

Mr Lorimer—It is actually in the last box in that table, the column on the right-hand side.

Senator SHERRY—That is on page 9. I do not know what is happening on the Internet; they must be going through more paper than—

Mr Lorimer—I just push the buttons.

Senator SHERRY—No, I am not blaming you. I am sure you were right in your observation but I just could not find it. This is just an observation on my part, but it seems to me that these will involve bilateral negotiations with literally tens of governments around the world, and to get agreement—it is going to be a bit like the greenhouse negotiations, I suspect—with all these governments to fit into our policy is going to take an extraordinarily long period of time.

Mr Lorimer—I could well imagine. I guess the issue that we are endorsing is the portability of benefits from Australian super funds to legitimate employee superannuation or retirement arrangements overseas and, certainly, whilst there is a significant amount of time involved in transferring overseas superannuation benefits into Australian super funds, it can happen and I am not aware whether they are the subject of reciprocal agreements or bilateral negotiations. It

appears to me from my own experience that they are the subject of the laws of the relevant country as opposed to any negotiations between two or more countries.

Senator SHERRY—I accept the negotiations are important. Are you aware of whether these negotiations have commenced?

Mr Lorimer—No, I am not aware.

Senator SHERRY—Are you saying that they have not commenced?

Mr Lorimer—I am not aware that they have commenced.

Senator SHERRY—So you are looking for some leadership from the Assistant Treasurer Senator Kemp on this matter?

Mr Lorimer—Absolutely.

Senator SHERRY—Okay, thanks.

CHAIR—Thank you very much, Mr Lorimer, for coming down to us and presenting this afternoon.

Mr Lorimer—Thank you for involving us.

[5.34 p.m.]

ELLIS, Mr Paul Anthony, Principal, Human Capital, Arthur Andersen

CHAIR—Welcome, Mr Paul Ellis. Have you any other colleagues who are coming with you or are you doing it alone?

Mr Ellis—No, the short notice made that a little difficult.

CHAIR—I apologise for that.

Mr Ellis—That is okay.

CHAIR—The Senate gave us a very brief time in which to handle a fairly complex issue. We invite you to make a short opening statement and, as you are obviously a specialist in the area, we also invite to comment on some of the other evidence that has been given in terms of how you perceive it and the need for the legislation, and then we will follow with some questions.

Mr Ellis—Thank you for this opportunity to present today. A lot of the points that I wanted to make have been covered to some extent. Let me give you a bit of background about where I am coming from. I work in what we call our human capital division. We work on human resource related issues for major international organisations. One of the main topic areas—or one of the areas where we are heavily involved—is expatriates, that is, international employees. I am looking at our client base, which includes both significant Australian companies as well as significant international companies, and the impact that this proposal will have on their business. I would like to state at the outset that I have no qualms at all with the intent of the legislation insofar as it is designed to attack aggressive tax planning schemes using so-called superannuation funds. I would like to make the point that we need to ensure that there is no collateral damage as part of that process—for Australian companies which are operating overseas and also for Australian and international companies which are bringing employees into Australia.

Another witness made reference to subsidiaries of overseas companies, but it is not just subsidiaries of overseas companies. We have seen in recent years a number of Australian organisations hiring foreign CEOs and finance directors, et cetera, and we have seen a lot of press about some of the tax problems that cause them difficulties. One of the side effects of this legislation as it is currently drafted is that it is going to create more tax difficulties. Let me focus firstly on the Australian companies that are operating offshore. I would like to stress at the outset that I am talking about contributions to legitimate funds and bona fide retirement funds in jurisdictions where an employee is working. For example, 401(K) plans in the US, pension plans in the UK and things like mandatory provident funds in places like Singapore, Malaysia and Hong Kong are all funds that are prescribed by legislative regimes in the countries in question.

If this proposal goes ahead then those Australian companies contributing to such funds may lose tax deductions to which they are currently entitled. They may also, in some cases, be subject to fringe benefits tax, despite the fact that it is possible that they may be under a legal obligation to do so in some cases. Also, taking advantage of legitimate tax concessions that are available in a foreign country may well be a legitimate cost and tax planning way of structuring

the assignment in the foreign location in order to reduce the overall cost of placing people in a foreign country. There are a number of reasons why that might be done.

I am suggesting, as a panacea, allowing a tax deduction where a contribution is made to a fund in the country where the person is currently residing. For example, if someone is working in the US and they are making a contribution to a fund in the US, then that should be accepted. If they are working in Malaysia, Singapore or even Hong Kong, and their employer is making a contribution to the fund in that location, so that should be accepted. It is not giving *carte blanche* and it is not necessarily allowing someone to put money into a fund in New Zealand or wherever. You asked a question before about trying to identify what is *bona fide*, and it is a way of attempting to do that. It is not going to be perfect and it will not cover all the situations, but it is one way of putting a fence around it without penalising legitimate commercial transactions.

CHAIR—Wouldn't these be termed, though, controlled superannuation funds?

Mr Ellis—Absolutely not.

CHAIR—If they are a company fund, aren't they controlled by the company?

Mr Ellis—The controlling interest super is the other part of this. I have not spent a lot of time looking at that part of it, but my understanding is that it is basically where an entity controlled by the person on behalf of whom the contribution is being made makes that contribution. So there is a very close connection between the individual and the entity making the contribution. What I am talking about are major international organisations who are contributing to significant employer sponsored funds. There is no element of control or, in my view at least, there is no element of avoidance or aggressive tax planning.

I think Senator Sherry raised the question before that there might be no surcharge and there might be no FBT, but, on the other hand, these funds will be subject to the taxing regime in the country in which they have been established and, in most cases, there will be a proper legislative regime that has been established for that purpose. Now, it will not always mirror ours but it nonetheless will be a *bona fide* legislative regime. That is looking at the position of Australians who are working overseas for a period of time.

A significant concern also is the position with people who are coming in to work in Australia, both for Australian companies or for international organisations. The comment is made in the explanatory memorandum, and I think it has already been referred to again, that people are free to contribute to Australian funds if they want to for the period that they are here. But the problem with that is that, firstly, it is a very short-term perspective whereas retirement planning requires a very long-term view; and, secondly, frequently it is very hard to make investments in the right currency, because Australian funds will generally be aligned towards Australian investments, whereas people who come from the US or from the UK or wherever will want to have funds in their own currency to avoid currency risks. It also means that it is out of sync with their general retirement planning if you have a little bit of money in a fund in the antipodes, so to speak.

But by far the biggest problem is that you cannot get the money out, and the previous witness was alluding to that. You talked about the process whereby the government has said it will

negotiate on a country by country basis, but the simple fact is that nothing has happened in the time since that announcement was made some two or two and a half years ago, and it is highly unlikely that anything ever will happen—because we do not have the bargaining power to get it on the table and other countries do not care. Other countries—for example, the UK—have made arrangements to allow moneys to come out from their superannuation funds, when they are satisfied that appropriate controls are in place in the country where the money is going to. It kind of provides for a discretionary regime for release. Again, it is not open slather, not *carte blanche*.

CHAIR—Australia is one of those countries?

Mr Ellis—That is right. I have seen a number of situations where people transferring from the UK have been able to transfer their funds into an Australian fund.

CHAIR—But when they come in, there is a big tax penalty, isn't there?

Mr Ellis—Not if they are able to organise it quickly enough. If they are able to organise it within six months of arriving here there is no tax penalty, from an Australian perspective. I could not tell you off the top of my head what the UK position is; I am not sure. I would not want to mislead the committee by saying something that is incorrect.

CHAIR—There is no great incentive for people who are already here to then transfer their UK pension moneys to Australia?

Mr Ellis—Oh, no, absolutely not; because once you have been here for more than six months then the entire increase in value from the time you arrived here is taxed at the marginal tax rate. So it is very punitive from that perspective.

CHAIR—Thank you.

Mr Ellis—Again, what I would like to suggest is a situation where organisations are allowed to make contributions to bona fide funds in the country of origin of the individual: if they have come from the US, they can make a contribution back to a fund in the US—or the UK or wherever. Again, it is not trying to provide open slather, but what it is trying to do is find a way that will solve most of the legitimate problems that are caused by the legislation as drafted. Those are my comments on the bill and what we would like to see.

I now have a couple of comments on some of the evidence that has been presented while I have been here. On the self-managed and small superannuation fund issue, you asked for a comment as to whether two years was a sufficient time frame. In my view it is not, and the reason that it is not is that, generally speaking, Australians who are transferred overseas will not cease to be tax resident unless they are going for more than two years. If they go for less than two years they are generally still regarded as being Australian resident, for our purposes.

Providing an amendment that says that a small superannuation fund will not be deemed to lose its complying status if someone goes for two years will not overcome the problem because, in that two-year period, people will still be resident anyway. It is only those people who are going for more than two years that will be substantially affected by this proposal. Therefore, it

needs to allow for a longer time frame, perhaps three, four or even five years. Again, if need be, you can limit contributions happening while the person is away to prevent any perceived abuses, but there is no reason why someone with a fund here who is transferred overseas for that length of time should be penalised purely and simply by virtue of being transferred overseas.

I would like to add one other comment. It has been asked a number of times whether we think this legislation is necessary. The difficulty with that question is that you can almost never answer it until it has been decided by a court. I look back to a situation very early in my career in the tax game—and I have been doing this for quite some time now—to a case involving Coles Myer and an assignment of an income stream, which they won in the full Federal Court. At that stage, it was decided that legislation was needed to overcome that particular issue, whatever it was—I cannot even remember the details now. Then the High Court overturned the case and eventually the tax office won anyway. So, with the benefit of hindsight, you could conclude that the legislation was not necessary. But the difficulty is that it takes a long time to conclude that.

The biggest problem that we are seeing here with these controlling super and New Zealand super schemes—and even employee benefit trusts and the like—is the lack of action and the time it has taken for someone to say that these have to stop and that we are going to legislate to stop these to avoid any doubt. If that had been done sooner, then the revenue issues would have ceased sooner. It is okay for the tax office or Treasury or anybody else to say that the legislation is strong enough to cover these situations, but the bottom line is that no-one really knows until such time as the court—in fact, the High Court—decides that that is or is not the case. That is the real problem, because that can take years.

CHAIR—How do we overcome that?

Mr Ellis—We overcome that by a clearer, quicker legislative process, but one that needs to recognise that you cannot crack a walnut with a sledgehammer or throw the baby out with the bathwater, as someone earlier said. You need to make sure that this type of legislation, whilst achieving what it is meant to achieve, does not also have unintended commercial consequences for bona fide retirement funds.

CHAIR—Are you happy about the commencement date?

Mr Ellis—Provided the legislation is passed within a reasonable period of time, yes. If it went on and on and on so that it is substantially retrospective, I think you would have to question that but, at the end of the day, there have been announcements: people who are continuing to go into these arrangements, if indeed they are, have been served with appropriate notice.

CHAIR—What about some of the earlier blatant arrangements? Is there justification for the tax office taking court action?

Mr Ellis—It is difficult for me to comment, because I am not familiar with what the precise arrangements were. However, if—as has been reported by the committee that looked at these schemes—these schemes were, in some cases, able to at least effectively get a tax deduction and no-one paid any tax at all, then, yes, I believe that is justified. By the same token, there are

instances where some of those arrangements were quite legitimate and the tax office is now seeking to attack those as well. Once again, it is a situation of innocent commercial transactions being caught up in a 'round-up everybody' situation.

CHAIR—Would you be happy if the committee, for example, came down with a view that the tax office should not take action against legitimate arrangements but that there is a case for court action by the illegitimate—what is the word you used?

Mr Ellis—Aggressive tax planning.

CHAIR—Aggressive tax planning arrangements.

Senator SHERRY—If they are not illegal what is the sense of court action? Isn't that the reason why we are considering changes to the law to make them illegal, to put it beyond reasonable doubt so the court action can succeed?

Mr Ellis—It comes back to my earlier comment. I agree with that because I think the purpose of legislation like this can be to absolutely confirm that they are meant to be illegal and that they should be outlawed. So the question of whether or not the legislation is necessary becomes in a sense irrelevant if you believe that these arrangements should be outlawed. If you believe they should be outlawed, then, to avoid any doubt, I think it is a legitimate legislative exercise.

CHAIR—On the other hand the commissioner might say, 'We are losing all this money so quickly we have got to put some legislation down because it might take us three years to go through the full court process.' You have already indicated that the Federal Court has been overruled by the High Court. In such an environment, I am just saying is there a need for a message to be sent in respect of those super aggressive tax planning schemes that are not deemed to be legitimate that there is a case for the commissioner to not just close the book on them but to pursue some of them despite the fact that legislation is around?

Mr Ellis—I think to a certain extent the commissioner has to because the legislation is not going to be backdated and therefore many of the arrangements will have taken place prior to the legislation being effective, so I do not think that is going to take away the need for legislation if we are going to try and recoup the money that has already gone into some of those arrangements.

CHAIR—So you hope that the commissioner will not close the book simply because this legislation now is likely to be on the statute book in a short period of time.

Mr Ellis—I would hope so. Quite apart from anything else, I think there are a number of aspects that could do with some clarification in the courts anyway.

CHAIR—Such as?

Mr Ellis—Such as the principles, if you like, for the application of the general anti-avoidance provisions in remuneration arrangements and where the boundaries are. Again, if you look at the US as an example, there are legitimate income deferral arrangements allowed for things like bonuses provided there are some vesting issues or some vesting restrictions and some

performance conditions. I think there needs to be some clarification as to where the boundaries are and what is legitimate and what is not, and these cases could perform a role in that respect as well.

Senator SHERRY—I am pleased that you said in your earlier comments that you had no qualms at all with legislation attacking aggressive superannuation funds, that they should be bona fide retirement funds, bona fide residential qualifications, et cetera. What area of Arthur Andersen do you work in?

Mr Ellis—I work in the human capital area. Our client base is essentially international organisations, Australian companies, people who are transferring employees into and out of the country. That is the client base that I am typically working with.

Senator SHERRY—We did ask that Mr Levy, who I understand is an employee of Arthur Andersen—

Mr Ellis—He is a partner in the Sydney office.

Senator SHERRY—Are you a partner?

Mr Ellis—I am a principal. There is a very subtle difference but I am not sure I could explain it to you in half an hour.

Senator SHERRY—Is Mr Levy superior to you?

Mr Ellis—Yes, he is, but he works in a different area.

Senator SHERRY—I understand he works in an area involving what would be described as aggressive tax planning.

Mr Ellis—You would probably have to take that up with him.

Senator SHERRY—We had hoped to, but he has not turned up.

Mr Ellis—I understand that.

Senator SHERRY—You do know we did request he attend?

Mr Ellis—I do know that, and I did try and find out last week, when I was contacted by the secretary, if that was possible. Unfortunately, it was not.

Senator SHERRY—Do you know why it was not possible?

CHAIR—I do not think you can answer that. You cannot answer on behalf of other people.

Senator SHERRY—He may know, though. He is a witness.

Mr Ellis—Last week he was away at a conference.

Senator SHERRY—Where was the conference? Was it in Australia?

Mr Ellis—I am not sure. I do not know, but it was indicated to me that he was not available today.

Senator SHERRY—Who indicated?

Mr Ellis—His secretary.

Senator SHERRY—Okay.

Mr Ellis—But she had been in contact with him.

Senator SHERRY—You have indicated an ethical position which I think is quite sound, but it appears from the information we have that Mr Levy does not share your ethical position.

CHAIR—Senator Sherry, we have to be careful about casting aspersions on partners.

Senator SHERRY—Well, isn't it true that your company is involved in these types of aggressive tax minimisation superannuation fund activities? Do you have knowledge of your company being involved in these sorts of aggressive tax minimisation superannuation funds?

Mr Ellis—I do not have specific knowledge in terms of specific clients and who has done what.

Senator SHERRY—Do you know that your company is involved in this area?

Mr Ellis—I think we have to be careful. We have to draw a spectrum. As with anything, there are different ends of a spectrum. The tax office gave some rulings on some of these areas and they are at the legitimate end of the spectrum, if you want to call it that. And then some people have taken those rulings and taken them a lot further than what was ever intended, and that is where most of the problems have arisen. I do not know all the details, but I would like to think that anything that Mr Levy has done is at the legitimate end of the spectrum and has been based on rulings that have been given to him by the tax office. To the best of my knowledge I do not believe that what he has done is either aggressive or unethical, but, again, I cannot comment on specifics.

Senator SHERRY—In a sense, it is unfair to you because you are not Mr Levy, and that is why we wanted Mr Levy here. And I am not raising this issue because it has not been discussed publicly. I do not query Arthur Andersen's position on this matter without noting that he was interviewed on the *Sunday* program, 'An investigation into Australia's secret tax system', on 23 July 2000. Are you aware of that interview?

Mr Ellis—I have not seen the interview and I have not seen the transcript, but I do know that he was of the view that he was quoted severely out of context. He might be an experienced tax

adviser but he was very inexperienced in the ways of journalism. From what I understand, a very small clip out of a somewhat lengthier interview was taken out of context and put in a much less favourable light than that in which the quote was made.

Senator SHERRY—I am aware that sometimes the media can be a little difficult.

Mr Ellis—You are probably far more aware than we are.

Senator SHERRY—Very aware, but that is the risk you take when you are interviewed by the media, as Mr Levy was.

Mr Ellis—Absolutely. I think it is fair to say he will not take that risk again.

Senator SHERRY—I was going to suggest, and I will be taking this up with the committee, that Mr Levy might take the opportunity to appear—

CHAIR—At the same time, we do not want to put any witness from an organisation into such a position that the organisation might not want to appear before this committee again. We have received some very professional information.

Senator SHERRY—The point is that Mr Levy has not appeared. He may or may not have a legitimate reason. Through Mr Ellis, I would certainly stress that we would like to give him the opportunity to give a full explanation about these types of arrangements, which he certainly alluded to in that interview, and he can correct the record. These schemes we are considering with respect to this legislation have been marketed by someone.

Mr Ellis—Yes.

Senator SHERRY—It would be useful to hear from Mr Levy and your company—and I do not just pick on your company; I am sure there are other companies involved in the promotion of these schemes—about how they operate and about what moneys are involved. These are not my words, but you were probably here earlier when there was reference to moneys being ‘laundered’, to hundreds of millions of dollars and to the \$2 billion by one company in two years. These are extraordinary sums of money. It is useful from our point of view to know a little more about what is going on.

Mr Ellis—Unfortunately, they are matters that I am not able to assist the committee with.

Senator SHERRY—I know, but I think your firm was specifically asked for Mr Levy, who has some expertise in this area and knowledge. You have attended—and I am not criticising you personally—and I accept the points you make about your concerns in the areas that you are worried about.

Mr Ellis—The two processes are actually quite separate. As you understand, our organisation is quite a big organisation. I became independently aware of the committee and its inquiry and, as a result, sought to submit. I was not even aware until last Thursday when I spoke to the secretary that she had been attempting to contact Mr Levy.

Senator SHERRY—What is a typical fee and charge in respect of these sorts of superannuation arrangements?

Mr Ellis—I do not know. Not being familiar with offshore superannuation arrangements, I do not know what the fees and charges would be.

CHAIR—On the basis of the evidence given to the committee today, I would not like it to be inferred that your firm, Arthur Andersen, is involved in any blatant tax avoidance arrangements.

Senator SHERRY—They are not the words I used. I think the words I used were ‘aggressive tax planning’.

Mr Ellis—I would also like to reflect that I do not think that my firm has been involved in the kinds of aggressive tax planning at the outer end of what has been referred to there. I think a lot of it has been lumped into this pot and, as I said, some rulings were given to us by the tax office and we acted on the basis of those rulings.

Senator SHERRY—I understand your concerns about the PBRs. It would have been interesting to hear from Mr Levy about whether any of the business that Arthur Andersen or he personally is looking after in this superannuation, particularly the international area, is adversely affected by the provisions of this legislation in respect of non-complying superannuation funds and a number of other tax minimisation activities that have been identified.

Mr Ellis—I cannot give you any detail—

Senator SHERRY—I understand.

CHAIR—Thank you very much for coming before the committee today. We appreciate your coming and your submission. The committee agreed that, when the giving of evidence by witnesses other than the tax office had concluded, we would recall Mr Nick Petroulias to continue the evidence he was giving earlier.

[6.04 p.m.]

PETROULIAS, Mr Nick (Private capacity)

CHAIR—Mr Petroulias, if we could circumvent a lot of the history and not mention names it would be helpful to the committee.

Mr Petroulias—There is probably one point I want to put on record, and that is the danger that this bill has because you are legislating fact. You are stating that the law should be written in a particular way and that that is the way it always has been. I want to express my concern about legislating facts as opposed to legislating the law.

CHAIR—I am not quite across the thrust of your comment.

Mr Petroulias—The provisions bill, as it stands at the moment, has a provision contained within it which says that the following interpretation was the interpretation that it always supposed it to be. That is a retrospective deeming of the fact.

CHAIR—That is in the explanatory memorandum?

Mr Petroulias—That is correct. It is also in the transitional provision that you called it rather loosely. The chairman has made probably a balancing act on your part about statements of fact and the like. Unfortunately, we do have statements of fact on the record by the commissioner. They are statements to the effect that: there is no ATO policy on the matter and that the ATO has always advised that.

Unless there is an ability to refute or examine those facts, they unfortunately are viewed by the community as statements which the parliament of Australia consider to be facts. Balancing all the considerations involved, I think we can all comment on what is and is not fact. It certainly is not in my interest to prejudice any other forum for examining those facts.

CHAIR—I think I mentioned earlier that the prime purpose is to examine the bill and, if it has some weaknesses, we would appreciate your comments. We would even appreciate ways to improve the bill from your extensive knowledge of tax law, both inside and outside the Australian Tax Office. That is why we are here today. It may be that this committee or another committee may wish to pursue, at a later date, some of the issues that you have raised. That is for another day and a different forum. We do have a fairly tight time constraint on this bill and it is an important bill. There is a lot of revenue outstanding and we are interested in your views.

Mr Petroulias—I was addressing questions by Senator Sherry.

CHAIR—Senator Sherry, do you have any further questions?

Senator SHERRY—I have just a couple more questions. I looked at the explanatory memorandum in this bill and at the financial impact, not the compliance cost impact. All the way through, it has ‘negligible’, ‘negligible’, ‘negligible’. That is in the EM. In your expert opinion, why is it negligible?

Mr Petroulias—I do not suggest that it is.

Senator SHERRY—What would you suggest it is?

Mr Petroulias—I think it is completely false. How can I be more emphatic about it?

Senator SHERRY—That ‘negligible’ is just wrong?

Mr Petroulias—It is completely wrong.

CHAIR—Can you refer the committee to the section Senator Sherry?

Senator SHERRY—I am looking at the printed explanatory memorandum of the House of Representatives Bill.

CHAIR—Under financial impact?

Senator SHERRY—It says ‘negligible’ on page 1, page 2 and page 3. You are saying that it will raise money.

Mr Petroulias—Section 82AAE is about the only section in the tax act which any person in the street can read and understand without any training in tax. It is quite clear. It simply says:

A contribution to a non-complying fund is deductible.

It is pretty plain. It is not terribly intricate.

Senator SHERRY—Therefore, this legislation will raise significant amounts of revenue?

Mr Petroulias—To the extent to which it denies it, of course.

Senator SHERRY—Do you have any estimate? Are we talking hundreds of millions, tens of millions, billions?

Mr Petroulias—No, it depends on the time frame. The difficulty with this area is that one provision cannot be read on its own. It depends on all the other provisions which can limit, curtail or set some sort of parameters around which deductions are claimed. I am saying that if you are talking about reasonable and provisions for superannuation retirement, then it is just merely a matter of how popular this particular arrangement is times reasonable retirements. I do not have a problem with that.

Senator SHERRY—What I am trying to get at is why haven’t we got a financial impact? What moneys are involved in this, or at least some range of moneys?

Mr Petroulias—I have given you some estimates. I am not in a position to give you any more.

Senator SHERRY—From your knowledge and experience in the tax office why would we have negligible in here?

Mr Petroulias—As certain revisions of history have taken place since about 19 May 1999 that would be in accordance with that revision of history.

Senator SHERRY—If this is such an important issue and we are required to legislate before the end of the year—and we are under enormous legislative pressure and the government says you have to pass the bill—why are we passing a bill that doesn't raise any money?

Mr Petroulias—Because to admit that it does raise money would be embarrassing to certain quarters.

CHAIR—Just a moment, Mr Petroulias. This is essentially a clarification bill, isn't it? It is a clarification of what the tax office or Treasury believes to be the intention of the law. Therefore, if it is the intention of the law that these sorts of arrangements were not what the parliament originally intended, in terms of financial impact it would be negligible. The fact is that some people have been able to so contrive their arrangements as to defeat the intention of the legislation. In effect, what we are looking at is a clarification and, if it is a clarification, I can accept a financial impact as being negligible as opposed to a situation where a new piece of legislation bringing forward something that was not intended and was not laid down. As an eligible employee then I can understand that course of action and that negligible financial impact. I think you would agree, Mr Petroulias, that it is a clarification, wouldn't you?

Mr Petroulias—There are two aspects to it: the controlling interest provisions and the general superannuation deduction. The general superannuation deduction which tended to be the more popular one in the year 2000 and beyond is clearly and unambiguously denying a deduction where there otherwise would be. In respect to the controlling interest provisions, the issue is: what was the intention when it was originally passed? The revision of history at the moment which is contained in that bill is that what we are saying now is what we meant to say back then. We really did say it and under that revision of history approach there is a negligible financial impact. As you can see from the extensive well documented and unambiguous views of the ATO over the last decade, that is not the only interpretation available. There never was any other alternative interpretation until 19 May 1999 when the ATO changed its approach.

CHAIR—We have already heard from the previous witness that a view that was agreed by the Federal Court was subsequently overturned by a higher court so obviously there has been a degree of uncertainty even in the tax office if you have a situation where courts do get overruled. It is not necessarily as clear always as we like to think it is.

Mr Petroulias—Quite correct. If the Chairman is saying that the ATO has taken a view up to a certain point in time and then changed its mind, we are in complete accordance that they are entitled to do that. But we are not in accordance that they can revise history.

Senator SHERRY—It is a bottom line. In respect to non-complying super funds you are saying that in passing this legislation then more revenue is raised?

Mr Petroulias—Absolutely.

Senator SHERRY—Quantum question mark?

Mr Petroulias—Yes.

Senator SHERRY—That view would be consistent with the Taxation Commissioner's own stated view. In the *Financial Review* on 20 November 1998, referring to AUSTRAC, he said that several hundred million dollars had flown into offshore superannuation funds under the structured tax effective arrangements and more than \$30 million had flowed to one fund alone.

Mr Petroulias—Yes. That severely underestimates the size of it—

Senator SHERRY—Yes.

Mr Petroulias—because most of these arrangements and, in particular, the more abusive arrangements, do not involve real cash at all.

Senator SHERRY—If it severely underestimates the figure—question mark; whatever the figure may be—I have not seen a piece of legislation that describes the financial impact as negligible. Why is it negligible? Aside from your alleged revision of history, can you think of any reason?

Mr Petroulias—When the Commissioner of Taxation expresses an interpretation of a law that is contrary to that which the prevailing professional opinion is, then it is a very courageous person to take on the ATO. Most small and medium enterprises will not have the financial capacity or resources to take on the ATO, so if the commissioner says something in a particular way then most of us will go for it because most of us do not have the money to fight him. So, of itself, the commissioner's stance on a position diminishes the appetite, if you like, of the community.

Senator SHERRY—The revenue losses in this area have been compared with the bottom-of-the-harbour schemes of the late 70s and early 80s. Were they retrospectively—

Mr Petroulias—To a point.

Senator SHERRY—This is prospective legislation.

Mr Petroulias—That is correct.

Senator SHERRY—Do you believe it should be retrospective?

Mr Petroulias—No, because it is a clear ATO policy up until the date of change—

Senator SHERRY—Okay.

Mr Petroulias—and those who have relied on that policy stated in its own documentation, mind you, that there is a policy. Those who have relied on that policy would be prejudiced.

CHAIR—Isn't it up to the tax office, if there is a blatant contrived arrangement—

Mr Petroulias—If it is a blatant contrived arrangement then it is not a problem.

CHAIR—Despite the passage of this legislation, they can still take action to prosecute somebody.

Mr Petroulias—They always have and always should. At no point in time has the ATO ever accepted an abusive arrangement. No-one is suggesting that.

Senator SHERRY—Have they prosecuted any of these arrangements?

Mr Ellis—Not to my knowledge. In fact, I have offered to run the test case.

CHAIR—Just a moment—I think we have to be careful—

Senator SHERRY—I am asking whether the tax office, to his knowledge, has prosecuted—

CHAIR—We have got to be very careful about leading a witness by asking what his opinion is and what he did when he was in the tax office.

Senator SHERRY—I am just asking whether he had any knowledge, I did not ask him whether he was involved.

Senator CONROY—Surely the tax office, if they understood that the intent of parliament was X—and you are saying that the tax office themselves took it upon themselves to have a different interpretation of the legislation to what parliament intended—then parliament has every right to retrospectively go back and say, 'We intended this. It has transpired differently, therefore we want to restore the intent and therefore we have a mandate that we originally set down that has not been followed because of poor drafting, perhaps, and we are saying we should go back and parliament should say, "We go back to the day when we intended it to apply from originally".'

Mr Petroulias—I think what you are saying is quite on the mark but to answer that: the literal interpretation was available to taxpayers. They sought clarification of that literal interpretation. Finding out what the parliamentary intention was always difficult. There had been so many changes since the Liggertwood report that we do not quite see what the intention was. In fact, in a paper delivered by Professor Vann which I commissioned, he made the point that there had been so much change that the original intention had been obscured. So in such a position for taxpayers to rely on the literal interpretation of the tax of the act is not inappropriate.

Senator SHERRY—Just to follow the ATO's logic in arguing that there is negligible revenue—

CHAIR—Just before you answer that, I did say to you previously. Mr Petroulias, that I did not want you to refer to what you did or did not do while you were in the tax office, and you have ignored my ruling.

Senator CONROY—That is an absurd proposition.

Mr Petroulias—It is quite true that I did not have to mention that. To rephrase it: in a paper presented by Professor Vann to the tax office he made it quite clear that in his understanding of the history of the area the original intention of parliament had been obscured.

Senator SHERRY—Presumably, as this legislation is not retrospective—it is prospective—as the ATO is arguing negligible financial impact we could legislate retrospectively for negligible income and no-one would be upset.

Mr Petroulias—That would be logical.

Senator SHERRY—So you do not see any problem—

Mr Petroulias—I think it is laughable.

Senator SHERRY—if we argue that it is negligible?

Mr Petroulias—I think it is laughable but I think most of the things the Commissioner of Taxation says are laughable.

Senator SHERRY—That is another argument. Just on the prosecution issue, are you aware of any recommendations for prosecution of these types of arrangements?

Mr Petroulias—Taxpayers have put their hands up from the moment, from my knowledge, when the first change of view happened in May 1999. Taxpayers have sought to say, ‘Okay, let’s test the law,’ and we have not had a favourable response from the ATO. On behalf of several taxpayers, I personally sought that we take this on; the ATO has not taken this issue on.

Senator SHERRY—Which section is responsible for deciding on prosecutions?

Mr Petroulias—Excuse me, I am confused by prosecutions. I am talking about test cases—

Senator CONROY—He is talking about when he was a tax agent, he is not talking about when—

CHAIR—I am in a difficult area. I am not quite sure whether you are talking about your role within the tax office or if you are talking about your subsequent employment as a private person.

Senator CONROY—That is what he was just talking about, his subsequent employment.

Mr Petroulias—Subsequent to leaving the ATO, on behalf of a number of advisers I sought to have a test case put on this matter as soon as possible.

CHAIR—Mr Petroulias, could you just clarify the oath or whatever you give to the tax office when you join them in relation to outlining matters that go on within the tax office? Could you help the committee in that regard?

Mr Petroulias—I do not think there is anything that prejudices this.

Senator CONROY—This is a parliamentary inquiry, and privilege attaches.

CHAIR—I am just asking what the rules are for tax officers who join the tax office, particularly those in responsible positions, about giving information about the internal workings of the tax office. It is just a statement of fact.

Senator CONROY—It is a complete furphy.

CHAIR—It is a statement of fact, but I think it will be of interest to the committee.

Senator CONROY—It has no bearing on the inquiry. Every question we ask a departmental official is about the processes that go on in the department. They cannot give their opinion, they cannot give what advice they give, so, by definition, the only thing that is left for us to ask them about are the processes of the internal workings.

CHAIR—Can you answer the question?

Senator SHERRY—I think my question was cut off; I had not quite finished it.

CHAIR—I would like a clarification before we finish. You can answer Senator Sherry's question first, but I think it would help—

Senator SHERRY—I had not finished it. Sorry, are you bringing us to a close?

CHAIR—No, not at all, I just want to be cautious in relation to these proceedings, that is all. And I would hope that you would be too, Senator Sherry.

Senator SHERRY—On prosecutions, which section of the tax office decides on whether there should be a test case in respect to the sorts of schemes that we are dealing with in this legislation?

Mr Petroulias—That would probably be the Tax Counsel Network.

Senator SHERRY—The Tax Counsel Network?

Mr Petroulias—Acting on advice from the relevant business line to whom it is of interest.

Senator SHERRY—Which individual heads that?

Mr Petroulias—Michael D'Ascenzo.

Senator SHERRY—Would a case of this importance go to the Tax Commissioner himself?

Mr Petroulias—Absolutely.

Senator SHERRY—Are you aware of any recommendations that a case or cases be prosecuted?

Mr Petroulias—I am aware that the most recent opinion from counsel is that it is negative, that they will not succeed on a legitimate arrangement.

Senator SHERRY—Within the existing law?

Mr Petroulias—That is right.

Senator SHERRY—Is that based on the existing law, the private binding rulings, or a combination of both?

Mr Petroulias—No, on the existing law their advice has been that they will not succeed—except in the abusive cases, which was never an issue anyway.

Senator SHERRY—Sorry, I should make my question clearer. It goes to an interpretation of the ruling.

Mr Petroulias—That is correct.

Senator SHERRY—That is what I am referring to.

Mr Petroulias—That is correct. What I am saying is that no counsel will subscribe to the views prescribed by the commissioner in TR 99/05.

Senator SHERRY—Why did the tax office continue to assert, as contained on page 70 of the annual report:

Employee benefit arrangements continue to be marketed by some, even after we made it clear that in our view these arrangements were not effective under the existing law.

Mr Petroulias—They did not. They say, depending on the circumstances, a number of wonderful things can happen, which is not really a great enlightenment to anyone who knows anything in the area. The only thing that has changed is TR 99/05, which is widely regarded in the community as being a joke.

Senator SHERRY—A joke in that it was unenforceable?

Mr Petroulias—A joke in that it is stupid, it is silly, it is unmaintainable at law.

Senator SHERRY—And that is why we have the amendments today?

Mr Petroulias—No; the amendments do not relate to TR99.5 as such, except and in so far as there is an application of fringe benefits tax to non-complying super funds, as part of the bill.

Senator SHERRY—You have named a number of people at this hearing and given us some documents. Do you believe those individuals should have an opportunity to express their view before a committee like this or another committee?

Mr Petroulias—Absolutely.

Senator SHERRY—You are happy that what you are say is tested?

Mr Petroulias—Absolutely.

CHAIR—The committee will be meeting at a subsequent time to determine those documents.

Senator ALLISON—Could you provide the committee with the link you seem to be making between the 19 May change of approach and the taxpayers you represent, in terms of testing the water? Can you explain what testing the water means? Are you suggesting that this legislation arises because of actions by people like yourself on behalf of those taxpayers testing the water?

Mr Petroulias—Yes. Let's clarify first of all that we are not talking about abusive arrangements, extreme arrangements, with bizarre, unreasonable amounts of money involved. Those were never going to be effective, are not effective, and the commissioner will succeed in those. They would represent the vast bulk, I would say. To that extent, he is perfectly correct. What I am talking about is this: the word 'legitimate' has been used, and it is all a bit subjective but, in relation to those arrangements where there has been no excessiveness and they are made for the genuine purpose to which they are intended, those arrangements, if tested in the court, will succeed—be they offshore super or be they employee benefit trusts. In respect of those arrangements, it is where the court challenge would lie: what is the correct interpretation of the law? Is fringe benefits tax payable going in, or coming out of, a benefits fund?

Senator ALLISON—Your proposition is that it is totally unreasonable that that group be now picked up by this legislation?

Mr Petroulias—That is correct, yes. At least in so far as the class is concerned. The parliament is quite open to making its own—

Senator ALLISON—And the status of those test cases?

Mr Petroulias—The status of those test cases will only be in relation to that class of taxpayers who entered into arrangements within reasonable limits. There are inbuilt reasonable mechanisms in the act, in section 65 and section 109, which allows for reasonable remuneration. Anything in excess of that is deemed to be a dividend. Part 4A provides for the dominant purpose to be actually providing an employee incentive. If it actually does not do that, then part 4A will apply and the arrangement will not work. We are talking about the small class of respectable arrangements that had relied on the commissioner's interpretation, which was in fact correct.

Senator ALLISON—I think you said that you were testing the water on behalf of these taxpayers, but that nothing had been heard from the tax department.

Mr Petroulias—No.

Senator ALLISON—What is the process for testing the water?

Mr Petroulias—My correspondence was with Michael Bersten and Iain Anderson.

Senator ALLISON—In testing the water, you wrote to the ATO, did you, on behalf of those taxpayers?

Mr Petroulias—Yes I did. ‘We hereby volunteer ourselves for a test case. We would like to give you five or six representative examples which would represent the class of arrangements which we are talking about, and which we think would be successful and would represent that population group. You can assist us in the process of selecting the test case.’

Senator ALLISON—And then that test case would go to court?

Mr Petroulias—That would go to court. The central issue is this: is the fringe benefits tax payable on the way into the fund, or on the way out of the fund?

Senator ALLISON—On what date did you put that to the ATO?

Mr Petroulias—I made a personal visit in, I believe, June or July 1999, and had subsequent correspondence.

Senator SHERRY—This is after you had left the tax office?

Mr Petroulias—Absolutely, yes. It is quite extensive.

Senator ALLISON—And one letter to the tax office?

Mr Petroulias—Probably three or four. There would always be some reason—potential concerns about conflict of interest, one thing or another.

Senator ALLISON—So you had a response from the tax office?

Mr Petroulias—Absolutely.

Senator ALLISON—And subsequent letters were put after those responses?

Mr Petroulias—Yes.

Senator ALLISON—What was the end of the process?

Mr Petroulias—The end of the process was that it was delayed to such an extent that it was no longer relevant and was no longer a concern.

Senator ALLISON—It was no longer relevant?

Mr Petroulias—Yes, it was no longer relevant. Events subsequently overtook things.

Senator ALLISON—What events?

Mr Petroulias—Well, 24 March 2000 overtook events and then there were no clients to speak of. They are now other people's clients, and I do not know what representations they are now making.

CHAIR—What is the significance of 24 March 2000?

Mr Petroulias—I think you would be aware that was the arrest.

Senator SHERRY—When you worked in the tax office, did you know a Mr Geoff Miller?

Mr Petroulias—That is right.

Senator SHERRY—What was his position when you worked in the tax office?

Mr Petroulias—He was a very senior policy officer.

Senator SHERRY—What does 'senior policy officer' mean?

Mr Petroulias—It is an area of the tax office which specialises in formulating policy and assisting in the drafting of legislation.

Senator SHERRY—So he would make a recommendation to the minister or ministers?

Mr Petroulias—It was his responsibility, yes.

Senator SHERRY—That is his responsibility?

Mr Petroulias—Yes.

Senator SHERRY—Did you and Mr Chow see Mr Miller about cracking down on this type of tax minimisation scheme?

Mr Petroulias—That is right.

Senator SHERRY—You did?

Mr Petroulias—Yes.

CHAIR—I do not know if we need that questioning about—

Senator SHERRY—When did you see Mr Miller?

Mr Petroulias—The dates?

Senator SHERRY—Yes, approximately?

Mr Petroulias—I am at a disadvantage because my diary and other personal material have been not available to me for some time, but I believe it was in June or July.

Senator SHERRY—Of which year?

Mr Petroulias—1998.

Senator SHERRY—Was your recommendation to proceed with changes to the law?

CHAIR—Just a minute. Are you giving information about being in the tax office now, or outside the tax office?

Mr Petroulias—No, this is 1998 when I was in the tax office.

CHAIR—You were in the tax office?

Mr Petroulias—That is right.

CHAIR—I think we have trouble there, if you were in the tax office.

Senator SHERRY—Okay. Let us pull ourselves out of the tax office and do a hypothetical. If you were in the tax office, what would you have recommended?

Mr Petroulias—The position that the tax office now has in relation to fringe benefits tax is untenable, and if it were to require what they hope to read like, that would require legislation.

Senator SHERRY—If it were to require legislation, and the tax office did not want to proceed, what would be their reason for not wanting to proceed with that legislation?

Mr Petroulias—Either the view held by those who make those decisions was to the contrary or, alternatively, there were other priorities, which I assume are very more likely to be.

Senator SHERRY—Why would there be other priorities?

Mr Petroulias—There are a lot of issues and this is only one of very many.

Senator SHERRY—Dealing with goodness knows how much money, maybe hundreds of millions of dollars, in lost revenue is not a priority?

Mr Petroulias—Firstly, I want to back track here. I have always maintained the position that the abusive arrangements were never going to work anyway. So I do not think that money is lost; I think that money will be gained. The only money that is lost is in relation to those small classes of bona fide arrangements—in which case it is not even lost at all it is just merely deferred. Having that put aside, can I return to your question?

Senator SHERRY—Yes. What are the other reasons for not proceeding with legislation in this area?

Mr Petroulias—Those concerned either had a different view or they did not see it as a priority.

CHAIR—In not proceeding with the legislation, I am not sure if that is relevant to the bill. We are proceeding and we have a bill before us.

Senator SHERRY—Its relevance is that we have a bill before us but we could have had a bill that is not retrospective, it is prospective. If it had come before us a lot earlier, then presumably the additional moneys that have been lost in the meantime would have gone into government revenue. That is the relevance of it.

CHAIR—Thank you. Next question.

Senator SHERRY—The figure you gave earlier, I think it was 10,000 arrangements?

Mr Petroulias—That is correct.

Senator SHERRY—Was it \$150,000 to \$200,000?

Mr Petroulias—Average.

Senator SHERRY—On my rough calculations that is about a billion dollars a year in those sorts of arrangements.

Mr Petroulias—That is right.

Senator SHERRY—You talked about one firm with a \$2 billion payment. That was offshore funds, wasn't it?

Mr Petroulias—That is right.

Senator SHERRY—Are you able to give us any more figures of substance in respect of the whole level of contributions into offshore funds?

Mr Petroulias—Those figures came post ATO; that is information that one hears from being involved in the industry. I do not know which is a more reliable source. Are market participants a more reliable source than the ATO? I cannot answer that. I do not have that knowledge.

Senator SHERRY—An article in the *Business Review Weekly*—it is a public document, obviously—alleged that, in March 1998, you and Mr Chow, another tax officer, attempted to dissuade—

CHAIR—No.

Senator SHERRY—This is a public document, Chair.

CHAIR—It does not matter whether or not it is a public document. I definitely rule that out of order, Senator Sherry.

Senator SHERRY—Do you believe it is correct?

CHAIR—Senator Sherry!

Senator SHERRY—It is a public document.

CHAIR—I do not care whether it is a public document; it could affect a possible court action, according to the terms that we read out and agreed to earlier.

Senator SHERRY—Perhaps the witness can—

Mr Petroulias—I have to take issue with that.

CHAIR—I am sorry.

Mr Petroulias—No, not at all. I am not going to answer a question that the chairman does not want answered, but I will say that there are public statements made by the commissioner; you are denying the opportunity to rebuke those statements and therefore giving the parliamentary imprimatur to statements of fact, and I do not believe that to be the role of the parliament. I am only a humble solicitor.

CHAIR—I am very conscious of the responsibilities of the Senate not to conduct its inquiry in such a way as to give an opportunity to you to affect a court outcome—

Senator SHERRY—I understand that, Chair, and I respect your view.

CHAIR—or court proceedings.

Senator SHERRY—I understand, and that is important, Chair. But it is important to understand why we are getting this legislation now, the reasons for it, why we have not got it earlier, why it purportedly raises negligible revenue.

CHAIR—I have no objection to those questions.

Senator SHERRY—All of those sorts of issues.

Mr Petroulias—Mr Chairman, do you see it as an inability to comment on statements that are publicly made by the Commissioner? So if the commissioner makes a statement, no-one can ever question that statement?

CHAIR—No, at this point there is a problem with making certain statements by certain people.

Mr Petroulias—So if the commissioner makes a statement, I cannot challenge it.

CHAIR—No, the commissioner has constrained himself under the circumstances.

Senator SHERRY—He is not the one in the dock.

CHAIR—All potential parties should also exercise that same degree of constraint.

Senator SHERRY—Do you have any other observations about the policy development behind this legislation?

Mr Petroulias—Yes. To the extent that it seeks to apply FBT to non-controlling superannuation funds, it represents a revision of history from a long-standing, well-established, well-documented, unequivocal, unambiguous position of the tax office in relation to the fringe benefits tax. To the extent to which it relates to deductions for controlling interest superannuation, it represents a revision of history. To the extent to which it relates to general contributions to offshore funds, it is a new approach.

CHAIR—We are just taking some advice, Mr Petroulias, because we cannot go past 7.30 p.m., according to the Senate. That is the time that was laid down, and we have to be fair to the tax office as to how long they require.

Senator SHERRY—You were going to outline the details of, and I did invite you to write to us on, a class of superannuation schemes. Is there anything of relevance—and I appreciate that we have time difficulties—that you can add to the record? We have the tax office giving evidence after this. Is there anything of relevance in respect of this legislation that you can add reasonably succinctly?

Mr Petroulias—I think I have actually covered everything. What I have not covered I am not permitted to admit, so I am at a disadvantage as to how I can assist you further.

Senator SHERRY—Thank you.

CHAIR—There are no further questions, so thank you very much, Mr Petroulias.

[6.44 p.m.]

COLES, Mr Tony, Director, Australian Taxation Office

FITZPATRICK, Mr Kevin James, First Assistant Commissioner, Australian Taxation Office

THOMAS, Mr Trevor John, Assistant Commissioner, Superannuation, Australian Taxation Office

CHAIR—I would like to welcome the representatives from the Taxation Office. I do not think all of you were present during my opening comments, so I would like to pass this to you and you to confirm that you have read it and understand the implications of the rules of conducting this inquiry. Before you commence, a number of things have been said, some indirectly related to the bill. As you are aware, we are looking primarily at a bill today, and it has been my intention to try and focus exclusively on the bill. We ask you to have that in mind in any comments that you might like to offer or in response to any questions that might be asked. I invite you to make an opening statement.

Mr Fitzpatrick—I am happy for us to make an opening statement to assist the committee in its consideration of the measures in this bill, and I ask my colleague Mr Thomas to make that statement.

Mr Thomas—Thank you for allowing the ATO the opportunity to comment on these important legislative measures. The measures were introduced to stop continued promotion of tax planning arrangements which sought to obtain tax benefits far in excess of those intended by parliament. As you know, the bill compromises essentially three measures: firstly, clarification of the meaning of ‘eligible employee’ in section 82AAA of the Income Tax Assessment Acts; secondly, exclusion of superannuation contributions for a fringe benefits tax only when made for an employee; and, thirdly, removal of deductions for contributions to non-complying superannuation funds. Our statement will concentrate on this last measure, as I understand this is the area of the committee’s principal focus.

Looking at the marketing of offshore superannuation arrangements, when the government announced these changes, it indicated that it is amending the law because of the continued marketing of these arrangements by some promoters despite clear public advice from the ATO that they fail both at law and in their implementation. Normal practice is that, once the ATO states its view on the law, the promotion of aggressive tax planning arrangements generally ceases. This did not occur in this instance and some promotion activity continued. Because of this continued marketing, we advised the government in June 2000 that legislative changes would be appropriate. The arrangements being promoted it seems to us were more to do with seeking tax benefits than any retirement income purpose.

In our view, these offshore superannuation arrangements are a blatant abuse of tax laws and an attack on the integrity of the tax system and the retirement income system. The most appropriate legislative change to ensure that these abusive arrangements do not continue to be promoted and to protect potential participants from such arrangements is to reinforce the position of complying superannuation funds as the governments preferred vehicle for retirement

savings by removing the deduction for contributions to non-complying superannuation funds. The concessional treatment of contributions to complying superannuation funds is, of course, matched by preservation requirements and restrictions on investments, which ensure that the contributions are used for the provision of an income in retirement. Under the arrangements that we have examined, contributions to non-complying superannuation funds do not have these restrictions. Amounts contributed can be used for any purpose, and the moneys are often immediately returned—as has been noted in evidence already—in the form of a round robin arrangement to the people who made the contributions in the first place.

The deductibility of contributions to non-complying superannuation funds after the introduction of the complying funds regime was continued because some employers had well-established superannuation arrangements which could not meet, in particular, the investment rules established under the Superannuation Industry (Supervision) Act. For example, the fund may have had borrowings which could not be unwound.

Of course, it has now been eight years since the introduction of the SI(S) Act, so any superannuation fund arrangements which may have breached the SIS investments rules should have been unwound by now. It is now clear government policy that contributions should be made to the complying superannuation fund regime where the government can have some confidence that the concessions provided will, in fact, generate income in retirement. The arrangements involving non-complying superannuation funds are being promoted by asserting that taxpayers can avoid any tax liabilities that would normally apply, as well as being able to avoid all of the restrictions associated with preservation and prudentially managed superannuation vehicles. The promoters of these arrangements continue to jeopardise their clients' best interests by advising them to enter into these arrangements. The most effective and appropriate solution of the problem is to remove the deductibility for contributions made to non-complying superannuation funds.

The ATO is pleased to see that submissions to the committee support the thrust of the bill. Continued abuse of the concessions granted to superannuation will lead, eventually, to a loss of public confidence in the mainstream superannuation industry. However, there appears to be some concern about unintended effects of removing deductibility from employer contributions on behalf of, firstly, Australians and other nationals working abroad where there is a requirement under the laws of these countries that superannuation type payments be made, and, secondly, companies with foreign employees working in Australia. The ATO has consulted widely with industry associations and accounting bodies in an attempt to quantify these concerns. Unfortunately, no-one has been able to provide any details to us about the number of employees involved or the level of contributions that they would have been making.

Turning firstly to outbound employees, in relation to employers of employees in other countries, it is evident to us that, yes, some employers will be impacted by the measures. Industry advise us, however, that any impact is likely to be small. Even where employers have been making contributions to genuine overseas superannuation funds—such as so-called 401K plans of the United States—for employees transferred overseas, the impacts are difficult to quantify because of the wide variety of factors which need to be examined. Types of factors that would need to be considered to determine the extent of the impact on these arrangements would include whether any income is assessed under the control foreign company regime or the foreign branch profits provisions; whether provisions are in a broadly exemption-listed country,

a limited exemption-listed country or an unlisted country; the percentage of active income against tainted income; whether the entity makes a profit or loss in that country in that revenue period; whether a tax deduction is available in that country for any contributions that need to be made; whether the remuneration package can be restructured to eliminate or minimise the contribution to a non-complying superannuation fund; and whether the contribution is actually made to a non-complying superannuation fund or some other type of entity, for example, consolidated revenue. Again, depending on the mix of factors involved, there may be some impact. But in our view this is simply not quantifiable, and that is the advice we have been receiving from industry when we have consulted them.

Turning to inbound employees, there are two elements which relate to employers of foreign nationals working in Australia who are seeking to have their contributions paid to a fund in their home country. The first of these relates to those who are employed for less than four years in Australia. The second relates to those who are employed for a period exceeding four years. Turning first to those who are employed here for less than four years, the effect of the bill will be to make no changes to the current law in relation to those people. I will repeat that: there will be no impact on employees who are seconded here for less than four years. The bill does not affect that. The employer will continue to be able to make contributions which would not be deductible, but also contributions would not be subject to fringe benefits tax for those people. In relation to longer term visitors, the bill will remove the deduction presently available for contributions made to non-complying superannuation funds, including all non-resident superannuation funds. The policy intent is that long-term visitors will be treated as Australian resident employees.

Under the bill, an employer making contributions to a non-resident fund for a local Australian employee will receive no deduction but incur an FBT liability. Industry have indicated to us that only a limited number of employers and employees will be affected by this amendment. We have been informed that in many cases employers will need to restructure remuneration packages for such employees. We have also been advised that this repackaging will be an irritant but in the vast majority of cases will not present any major difficulties. The removal of deductions for contributions to non-complying funds is in line with Australia's retirement incomes policy which seeks to provide tax concessions for contributions made to complying superannuation funds where prudential controls provide some certainty that the concession will generate retirement income for individual fund members.

In conclusion, we would be happy to assist the committee further in its deliberation on this bill by answering what questions you might have.

CHAIR—Is it possible for you to table the statement that you just gave? I ask that because it would help the secretariat. We will not get the *Hansard* transcript for some time and there is some degree of urgency, in terms of the Senate timetable, in reporting back to the Senate.

Mr Thomas—That is fine.

CHAIR—You indicate that it has been difficult to quantify the amount of money involved in terms of genuine, bona fide arrangements involving expatriates. Is there a sum of money like \$100,000 or \$5 million that is necessary to trigger the interest of the tax office about an amendment, even though there may be potential injustice or an irritant or something like that? I

just have some concerns that, because the amount of money might not run into millions of dollars, an amendment may not be necessary, whereas we have heard some quite convincing arguments about the need for it. You have indicated that it may be just an irritant. You said you have had trouble trying to quantify it.

Mr Thomas—We have, indeed.

CHAIR—But is that really the issue? If it is a justice and fairness issue and something that is going to create good relations with our trading partners and others, shouldn't we be more interested in getting good law rather than law to suit the majority of people? We are not talking about tax avoiders. Often law is made to pick up people who blatantly misuse the law, but in this case we are talking about hopefully innocent sort of people who reside in another jurisdiction.

Mr Thomas—I acknowledge your point, Senator. As I said in the statement, there are a range of factors which will determine the extent to which the impact is there. It depends very much on the jurisdiction and those sorts of things. The danger that we run in seeking to carve out any particular aspect is how you frame that carve-out and the risk that might be created by that for people who have proved able to look to exploit any opportunities—

CHAIR—They have told us about the problem, but they have not come up with a form of words to overcome the problem.

Mr Thomas—No. I think in evidence today we have had clearer indications of the manner in which that carve-out could occur. We had put to us, for example, that you might list certain superannuation funds as being acceptable recipients of contributions. That is not a course that we would favour because the government does not give an imprimatur to particular superannuation funds, particularly overseas superannuation funds over which the prudential regime under the Superannuation Industries (Supervision) Act does not apply. So there are inherent risks in seeking to do that.

CHAIR—How do other countries such as tax jurisdictions in Britain, Canada or the United States handle this issue?

Mr Thomas—I think one of the other witnesses—to answer your specific question, I am not sure.

CHAIR—Could you find out for us?

Mr Thomas—We could certainly do that.

Mr Coles—It is difficult for other jurisdictions. I think it depends on the sophistication of the country and those involved. I would be very surprised if many, or any, other jurisdictions would provide deductions or provide for contributions to offshore superannuation vehicles.

CHAIR—If you could give that information to the committee, it would be very helpful, so that we could say that none of the five principal countries with whom we have international

agreements provides the sort of concession that industry is seeking. That would be helpful but we need it on the public record.

Mr Thomas—I think the other point that is relevant here is that, in all of the OECD countries and in a significant number of the other countries with which we regularly deal, there is a deduction allowable for those contributions to the non-complying superannuation fund in our terms in that jurisdiction. For example, if an Australian company with operations in Hong Kong makes a contribution to a Hong Kong fund, there would be a deduction available in Hong Kong for that contribution to the fund.

Mr Fitzpatrick—If there is more information that you wish us to provide, we could get it to you as soon as possible.

CHAIR—Thank you.

Senator SHERRY—In seeking the attendance of the tax office, I indicated a number of other officers that we would have liked to appear before the committee, I understand that the secretary spoke to Mr Coles directly. Why don't we have those officers here this evening?

Mr Fitzpatrick—Senator, there is a limit to how many officers we can bring to any particular hearing. We are here as we believe we could assist the committee, from an ATO viewpoint, on the bill. We will certainly do our best to try to do that. If we cannot answer questions, we will seek to take them on notice and answer them for you. But, as you would appreciate, the ATO has many responsibilities and its senior officers particularly are involved in a number of matters. We made a judgment that we would certainly assist the committee with the consideration of this bill, and we are here to do that.

Senator SHERRY—Who made that judgment? Did the individual officers make the judgment or did the tax commissioner make the judgment?

Mr Fitzpatrick—There were a number of officers involved in discussions that I had with commissioners about making that judgment.

Senator SHERRY—And who were they?

Mr Fitzpatrick—Some senior officers that I spoke to, including some commissioners.

Senator SHERRY—Does that include the tax commissioner?

Mr Fitzpatrick—The tax commissioner is aware of who is representing the ATO at this hearing, yes.

Senator SHERRY—Did he express a view on the matter?

Mr Fitzpatrick—Not to me personally, but he was aware of who was representing the office and was certainly comfortable that we were able to represent the office properly in helping the committee with its deliberations on this bill.

Senator SHERRY—I think you were here during the earlier evidence that we received.

Mr Fitzpatrick—I was only here in the last half an hour or so.

Senator SHERRY—I think Mr Thomas and Mr Coles were here. There have been issues raised about the policy discussion in respect of the formulation of this legislation. Some officers were mentioned by name—some of whom I requested, some of whom I did not request. They are pertinent issues to the policy development behind this bill. I would have thought it was perfectly proper and reasonable for them to have an opportunity to comment on the criticisms made.

Mr Fitzpatrick—We will comment on any questions you want to put to us, Senator.

Senator SHERRY—I know you will do that, but dealing first hand with people is always a more desirable approach.

Mr Fitzpatrick—I am not sure which officers you are talking about.

Senator SHERRY—You were not here.

CHAIR—They do not need to be named.

Senator SHERRY—They are in the transcript—and also the officers that I specifically requested.

Mr Fitzpatrick—I cannot add any more to what I said before, Senator. We will do our best to answer your questions in helping this committee consider the bill.

Senator SHERRY—Do you consider in a parliamentary sense that the policy formulation process is an important aspect when considering this legislation—the reasons?

Mr Fitzpatrick—The policy formulation process is important, of course, yes. I might add that the people involved in the policy formulation in relation to this bill—my colleagues—are here.

Senator SHERRY—I am sure the three of you are involved. I do not doubt your assurance that you have been involved.

Mr Fitzpatrick—I am not sure what you are alluding to.

Senator SHERRY—We will get to it. Perhaps if you had been here earlier—

CHAIR—Final policy consideration is really up to the minister and the cabinet, so perhaps you could leave that till the Senate.

Senator SHERRY—I will come to some public comments made by one of the people that we requested be here, who is not here, Mr D'Ascenzo. Are you aware of the evidence that he

gave to the House of Representatives Standing Committee on Employment, Education and Workplace Relations on Thursday, 11 May?

Mr Fitzpatrick—I am aware he gave evidence to that committee.

Senator SHERRY—Are you aware of the detail in that evidence?

Mr Fitzpatrick—I would not say I am aware of the detail. I am aware broadly of the evidence he gave. I could not say I am obviously aware of the detail.

Senator SHERRY—Mr Emerson, a member in the other place, asked Mr D’Ascenzo about page 16 of a submission that you provided last year to that inquiry. The transcript says:

The ATO is currently reviewing the products of over 40 promoters involved in the “employee benefit arrangements” described above. On the data we have to date, we would estimate that the total contributions made by the clients of these identified promoters will, on a conservative measure, amount to approximately \$1.5 billion.

Mr D’Ascenzo said:

Yes, but I am not sure that the \$1.5 billion is covered by the private rulings.

Are you aware of that figure of \$1.5 billion?

Mr Fitzpatrick—Yes, I am.

Senator SHERRY—Is there anything in the legislation that we are dealing with here that is dealt with within that \$1.5 billion—these tax minimisation schemes that Mr D’Ascenzo was referring to on that occasion?

Mr Fitzpatrick—On my understanding of the \$1.5 billion you mentioned, Mr D’Ascenzo was referring to an estimate of the deductions we think could be claimed or were claimed in respect of various employee benefit arrangements. It was not referring to a figure of revenue or tax. It was referring, based on what we identified at that particular time—and some, I suppose, in a sense, forecasting ahead of unidentified cases at that time—to what we would estimate to be in the vicinity of the deductions claimed under various employee benefit arrangements. I think it is important in answering your question to make it clear that in this particular bill the measures are dealing with what we refer to as controlling interest superannuation arrangements and non-complying or offshore fund arrangements. The bill does not refer to other employee benefit arrangements, which were included in the figure of \$1.5 billion deductions.

Senator SHERRY—In answering the question though, are there any issues in this bill that we are considering that directly relate to that figure and the schemes of arrangement that were going?

Mr Fitzpatrick—Yes, that is correct. The estimate of \$1.5 billion covered what we refer to as four different types of employee benefit arrangements.

Senator SHERRY—And some of them are impacted by this legislation—some or all of them?

Mr Fitzpatrick—No, not all of them. In our view, we estimated at the time around \$1.5 billion deductions, not tax, was at risk from the various arrangements. This particular bill seeks to clarify the law in relation to controlling superannuation and to deny deductions for contributions to non-complying funds.

Senator SHERRY—I will come back to that a little later, time permitting, of course. Are you aware of the comments by the tax commissioner, Mr Carmody? He was quoted in the *Australian Financial Review* of 20 November 1998. This is in the AUSTRAC's annual report, which is a quote of Mr Carmody's. Mr Carmody said:

The financial tracking agency AUSTRAC have identified several hundred million dollars flowing into offshore superannuation funds under the structured tax effective arrangements. More than \$30 million flowed to one fund alone.

Are you aware of that?

Mr Fitzpatrick—I cannot recall, Senator. Did you say it was 1998 and a comment in the *Financial Review*?

Senator SHERRY—Yes. I am quoting from AUSTRAC's submission to us.

Mr Fitzpatrick—I cannot recall a reference to the commissioner's statement in 1998. I have no information about what he said then about that matter. To help you, I might add that, in trying to identify contributions made to non-complying funds offshore, we have looked at AUSTRAC data to see whether we can identify contributions made to offshore funds. We have taken other action as well, of course, and we continue to take action to identify how much and which taxpayers contributed to these offshore funds, and what was claimed as tax deductions.

Senator SHERRY—And what figure have you identified?

Mr Fitzpatrick—You mentioned earlier the estimate we gave then, which is still our best estimate, having identified further cases and forecasted ahead for unidentified cases. Our best estimate of deductions that we think are claimed in response to the various employer benefit arrangements is \$1.5 billion.

Senator SHERRY—I do not want to interrupt, but is this \$1.5 billion figure the same coverage that Mr D'Ascenzo has been talking about?

Mr Fitzpatrick—That is correct. I know it is sometimes difficult to get across all of these various arrangements, but that covers employee benefit trusts and share plans as well as superannuation arrangements which are subject, to some extent at least, to this particular bill.

Senator SHERRY—You and Mr D'Ascenzo have referred to that \$1.5 billion. I assume that the tax commissioner has looked at this as well?

Mr Fitzpatrick—He is aware of the information.

Senator SHERRY—He is aware of it?

Mr Fitzpatrick—Yes.

Senator SHERRY—He does not disagree with this?

Mr Fitzpatrick—No, he does not disagree.

Senator SHERRY—Thank you. How much of this \$1.5 billion, which Mr D'Ascenzo outlined at the House of Representatives committee and you have confirmed here today, is not included in terms of being caught by this legislation?

Mr Fitzpatrick—As I said earlier, we have identified and continue to identify taxpayers involved in the various arrangements. The amount we have identified at this point in time in relation to offshore funds is around \$100 million in deductions. We need to be careful in relation to controlling interest arrangements, because some of these arrangements overlap. Whether they are employer benefit trusts, controlling interest or non-complying, there is some overlap. I recommend caution with the use of these figures but, around the controlling interest, we have identified deductions of about \$400 million in addition to that \$100 million I referred to earlier.

Senator SHERRY—But there is some overlap?

Mr Fitzpatrick—Our best estimate at this point in time on deductions claimed and ones we have identified—and I have to be careful here: these are ones we have identified but there are some we have not identified, and I am sure we will continue to identify those—is around \$500 million in relation to superannuation arrangements.

Senator SHERRY—These have been identified, but presumably there are some that have not been identified?

Mr Fitzpatrick—I presume there will be some we have not yet identified, and we will continue to do that.

Senator SHERRY—I would not criticise you for this, but you have not got a 100 per cent success rate in terms of identification.

Mr Fitzpatrick—I understand and I accept that. If taxpayers know more, they should tell us or tax advisers should tell us.

Senator SHERRY—So we are talking about a figure of half a billion dollars, with some overlap?

Mr Fitzpatrick—On superannuation, we are talking about half a billion dollars. There is no overlap between the \$400 million and the \$100 million.

Senator SHERRY—Good, I am glad you made that clear. Please go on.

Mr Fitzpatrick—In think I have answered your question.

Senator SHERRY—Is there any other area that is covered by this legislation that you are able to identify?

Mr Fitzpatrick—There is another measure, which concerned salaries.

Mr Thomas—Salary sacrifice contribution for your spouse's superannuation account was something which was at the relatively early stages of promotion. It appeared to be particularly attractive to the tax exempt sector of the economy because of the nature of the deduction regime. We think we have got that one very early in the piece.

Senator SHERRY—I am just a bit puzzled. When was the salary sacrifice for a non-working spouse's superannuation contribution introduced into law? It was only recently, wasn't it?

Mr Thomas—No. I think you are confusing two issues. An example of the issue we are addressing in this bill is when you sacrifice part of your salary and, instead of having the moneys paid into your superannuation account, you have it paid into your spouse's or other associate's superannuation account.

Senator SHERRY—What do you think the loss of revenue in that area would be?

Mr Fitzpatrick—It would not be significant. As Mr Thomas said, it was only sought by tax exempt bodies. As I understand, it would not be of any benefit.

Mr Thomas—Not to the broader community.

Mr Fitzpatrick—We are not talking about amounts which are more than negligible.

Senator SHERRY—The estimate of \$1.5 billion we were talking about earlier was provided in the ATO submission of 30 April 1999. Is that correct?

Mr Fitzpatrick—My understanding is that that is correct.

Senator SHERRY—Why has it not been revised upward to cover the period to 20 June 2000?

Mr Fitzpatrick—Because at the time we made that estimate, and that was what I tried to mention before to you, we had identified some and obviously, we have since identified more. In providing an estimate we did not just look at what we identified. We forecast ahead or made an estimate of what we would not have identified at that point in time. It was the best estimate we could put together. Since then we have obviously identified more participants. Our estimate of any additional deductions that have been claimed and not identified yet would be much smaller than it was when that estimate was made in 1999. The best estimate at this point in time is still around \$1.5 billion in deductions for those various arrangements, which is around \$600 million in tax on my best calculation.

Senator SHERRY—\$600 million in tax?

Mr Fitzpatrick—Around that, yes. It is an estimate.

Senator SHERRY—Or higher. This is what you have identified.

Mr Fitzpatrick—It depends. Of what we have identified; that is correct, yes.

Senator SHERRY—Why haven't we got any estimate of financial impact in the explanatory memorandum to the bill?

Mr Fitzpatrick—As I recall, the explanatory memorandum said that the revenue would be negligible, or words to that effect, simply because we believe the existing law deals with these arrangements and we will recover under the existing law.

Senator SHERRY—Why should we pass this amendment?

Mr Fitzpatrick—The government announced the reasons why it was introducing the amendment. We advised government that, in relation to controlling interest arrangements, and despite the expression of our views publicly of how we saw the law applying, there was some continuation of promotion to investors or taxpayers of these arrangements. To protect those taxpayers from ongoing promotion—marketing of these arrangements—we advised government it would be appropriate to clarify the law in relation to this area. That is the reason we gave, and I think that is the reason the government expressed in its announcement of these proposed changes.

Senator SHERRY—Let us take the area of moneys going into non-complying superannuation funds.

Mr Fitzpatrick—Non-complying funds?

Senator SHERRY—Yes. Let us just take non-complying superannuation funds. An advantage is being gained by the people who contribute into these funds through minimising or avoiding a range of taxes. That is happening at the moment, isn't it? It is not hypothetical.

Mr Fitzpatrick—I am not sure to what extent it is happening right now, but it has been happening, certainly.

Senator SHERRY—It has been happening.

Mr Fitzpatrick—Yes, that is correct.

Senator SHERRY—It has been happening. We are changing the law in this area to minimise as much as possible and eliminate, hopefully, what has been happening in this area.

Mr Fitzpatrick—It is our view that the existing law will deal with these arrangements because they are abusive arrangements, and various provisions, including the anti-avoidance provisions, will in our view apply to make these arrangements not effective.

Senator SHERRY—That was not my question. We know as a matter of fact that considerable sums are being put into these non-complying superannuation funds. We know that as a matter of fact, don't we?

Mr Fitzpatrick—Have been. That is right.

Senator SHERRY—Are you saying it has stopped?

Mr Fitzpatrick—I am not saying it has stopped. I am not sure to what extent it is continuing now.

Senator SHERRY—But it has been going on for some years.

Mr Fitzpatrick—It has been going on for some time.

Senator SHERRY—Some years.

Mr Fitzpatrick—Yes, I think—

Senator SHERRY—I will stretch you in time. Years—can I get you that far? We will accept years.

Mr Fitzpatrick—Yes, some years.

Senator SHERRY—Thank you.

Mr Fitzpatrick—To our knowledge deductions peaked around 1998, and some certainly in 1997 and 1999.

Senator SHERRY—So 1997, peaked 1998, and 1999.

Mr Fitzpatrick—And some in 2000.

Senator SHERRY—And some in 2000. These schemes mean a tax loss to the government.

Mr Fitzpatrick—Not if the existing law applies to defeat them, and in our view it will.

Senator SHERRY—Why didn't you defeat these schemes in 1998? Have you collected the revenue from these schemes?

Mr Fitzpatrick—We are collecting revenue and will continue to collect revenue.

Senator SHERRY—Have you collected all the revenue that you have identified that has gone into these schemes?

Mr Fitzpatrick—No, not all the revenue. But we are taking action, as we should do, both to identify taxpayers, to consider their circumstances, to express our view and to consider how the law applies to each particular case under various arrangements. There are a number of different arrangements. We continue to do that. We take action to amend assessments. We consider objections. We consider settlement offers which are made to us. Some taxpayers concede, some wish to settle. We give opportunities for taxpayers to come forward to identify their involvement in these schemes with the opportunity of reduced penalties if they voluntarily disclose their involvement. That has happened.

Senator SHERRY—I want to come to that.

Mr Fitzpatrick—I am just trying to explain to you what we are doing. You asked about what we have collected and how much we have collected. We have collected all of it, and this is the range of actions we are taking and continue to take.

Senator SHERRY—You have not collected all of it, though?

Mr Fitzpatrick—Of course not at this stage.

Senator SHERRY—So that would be in the revenue figures for out years, presumably.

Mr Fitzpatrick—Collections?

Senator SHERRY—Yes.

Mr Fitzpatrick—The collections in those years in which we collect the revenue, that is correct.

CHAIR—Can you give us an estimate of what you have collected to date?

Mr Fitzpatrick—In relation to employed benefit arrangements—

CHAIR—I do not want a split up.

Senator SHERRY—If he has got a split up figure let us have it.

CHAIR—Just a guide would be helpful.

Mr Fitzpatrick—The guide under employed benefit arrangements is around \$100 million since we have collected.

CHAIR—One of the witnesses did indicate that there is a possibility that people could be attacked for genuine, within the law type schemes as opposed to the aggressively marketed type schemes. How do you distinguish between the two, and can you give us a sense of assurance

that the genuine bona fide people will not be picked up according to your criteria of trying to recover tax?

Mr Fitzpatrick—I suppose the simple answer to that is that we apply the law to the particular facts of each individual case. If the anti-avoidance provisions do not apply to the facts, we do not apply the anti-avoidance provisions. If the FPT provisions do not apply to the facts, we do not apply the FPT provisions. If the deductibility provisions do not apply, of course similarly. I think Mr Thomas was referring in his opening statement to arrangements which might be talking about overseas employees and referring to those cases which would be impacted by the deductibility being removed from contributions to the non-complying funds. That is what Mr Thomas is referring to. We have to apply the law to the individual facts of each case, and that is what we do.

CHAIR—But those sorts of people would not be attacked aggressively by the tax office, would they?

Mr Thomas—Senator, I can add to what Mr Fitzpatrick has said. In relation to controlling interest superannuation contributions presently, the change to the section 82AAA will mean that they can no longer claim the deduction for a contribution made by themselves on their own behalf. But a contribution deduction would still be able to be claimed and would be available to the employing entity for that person, so it does not mean that contributions cannot be made for that individual. Tax deductible contributions will still be able to be made for that controlling interest individual. In relation to the offshore superannuation schemes, as Mr Fitzpatrick said, and I said earlier in my opening statement, there are a range of circumstances which will determine the extent to which people are impacted by these proposed provisions.

CHAIR—Excuse me for just a moment, but the hearing has to finish up at 7.30. We have no leave to sit when the Senate is sitting beyond 7.30. In accordance with normal Senate practice where we request an individual as an individual rather than part of a corporate or lobby group to appear, it is the usual for an economy airfare to be paid. The committee did request Mr Petroulias to attend, so I ask if it is the wish of the committee that the committee pay Mr Petroulias's economy airfare and, given that he will be overnighing in Canberra, that the secretary negotiate with Mr Petroulias in relation to a TA equal to the public service rate that may apply as a non-SES in terms of the Canberra accommodation overnight. Senator Sherry, everybody happy?

Senator SHERRY—Yes.

CHAIR—This has been so agreed. Perhaps one last question.

Senator ALLISON—Can the tax office give us a response to various suggestions and criticisms that are made in the submissions that have been put to us? I am looking in particular at Arthur Andersen's suggestions about alternative proposals. Can you provide the committee with your views about those alternatives?

Mr Fitzpatrick—We will certainly seek to look at those suggestions in their submissions and provide our views in respect of them. I do not see a problem in doing that, if we have not addressed them already in our opening statement and in response to questions.

Senator ALLISON—I think also there have been some statements made today that you have not responded to where it would be worth while.

Mr Fitzpatrick—It would be handy to know which ones we need to respond to.

Senator SHERRY—I think in view of Senator Allison's quite legitimate concern, and I share her concern, a copy of the transcript will be made available to the tax office, and I assume that can be done today or tomorrow—it is going to take another day—and I have got at least another half an hour of questions going to some of those matters that Senator Allison has alluded to and some other matters.

CHAIR—Can you put them on notice?

Senator SHERRY—No, putting them on notice is not satisfactory, Chair, and we did discuss having another hearing at another time, so I would indicate that we would, to properly consider this legislation, certainly need another opportunity to complete our questioning of the tax office. I think in fairness to the tax office, they should be entitled to respond to some of the criticisms that were made earlier after a considered view of the transcript.

CHAIR—In relation to the bill?

Senator SHERRY—Yes, of course.

CHAIR—When do you anticipate that would happen, Senator Sherry?

Senator SHERRY—We will have to make some arrangements, because we are not happy. In order to deal with this legislation effectively before the Senate, I think we need to have had a reasonable hearing and we had discussed having another day's hearing.

CHAIR—Order! Given that the reporting date is 4 December, are we all happy about trying to organise another hearing tomorrow night?

Senator SHERRY—If that is possible, yes, Chair.

CHAIR—Would you be available tomorrow night?

Mr Fitzpatrick—I will be in Canberra, Senator. Yes, I will certainly make myself available.

Senator ALLISON—I will not, but that is fine.

CHAIR—The committee is adjourned. On behalf of the committee, I thank all witnesses who have given evidence for their participation. The committee will continue to take evidence at a time to be decided tomorrow evening and with the permission of the Senate.

Committee adjourned at 7.30 p.m.