



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

SELECT COMMITTEE ON SUPERANNUATION AND  
FINANCIAL SERVICES

**Reference: Taxation Laws Amendment (Superannuation Contributions) Bill 2000**

THURSDAY, 30 NOVEMBER 2000

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BY AUTHORITY OF THE SENATE

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**SENATE**  
**SELECT COMMITTEE ON SUPERANNUATION AND FINANCIAL SERVICES**

**Wednesday, 29 November 2000**

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

**Senators in attendance:** Senators Conroy, Hogg, Sherry and Watson

**Terms of reference for the inquiry:**

Taxation Laws Amendment (Superannuation Contributions) Bill 2000.

**WITNESSES**

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**Committee met at 3.16 p.m.**

**COLES, Mr Tony, Director, Superannuation, Australian Taxation Office**

**D'ASCENZO, Mr Michael, Second Commissioner, Australian Taxation Office**

**FITZPATRICK, Mr Kevin James, First Assistant Commissioner, High Wealth Individuals Project, Australian Taxation Office**

**SMITH, Mr Peter Gerard, Assistant Commissioner, Small Business, Australian Taxation Office**

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

**CHAIR**— I declare open this hearing of the Senate Select Committee on Superannuation and Financial Services. This is the third public hearing on [Taxation Laws Amendment \(Superannuation Contributions\) Bill 2000](#). The aim of today's hearing is to continue to take evidence from officials from the Australian Taxation Office. I remind the witnesses who appear before the committee that they are protected by parliamentary privilege with respect to the evidence given before the committee. I also remind the witnesses of my remarks expressed at various hearings on the bill that there are some matters that are presently the subject of legal proceedings and, as such, are covered by Senate sub judice principles, and the committee would not wish to be the cause or a contributing factor to a judge dismissing a prosecution or aborting a trial. I therefore seek the cooperation of all witnesses in confining their evidence to issues which are of relevance to the bill as in this way they will assist me and the committee to ensure that no matters are raised which might impact on any legal proceedings that are potentially prejudicial to trial.

I welcome the officers from the Australian Taxation Office, the same officers who appeared yesterday. I say that because I will not repeat the full statement that I made yesterday in relation to the clerk's advice, et cetera. I invite you to make an opening statement.

**Mr Fitzpatrick**—Thank you, Senator. During the last two days of hearings some questions were taken on notice both yesterday and on Monday evening and I thought it might be an appropriate time to respond to those as best we can where we can respond.

**CHAIR**—Excellent. Thank you.

**Mr Fitzpatrick**—Senator Sherry raised the issue at both hearings of the representation of the ATO before this committee. I have a written statement from the Second Commissioner Michael D'Ascenzo which I would like to give to the committee which explains our position.

**CHAIR**—We will give you the opportunity to read it into the public record if you wish.

**Mr Fitzpatrick**—I will, Senator, thank you. It is addressed to Senator John Watson, chairman of the committee:

Dear Senator Watson ...

In relation to a request from Senator the Hon Nick Sherry for additional ATO people to attend the hearing today, the ATO is of course prepared to fully assist the Committee on its deliberations in relation to the *Taxation Laws Amendment (Superannuation Contributions) Bill*. The people who have attended previous hearings and will be attending today have tried to assist and will continue to be available to properly assist the Committee to the best of their endeavours. They represent the senior officers most closely concerned with the development of advice to government in connection with the Bill which is the subject of the Committee's inquiry. They are the ATO officers who are in the best position to provide the Committee with full and frank advice on the issues associated with the Bill.

The other people requested, who include some relatively junior officers, were not involved in relation to the measures contained in the Bill, and in my opinion are unlikely to be able to assist the Committee in respect of this matter. Nevertheless, if it is the wish of the Committee, I am happy to attend today's hearing, although I am probably unlikely to be able to add much to the evidence already given by Mr Fitzpatrick on behalf of the ATO.

Yours sincerely

Michael D'Ascenzo

Second Commissioner

Do you wish me to table that?

**CHAIR**—Pass it across; that would help. I just thought we should put it on the public record. Do you have any other statement or documents that you would like to present?

**Mr Fitzpatrick**—Yes, Senator, thank you. There are some answers to questions, as I indicated. One that Senator Ellison, as I recall, asked on Monday evening concerned the submission from Arthur Andersen. I will ask Mr Thomas, my colleague, to respond to that.

**Mr Thomas**—Arthur Andersen, in its submission, suggested a possible carve-out which would allow a deduction for all contributions where the employer could demonstrate some sort of obligation, provided the fund is a resident in the country in which the employee is working. The submission referred to two circumstances: companies with employees overseas on a long-term basis, and companies with employees overseas on a short-term basis. In relation to the long-term basis, the Arthur Andersen submission suggested that the amendments would result in the deduction being denied for contributions to non-resident funds, but if there was no FBT liability where a non-resident derives income from a source outside Australia such contributions would only be taxed once. In our view, this is entirely consistent with the treatment of contributions for exempt visitors, and therefore we consider that appropriate.

In relation to companies with employees overseas short term, Arthur Andersen makes no suggestion but simply notes that, where an employer is required to make contributions for an employee who visits another country for less than 91 days, they will also be required to pay FBT. However, neither Arthur Andersen nor we have been able to find a jurisdiction where contributions to non-complying superannuation funds are required for such short-term visitors.

This mooted carve-out from the amendment, like some other carve-outs that we have considered, would in our view open up loopholes which could be subject to abuse. The need for there to be an obligation, as suggested by the submission, would not restrict employers in any practical manner. An obligation could presumably include an obligation in an employment contract with an employee, so it could be as loose as that. Industry experts whom we have consulted advise that the number of employees involved is not large, and no industry body—as we have already noted—has been able to provide detail about the number of employees

involved or the level of contributions they would have been making. In earlier evidence it was stated that there would be some modest costs and inconvenience from having to make changes to the current arrangements.

Overall, our view is that the possible abuse of taxation concessions, as already evident from past experience, needs to be weighed against the impact—in some cases—for employers. As I have already said, in most cases that will be capable of being mitigated. So, overall, we see as not compelling the reasons which have been given so far for a carve-out from the legislation.

**CHAIR**—Given that we may have some trouble getting the *Hansard* within our time restrictions, is it possible that we could have a copy of that statement, so that we can accurately reflect it, if need be, in the report?

**Mr Thomas**—Probably I can get something over to the secretariat.

**CHAIR**—That would be good.

**Mr Fitzpatrick**—Senator Sherry also asked yesterday some questions concerning the use of AUSTRAC data. We answered those questions but agreed to take on notice the senator's questions about further analysis of the data. Mr Smith will respond to that now.

**Mr Smith**—Senator, yesterday you asked for contributions in respect of each year, and also whether we had identified offshore superannuation funds other than New Zealand superannuation funds. The AUSTRAC analysis that I referred to yesterday was carried out in late 1998. The research involved the analysis of tax return data for the 1996 and 1997 income years to identify companies with abnormally high claims for superannuation contributions in those years.

AUSTRAC searches were then conducted on those identified companies, and those searches established that the companies had been remitting funds to two New Zealand entities. AUSTRAC searches of those two New Zealand entities then identified other Australian companies that were also remitting funds to them. The AUSTRAC analysis identified transfers of \$22½ million to one of the New Zealand entities and an estimated \$30 million to the other. The reports of the analysis, though, do not break these transfers up by year.

However, the results of the follow-up work that we have done, which has involved getting details from promoters and auditing participants, show that the bulk of the contributions we have identified relate to the 1998 financial year. Of the approximately \$100 million that we have identified to date, about \$80 million relates to that 1998 year. My inquiries of the officer who conducted the AUSTRAC analysis, and of the auditors, have shown that the AUSTRAC analysis and our subsequent audit work have not identified any entities in countries other than New Zealand that are being used in the offshore superannuation schemes.

**Mr Fitzpatrick**—There was also a question you asked on Monday evening concerning the position with overseas countries and non-complying funds. Mr Thomas can provide some information in relation to that.

**Mr Thomas**—Following the hearing on Monday, we have contacted a number of tax authorities and other contacts in significant overseas countries and asked them for some information on the treatment of contributions to foreign based funds from those countries. We are awaiting that advice. We have asked for it very quickly, so I hope to be able to give the committee something about that in the next day or so.

**Mr Fitzpatrick**—Yesterday Senator Sherry sought copies of the advices which we had issued in relation to controlling interest superannuation arrangements. I had mentioned that there were a total of 19 such advices, including three private binding rulings. I indicated yesterday that I would consider whether we could provide copies to the committee to assist it; they would need to be sanitised, obviously, to remove taxpayer identification. I am still considering that matter. I think I need to take advice from the DPP about whether it is appropriate to provide copies of the advices, because they may well be connected to the current court matter. We will certainly keep the committee informed, once I receive that advice.

**Senator CONROY**—You would be referring to the doctrine of the separation of powers, wouldn't you?

**Mr Fitzpatrick**—Yes, Senator.

**Senator CONROY**—That would be the one where parliament and the executive do not interfere in legal cases and the judiciary do not interfere in parliamentary inquiries. It would be that doctrine of the separation of legal powers, would it? It is up to us what we take and not take.

**Mr Fitzpatrick**—I understand that. I am trying to assist the committee, as I said yesterday, as best I can, but I hope you would understand that in the circumstances I need to take advice about this, and that is what I will do. I did take advice in relation to another matter concerning a question from Senator Sherry yesterday, about an article in the *Australian Financial Review*. I am happy to try to respond as best I can to that question, but in relation to the copies of the advices I spoke about yesterday, I believe I do need to take further advice about whether it is appropriate in the circumstances.

**Senator SHERRY**—Just on this matter: have you sought advice yet?

**Mr Fitzpatrick**—I sought advice last evening concerning the article in the *Financial Review* and the document which I believe is the document referred to in that article. I looked at the issue last night, and again this morning, about the 19 advices I referred to yesterday, but I need to take further advice about whether it is appropriate, once they have been sanitised, to release those—for the reasons I have mentioned.

**CHAIR**—Even if we do receive it, the committee itself may also have to take advice, given the letter that we received from the DPP.

**Senator CONROY**—I doubt that we would take advice on whether we should receive it. Would the DPP—

**Mr Fitzpatrick**—I understand the position, Senator, but I hope you understand my position, too.

**CHAIR**—We ourselves may have to determine the status of that document. We may even have to return it to you, depending on the advice that we get.

**Mr Fitzpatrick**—Those advices that I referred to yesterday obviously have to be, in my term, sanitised to take off taxpayer names and identification. If that has not been done, then I cannot—

**Senator SHERRY**—We understand that; that is not an issue.

**Mr Fitzpatrick**—It will take a little bit of time to provide those, if we are able to do so in the circumstances. I understand the point that Senator Conroy makes, but I hope that you understand my position, too. I am not trying to in any way mislead or not to assist the committee.

**CHAIR**—Just to make it perfectly clear, even though you might tender those documents, given the possibility of their sensitivity, the committee may also have to defer and seek advice as to whether it will receive them or return them to you in the same manner that certain documents from Mr Petroulias were returned.

**Mr Fitzpatrick**—I understand that, Senator.

**Senator SHERRY**—Your comments go to the paper written by Mr Collie, as detailed in the *Financial Review* on Wednesday?

**Mr Fitzpatrick**—I think I understand what paper was referred to in the *Financial Review* article.

**CHAIR**—Again, I warn both my colleagues and the tax office in terms of the use of names and documents that may have either an indirect or a direct bearing on what may or may not be tendered as evidence in a future court hearing. Use of names and reference to particular leading documents may cause some problems.

**Senator SHERRY**—Chair, I am being careful. I am reading the *Fin Review*. If there is any potential problem, I do not think my reference to an article—

**Senator CONROY**—I think the journalist, Mr Cleary, is the one with the problem.

**Senator SHERRY**—Yes. Mr Cleary is a very respected journalist, I might say. I do not think I am going to add any more to the publicity that Mr Cleary in the *Fin Review* has already given this matter.

**CHAIR**—I was not casting any aspersions on Mr Cleary. I just ask all participants on both sides of the table to take care.

**Senator SHERRY**—We are looking for the signed brief from Mr Graham Collie. With respect to the initial comment by Mr Fitzpatrick, yes, we would like Mr D'Ascenzo to be here.

**CHAIR**—We had better give them time.

**Senator SHERRY**—That is right. It is unfortunate because if you had let the committee know before you read your opening statement, obviously we would have had time to come back to you.

**Mr Fitzpatrick**—If it is the committee's wish, as Mr D'Ascenzo has indicated in that letter, we will be able to contact him and ask him to appear here this afternoon.

**Senator SHERRY**—Good.

**CHAIR**—Mr Fitzpatrick wanted to discuss some issues with me prior to the hearing, and I think this may have been one of them. I felt it was best to discuss them in the context of a full committee meeting, Senator Sherry. If there was any delay, at least half an hour may have been my fault, because I felt that the full committee was entitled to the information.

**Senator SHERRY**—I do not blame you, Chair. I think you have been as cooperative as you can within the constraints that the government imposes on you. I do blame the tax office.

**CHAIR**—Do you want Mr D'Ascenzo to be here? The offer has been made.

**Senator SHERRY**—Yes.

**CHAIR**—Can somebody contact Mr D'Ascenzo?

**Mr Fitzpatrick**—We can call Mr D'Ascenzo.

**Senator SHERRY**—How long will it be? Ten minutes, 15 minutes?

**CHAIR**—Half an hour, probably.

**Mr Fitzpatrick**—Twenty minutes, perhaps.

**CHAIR**—You will have at least an hour, Senator Sherry.

**Senator SHERRY**—I am just getting worried, Chair, because this is cutting into our time. It is very useful that Mr D'Ascenzo has indicated that he would come; it is just unfortunate that we did not know beforehand.

**Mr Fitzpatrick**—We also read the last bit of Mr D'Ascenzo's letter, Senator.

**CHAIR**—Do you have any further answers to questions?

**Mr Smith**—There was a question asked yesterday about the numbers of non-complying funds that we had identified. I am assuming this related to the number of non-complying funds that we have identified as part of our audits. I tried to check that overnight. The reporting systems that we use for these audits are based on the numbers of promoters and the numbers of participants. We do not have particulars of the number of funds and therefore we do not have the break-up of the complying and non-complying funds. At this stage we have not completed our audits and are not in a position to know whether a particular case involves a complying or a non-complying fund. On the basis of the information we have obtained so far, the numbers of non-complying funds far outweigh the numbers of complying funds. To give you an indication of the numbers, because some participants may contribute to the one fund, the number of funds would be something less than the 2,400 participants that we have identified in the controlling interest superannuation schemes and the 220 that we have identified in the offshore super schemes.

**Senator SHERRY**—When would you have your completed figures?

**Mr Smith**—To get those figures would require our auditors to go through every case they have and tally them up. Our reporting systems do not work on the basis of super funds. We have records of the numbers of promoters and the number of participants. We did not see a need in developing our reporting systems to identify the actual number of superannuation funds. That would require a case by case analysis from the auditors.

**Senator SHERRY**—So what you are saying is that you could not provide that information in the time we have available?

**Mr Smith**—No, we could not, Senator.

**Mr Fitzpatrick**—We are still auditing some cases and getting information in relation to those cases. Senator Sherry also asked questions about these three private binding rulings and the revenue involved in relation to those three. I should say at the outset, just to clarify my answers yesterday in relation to these advices and ruling in relation to controlling interest arrangements, that the numbers I referred to did not cover advices which are connected with the current court matter. The 19, including the three private binding rulings, do not include those which appear to be connected with the current court matter. That was referred to previously—as I said, yesterday. The commissioner acknowledged previously that we gave some incorrect advice in speeches over the last few months on at least two or three occasions that I can recall. What I said yesterday was consistent with his previous acknowledgment, and I have given you the up-to-date numbers, as we identified yesterday.

In relation to the three private binding rulings, we are examining those three cases and have not yet completed those examinations. I indicated that we would be bound under the law to those rulings as long as the conditions necessary are satisfied. But on present information, and subject to the completion of our examinations of those three cases, the amount of tax estimated to be involved in those three would be in the vicinity of \$40,000. I commented yesterday that it was relatively insignificant in the context of all of these arrangements. That is still my position. I do not think I have anything else to respond to.

**Senator SHERRY**—Chair, do you want to form a subcommittee at this stage?

**CHAIR**—We have done so.

**Senator SHERRY**—Some of these matters might be dealt with more appropriately when Mr D'Ascenzo arrives. Do we have any idea on the time frame?

**Mr Smith**—He said that he would be on his way as soon as possible.

**Senator SHERRY**—I will go back to a couple of matters raised yesterday.

**CHAIR**—I might clarify a few things. On the residency issue, there was some talk about it being extended beyond two years. We note that there has been a recent media release and also a comment from the Australian Taxation Office that under the regulations that period can be extended. I thought that should be put on the public record. A corporate superannuation association spoke of bona fide corporations being exempt. We believe that it would be fairly difficult to define that term 'bona fide'. You might be able to tell us whether an age based limit would be a better means of separation.

**Mr Thomas**—Certainly I agree it would be difficult to establish what was a bona fide corporation and then to define that in legislation. That would be a very difficult task and it could lead to considerable comment and adverse reaction, I expect. In some of our consultation with the various groups, one suggestion put forward was one that you just mentioned about an age based limit being an approach for contributions to non-complying superannuation funds, as well as to complying superannuation funds in certain circumstances. The difficulty that we have with that is that it goes to the heart of the need to allow contributions to non-complying superannuation funds. As I said in my opening statement on Monday night, the reason why deductibility remained available for contributions to non-complying superannuation funds after the introduction of the SIS legislation was because of the inability of certain funds, in particular some corporate superannuation funds—employer-sponsored superannuation funds—to meet the requirements of the SIS legislation, in particular the borrowing provisions.

**CHAIR**—But then you went on and said you felt that eight years was sufficient time.

**Mr Thomas**—Eight years past is quite sufficient in our view and it is questionable then why there is a need to give a fairly large let-out in the nature of the age based limit. That would be our position on that suggestion.

**Senator SHERRY**—Returning to information that you have given the committee this afternoon, you mentioned the number of participants. Was it approximately 2,400 controlling interest schemes?

**Mr Thomas**—That is right.

**Senator SHERRY**—And approximately 220 participants in offshore superannuation schemes?

**Mr Fitzpatrick**—Identified to date.

**Senator SHERRY**—Identified to date. That is right. So this is obviously subject to completion of audits, as we should recognise. You can or you cannot complete the audits so we can identify the proper number? This might be 50 per cent; it might be a third.

**Mr Smith**—The best guess that the officer I spoke to this morning had—the officer who believed that the number of non-complying funds far outweighed the number of complying funds—was that of the order of 75 per cent were non-complying funds.

**Senator SHERRY**—The funds that flow into these schemes: what is the best guess, if you do not have an exact estimate, of the quanta of money flowing into these schemes?

**Mr Fitzpatrick**—On Monday evening, I spoke about identified cases and the contributions being claimed as deductions. I said that the figure was in the vicinity of \$100 million for offshore schemes and around \$400 million for controlling interest schemes.

**Senator SHERRY**—This is into all of the approximately 2,400?

**Mr Fitzpatrick**—That is 2,600 in total between the two of them. Between the two superannuation arrangements, there are around 2,600 participants—that is 2,400 and—

**Senator SHERRY**—Yes.

**Mr Fitzpatrick**—and around \$500 million in deductions.

**Senator SHERRY**—That is annually.

**Mr Fitzpatrick**—No, that is total. That is deductions claimed on the cases identified at this point in time.

**Senator SHERRY**—On cases identified?

**Mr Fitzpatrick**—To this point in time, yes.

**Senator SHERRY**—But we do not know how much higher the figure is, because you cannot—

**Mr Fitzpatrick**—As you know, we have given an estimate based on what we have identified to date. In our judgment, there will be some others we have not yet identified in our estimate, which is based on identified cases at this point in time. For all of the EBA arrangements—that is, the four different types now—there is the \$1.5 billion in deductions we talked about on Monday evening, including those two superannuation measures.

**Senator SHERRY**—It could be higher, but you just cannot—

**Mr Fitzpatrick**—That is our estimate. Our estimate is that figure, as I said on Monday night. It is based on identified cases, with some projection that some have not yet been identified. That

is the best estimate we have been able to give. I cannot think of anybody who has given any better basis.

**Senator SHERRY**—So we have the \$1.5 billion, and we have the approximate number of controlling interest—

**Mr Fitzpatrick**—To make sure you are clear about this, the \$1.5 billion includes \$1.3 billion identified for all EBA cases, the employee benefit types, and, of the \$1.3 billion, around \$500 million is in relation to superannuation arrangements. That is the most reliable basis of the estimate we can give in relation to these matters.

**Senator SHERRY**—You cannot have a more accurate figure by the time we consider the bill next week?

**Mr Fitzpatrick**—No, I would not have thought so. That is our estimate at this point in time. A few days will not change that, unless something out of the ordinary happens in the next couple of days. I would not expect that.

**CHAIR**—I think that is fair enough.

**Senator SHERRY**—Thank you.

**CHAIR**—Senator, you raised the question of retrospectivity last night, either in whole or in part, and I think a response came back that it may introduce an element of confusion. In addition to that, could it also introduce an element of inequity, because the cases that have already been determined settled. Some might have been by negotiated settlement and others by settlement in full. They would be settled on the basis of the law as it then stood, wouldn't it?

**Mr Fitzpatrick**—Any cases we have settled clearly have to be based on existing law.

**CHAIR**—There would not be any uncertainty in respect of those, because they would still stand even in the event of a retrospective law being passed. However, would that not create a potential for some inequity between people who had identical arrangements—that is, one being settled some time ago and one being settled as a result of retrospective application of the law? Some might have done well out of it; some might have done badly out of it. I just raise this question of equity between people where settlements have been made simply because they were chosen early vis-a-vis people who might get caught up in the retrospective law. Do you see the point I am raising?

**Mr Fitzpatrick**—No.

**CHAIR**—I am not challenging the legality of the settlement because, as I understand it, that would be settled under the law as it then stood.

**Mr Fitzpatrick**—In my view, that settlement would be binding.

**CHAIR**—That would be binding. But then, if a retrospective law were to be passed—and I am just maybe raising the question of—

**Mr Fitzpatrick**—I understand. I am trying to think through the possibilities.

**CHAIR**—If an amendment were put up to have retrospectivity, would that not create the potential for some inequity between the settled cases and those cases that would be affected by the retrospective rather than the prospective legislation?

**Mr Fitzpatrick**—It is an interesting issue. Certainly, as I said, cases that have been settled to date would be binding on the parties, I believe. I mentioned yesterday—in response to Senator Sherry, I think—that, according to the code of settlement practice and settlement guidelines, any settlements we have undertaken to date, depending on individual circumstances, of course, would not be settlements of primary tax but rather possible settlements of interest or penalty. You have raised an issue, I suppose, about—

**CHAIR**—It is a hypothetical debate, but I just thought we should be aware of it.

**Mr Fitzpatrick**—the law being passed retrospectively in relation to, say, controlling interest. As we touched on yesterday, we need to be very careful about the other two measures, because there are different issues here. As we discussed yesterday, the controlling interest of many an eligible employee was in our view a clarifying amendment, and the bill and the EM say that as well, whereas the other two measures are not clarifying in that sense. So there is an issue there about what measures would be retrospective, and I think it is very important for that to be considered. As I said yesterday, because our view of the existing law is that these schemes can be dealt with under existing law, retrospective legislation is not necessary. You have raised issues about the possibility of whether the penalty in a settlement context, or even without a settlement, might be different under the changed law in cases we are considering in the future—

**CHAIR**—In the hypothetical event of a retrospective application.

**Mr Fitzpatrick**—Yes. We would need to consider the penalty provisions in the law. I am not sure what effect it would have. It does raise an interesting issue, not just in a settlement context, I would have thought, but rather also perhaps in an assessment context—

**CHAIR**—That is right.

**Mr Fitzpatrick**—as to whether there would be a different answer if the law was made retrospective, say, in relation to the eligible employee definition.

**CHAIR**—That is purely my perception.

**Mr Fitzpatrick**—Yes. It raises an issue which would need to be thought through a bit more, I think, about the penalty. I am not sure that I can add any more to it than that at the moment.

**CHAIR**—That may or may not help Senator Sherry.

**Senator SHERRY**—I had not finished my questions in respect of the response I received. Mr Smith, you referred to a number of promoters. What are we talking about here?

**Mr Smith**—The ones we have identified are 16 with respect to the controlling interest super funds—I am sorry, I have just got updated information here: it is 18 controlling interest super and 11 offshore superannuation.

**Mr Fitzpatrick**—Some of those might be in both, mightn't they?

**Mr Smith**—That is right.

**Senator CONROY**—There would be overlap?

**Mr Smith**—There would be overlap in some of them.

**Senator SHERRY**—But these are the promoters?

**Mr Smith**—That is right.

**Senator SHERRY**—What types of promoters are they—lawyers, accounting firms, superannuation companies?

**Mr Fitzpatrick**—It would be a variety of different firms.

**Senator SHERRY**—Such as?

**Mr Fitzpatrick**—There would be accounting, legal firms, other organisations. Mr Smith might have something to add to that.

**Mr Smith**—Mainly accountants and lawyers.

**Senator SHERRY**—Can you provide us with a list of the people involved?

**Mr Fitzpatrick**—No.

**Senator SHERRY**—Why not?

**Mr Fitzpatrick**—That is protected information

**Senator SHERRY**—Is it protected?

**Mr Fitzpatrick**—I would have thought so. I am sorry, yes, I think so.

**Senator SHERRY**—You think so or you would have thought so—you can't be sure?

**Mr Fitzpatrick**—In my view it is protected, yes.

**Senator SHERRY**—Can you check that out?

**Mr Fitzpatrick**—I am happy to check it out, but that is my view.

**Senator SHERRY**—Okay. Can you check it out and, if it is not correct that it is protected information, can you take it on notice to provide us with a list of the promoters of these schemes?

**Mr Fitzpatrick**—I will certainly take it on notice, as you request. But it is my view that under the law—

**Senator CONROY**—On what basis?

**Mr Fitzpatrick**—Under the secrecy provisions of the income tax laws.

**Senator CONROY**—In what way?

**Mr Fitzpatrick**—Section 16 of the income tax—

**Senator CONROY**—They are advertising publicly: come and use these schemes. Just because a taxpayer—

**Mr Fitzpatrick**—We have information concerning taxpayers' involvement in particular arrangements—

**Senator SHERRY**—It is not the taxpayer we are asking for, it is the promoter.

**Mr Fitzpatrick**—I understand that. But that information is confidential, as I understand the taxation laws.

**Senator CONROY**—If they promote these things publicly, as they appear to have been doing, then just because—

**Mr Fitzpatrick**—I do not know whether all of them promoted them publicly.

**Senator CONROY**—one taxpayer then takes them up, you are saying you can never name them?

**Mr Fitzpatrick**—We cannot divulge information provided to us in respect of these cases. It is the section 16 provisions of the income tax laws—the secrecy provisions. I do not know to what extent all of these have been promoted publicly, in the sense of the mass market. These cases are not prospectus arrangements.

**Senator CONROY**—If a company is walking around telling members of the public, 'Come and use us because we have got this great idea,' and a taxpayer then takes them up on it, you are saying you can then never say who is promoting these schemes publicly?

**Mr Fitzpatrick**—I have given my answer, Senator, and I cannot add any more to it. I will take it on notice, as you requested.

**Senator CONROY**—So it is a secret?

**Mr Fitzpatrick**—We are bound by the secrecy provisions of the income tax laws, of course.

**Senator SHERRY**—You may be in this case.

**Mr Fitzpatrick**—I understand your question and I have given my answer as best I understand the laws. I have agreed to take it on notice as you have asked me to do. If I am wrong I will admit I am wrong.

**Senator CONROY**—So if we were to ask you if you could tell us the names of companies which were involved in promoting these schemes, could you tell us that?

**Mr Fitzpatrick**—I do not believe I can.

**CHAIR**—On the other hand, we probably could get that information if we were interviewing ASIC.

**Mr Fitzpatrick**—There may be a difference between those which are prospectus based arrangements as distinct from other arrangements.

**Mr Smith**—I am not too sure of the secrecy provisions that apply to ASIC laws but our secrecy provisions apply to information that is required in the course of our duties as an officer.

**Senator HOGG**—Can I just follow on with that? What does ‘publicly promoted’ actually mean?

**Mr Fitzpatrick**—It could mean those which have been promoted through a prospectus.

**Senator HOG**—What about on the Internet or by word of mouth? Do you have a definition of ‘publicly promoted’?

**Mr Fitzpatrick**—I do not have a definition of ‘publicly promoted’—that is not the issue under the taxation laws. As Mr Smith has said, we have obtained information in the course of our duties as taxation officers advising the tax affairs of taxpayers and I do not believe we can divulge that information.

**Senator HOGG**—Even if it is publicly available?

**Mr Fitzpatrick**—I believe so. I am not sure what is publicly available either as to what has been promoted to what taxpayers.

**Senator SHERRY**—You may be because, in fact, your investigating officers may have seen an advertisement and that may lead them to a particular scheme.

**Mr Fitzpatrick**—It may lead them to examination. It may lead to a scheme and examination of who is involved in the particular scheme.

**Senator SHERRY**—You are going to seek legal advice obviously. Could you provide us with a copy of that legal advice?

**Mr Fitzpatrick**—I did not say ‘legal advice’. You asked me to review my answer. I am fairly clear in my own mind that it is the correct answer but I agreed to take on notice to review that. If I am wrong and I am able to provide information I will certainly assist the committee. But I am not necessarily going to take legal advice.

**Senator SHERRY**—You will obviously take advice and there is a fair show it will be from a lawyer.

**Mr Fitzpatrick**—It might be just Taxation Office advice.

**Senator SHERRY**—Yes, within the tax office.

**Mr Fitzpatrick**—I misunderstood you. I thought you were meaning that I was going to seek legal advice outside the tax office. That is not necessarily the case.

**Senator SHERRY**—You may or may not—that is up to you.

**Mr Fitzpatrick**—Yes, I understand.

**Senator SHERRY**—Just on the issue of the promoters, I think you would be aware that we did hear evidence of a sort from Arthur Andersen and we had Mr Ellis in front of us. We did request—not just in respect of Arthur Andersen—a number of other companies that we believe are involved in the promotion of these products and none of them have responded. Do you have any comment to make about that?

**Mr Fitzpatrick**—No.

**Senator SHERRY**—Don’t you think it is a bit unusual that where you were proposing legislation the promoters of the schemes that you say you are attempting to rein in and stop the promotion of do not appear before the committee to give their side of the story?

**Mr Fitzpatrick**—I cannot talk for any firms as to why they—

**Senator SHERRY**—I am not asking you to talk for any firms, I am asking your view.

**Mr Fitzpatrick**—appear or did not appear to give evidence before the committee. I have no view about that.

**CHAIR**—Somebody indicated to the secretariat that they thought the time was too short. A couple of people could not be contacted. Apart from that we do not know why they did not come.

**Senator SHERRY**—Perhaps if they believed there was some element of retrospectivity they might spring out of the woods. I cannot believe that all of them were contacted at short notice.

**CHAIR**—That is your opinion, Senator.

**Senator SHERRY**—I cannot believe that all of those who were contacted at short notice could not be here. I did want to go back to the issue of settlement. I had quite a few questions on that. You were answering Senator Watson earlier regarding retrospectivity resulting in unfairness between people who had already arrived at settlement and those who had not. Have any people involved in these schemes entered into settlement with the tax office so far?

**Mr Fitzpatrick**—I think I said in previous evidence that certainly some cases have been resolved by taxpayers conceding. I think I indicated the other day that some have been settled. Pursuant to our code of settlement practice, we would have settled on the penalty amount and not on the primary tax amount. I am not aware of any cases where we have settled on a reduction of the primary tax, although, as we have indicated in our settlement guidelines, as I recall, in some cases, depending on the facts, the arrangements may give rise to multiple taxing points. There is denial of deduction perhaps and perhaps the application of fringe benefits tax law. We have indicated in our settlement guidelines that we would consider offers in these types of cases where we would settle the primary tax on one taxing point rather than on multiple taxing points. Subject to that, the settlements would be on penalty amounts, as distinct from primary tax amounts.

**Senator SHERRY**—So you are still to settle the full tax liability in those cases?

**Mr Fitzpatrick**—That is the exact point I made about multiple taxing points. To my knowledge, we have not settled on primary tax in these cases. But we consider each case on its merits, obviously.

**Senator SHERRY**—I understand that. You have not settled on the tax liability?

**Mr Fitzpatrick**—The primary tax liability, that is right.

**Senator SHERRY**—Why is that?

**Mr Fitzpatrick**—Because, in our view, it is not appropriate. Our view is that the deductions, for example, are not allowable. We make a judgment, obviously, in each case as to what is an appropriate settlement.

**Senator SHERRY**—How was that going to be resolved? They won't pay.

**Mr Fitzpatrick**—Some of them have.

**Senator SHERRY**—Some of them won't pay. How are you going to settle them?

**Mr Fitzpatrick**—If we can't settle and if the taxpayers wish, it will go to court or to the Administrative Appeals Tribunal.

**Senator SHERRY**—What sort of revenue are we talking about in this area?

**Mr Fitzpatrick**—I mentioned the other evening that we have estimated the tax collected at \$100 million in this area of employee benefit arrangements which includes the two superannuation arrangements we have been discussing. That would include taxes collected pursuant to taxpayers conceding the tax office position, if I can put it that way, and that would include some cases that presumably have been settled, as we have described.

**Senator SHERRY**—How many of these cases are outstanding—where you have not settled the primary tax liability?

**Mr Fitzpatrick**—As I indicated before, cases are at varying stages of progression to resolution. For some we are still gathering the facts to enable us to consider what assessment should be amended, if any; and for others we have had immediate assessments issued and the taxpayer may have lodged an objection, or is still to lodge an objection, within the time frame. We are considering objections in some cases, and in some cases we have determined objections. I said yesterday that there was a small number who have lodged appeals at this point in time to the Administrative Appeals Tribunal or to the Federal Court. So they are at varying stages. In some cases, the taxes are still outstanding, and they may be in dispute if taxpayers have lodged objections or even appeals.

**Senator SHERRY**—They do not have to pay the tax until it is settled, do they?

**Mr Fitzpatrick**—Until it is resolved. You have to be careful about the terms, Senator. In our terms, settlement means that the case is resolved by the parties coming together and settling the outcome in the way I have explained in the last couple of minutes. Cases are also resolved by taxpayers conceding that the tax is properly due and payable; and, of course, sometimes cases—in fact, very few of these—

**Senator SHERRY**—How many such concessions have you had so far?

**Mr Fitzpatrick**—I do not know how many cases have been resolved by a taxpayer conceding the position without objecting; some are still, presumably, deciding whether to object or even to lodge an appeal, depending on the stage of the particular case and the timing. As I said, we have collected around \$100 million from these various employee benefit arrangements to date, which would cover these two superannuation arrangements. They would, as I said, come either from taxpayers settling on the penalty tax, as I have indicated, or from some taxpayers conceding, I would imagine. I have not got details beyond that.

**Senator SHERRY**—Could you provide me with the information as to how many are fully complete, settled—

**Mr Fitzpatrick**—How many cases have been resolved one way or the other; is that your question?

**Senator SHERRY**—It is a bit more complex than that. How many have settled on your terms—what you believe had to be paid? In how many cases has a deal been struck? So that I

am clear about this, for those that are outstanding in respect of tax liability, what quanta of money is involved?

**Mr Fitzpatrick**—Taxes outstanding?

**Senator SHERRY**—Yes. Do you have the figure here?

**Mr Fitzpatrick**—I will just check, Senator. The figures we have available are in relation to employee benefits arrangements. Again, I want to emphasise that it includes all those arrangements, not just the two superannuation ones. With respect to the taxes outstanding, our estimate in relation to the cases identified is that around \$140 million in tax is outstanding. As I said before, our estimate is that \$100 million has been collected to date.

**Senator SHERRY**—So it is \$100 million plus \$140 million?

**Mr Fitzpatrick**—That is right. Those are the best figures we have got available on those components of the tax, which includes the interest and penalties, of course.

**Senator SHERRY**—If the legislation that we are considering is passed, does that assist you in collecting these moneys?

**Mr Fitzpatrick**—As I said previously, it is our view that the arrangements that we are talking about are not affected under the existing law. That has been our view and it is our view. I have tried to explain the reasons why we recommended a legislation change in this area—it was to clarify the law in one sense and to deny deductibility to non-complying fund contributions, to protect taxpayers from the ongoing marketing of these arrangements. If our view of the existing law is correct—we believe it is, and it is supported by senior counsel—we believe we will collect the taxes eventually found to be payable in all these cases.

**Senator SHERRY**—If your view of the law is correct?

**Mr Fitzpatrick**—That is correct.

**Senator SHERRY**—If we don't pass this legislation, what is the difference? I put it to you: you are trying to strengthen your position in the law.

**Mr Fitzpatrick**—I have tried to explain our position as to why the amendments are required. As I said yesterday, this is not the first time that this has happened. I think I mentioned yesterday my recollection of cases in the schemes era, if I can call it that, back in the late seventies and early eighties. There was an occasion when legislation was passed to address what were considered to be tax avoidance arrangements even though—

**Senator SHERRY**—Bottom of the harbour, were they?

**Mr Fitzpatrick**—No, I was not talking about bottom of the harbour schemes; I was talking about the paper schemes of that era. They were not necessarily bottom of the harbour schemes.

**Senator SHERRY**—With respect to those paper schemes, were changes made retrospectively in those cases?

**Mr Fitzpatrick**—I cannot recall retrospective legislation. I cannot think of all the changes made 20 years ago, of course.

**Senator SHERRY**—No, I am not being critical. Can Mr D'Ascenzo or anyone else help us?

**Mr D'Ascenzo**—I am in the same position as Kevin.

**Senator SHERRY**—Can you take that on notice?

**Mr Fitzpatrick**—To look at legislation changes from 20 years ago and whether they were retrospective?

**Senator SHERRY**—I am sure there will be someone in the tax office with some sort of record. There must be some sort of record.

**Mr Fitzpatrick**—In the parliament, as well, I presume. We can do our best.

[4.10 p.m.]

**CHAIR**—Order! I would like to welcome Mr Michael D'Ascenzo. Mr D'Ascenzo, you were not present when we read the opening statement but I have passed you a copy. You have noted the issues, in particular the request to confine your issues to relevant matters and to make sure that no matters are raised which have the potential to impact on any legal proceedings that might potentially prejudice a trial.

**Mr D'Ascenzo**—I have noted that, Senator.

**CHAIR**—Mr D'Ascenzo, I thank you for your letter. The committee has accepted your offer and, at very short notice, has invited you to attend. We appreciate the fact that you have attended the committee hearing this afternoon and thank you very much. Would you like to make an opening statement?

**Mr D'Ascenzo**—I have no opening statement to make. Mr Fitzpatrick has been keeping me informed of deliberations here. The advice he has provided to the committee, in my view, is full and prompt.

**Senator SHERRY**—Mr Fitzpatrick was trying to explain that, if we do not pass this law, there would be no impact on the collection of the moneys they are seeking.

**Mr Fitzpatrick**—I said that, in our view, we have the logistical means whereby we believe we can collect most of the tax which is properly due and payable.

**Senator SHERRY**—Most of the tax?

**Mr Fitzpatrick**—Subject to the taxpayers having the capacity to pay.

**CHAIR**—Order! I think we should confine our questions to each of the segments that this bill covers. Otherwise, we may convey a wrong impression. There are three elements of this bill and, to try to suggest there is an overall application, may lead people to come to the wrong conclusions. If you would like to address your questions to particular applications—

**Senator SHERRY**—Chair, I will determine how I address my questions. If you want to ask your own questions, that is fine; I do not interfere with your prerogative, and you do not interfere with mine. But Mr Fitzpatrick was answering.

**CHAIR**—I did that purely to ensure that there is no misunderstanding in terms of the evidence that is presented and that we do not draw incorrect conclusions. That is all.

**Mr Fitzpatrick**—I think I have answered the question, Senator. There is one point my colleague Mr Smith has reminded me of. It is to clarify the details of what you want by way of cases settled—just to make sure we understand clearly what it is you are seeking. I did say that in some cases taxes have been collected—\$100 million is our estimate—and these various employment benefit arrangements. As I said, some cases have been settled generally by way of penalty tax amounts but not primary tax other than that issue about multiple taxing points. I am just not quite sure what you want further.

**Senator SHERRY**—You have given me the details of the outstanding amounts—\$140 million. There is \$100 million collected. What I would like to know is whether any of these have so far gone to any sort of tribunal or court.

**Mr Fitzpatrick**—A small number have been lodged with the Administrative Appeals Tribunal and I think one at this stage with the Federal Court.

**Senator SHERRY**—There has to be a deadline for them to notify you of dispute or non-payment, presumably. If they do not pay by that date, presumably you have either got to take action against them or they will take their own action against you.

**Mr Fitzpatrick**—Yes, if amounts are outstanding—I assume that there are assessments and they are not in dispute; as you have said, if they did not lodge an appeal, for example, or lodge an objection before that stage—we would seek to recover the tax, if they do not pay it. That is a normal policy, of course.

**Senator SHERRY**—But at this stage have you taken any action against any of the outstanding cases?

**Mr Fitzpatrick**—We would be taking action in respect of those cases in accordance with our normal policy of recovery of tax. If the taxes are disputed, obviously that puts a different light on it, compared to the situation where there is no dispute. In some cases, the amounts outstanding would be as a result of fairly recent amended assessments, so the time period for lodging objections, for example, may not have expired. In some cases, objections would be lodged and we would be considering those objections. This applies across the board, not just to

this sort of case: we would normally not take legal action to recover while an objection is being considered.

**Senator SHERRY**—I understand that. We are not at the point where the tax office is taking legal action against anyone yet.

**Mr Fitzpatrick**—I am not sure whether we have started legal action against some of these cases yet; we may have done. There are various stages involved in that, of course.

**Senator SHERRY**—I understand that there are different dates for different cases.

**Mr Fitzpatrick**—That is correct.

**Senator SHERRY**—It is sort of a rolling issue.

**Mr Fitzpatrick**—There are no cases, to my knowledge—Mr Smith can correct me if I am wrong—where we are in the courts seeking to recover tax.

**Senator SHERRY**—As yet.

**Mr Fitzpatrick**—As yet.

**CHAIR**—But you have a case before the Federal Court.

**Mr Fitzpatrick**—I meant in court on the recovery side. That is what Senator Sherry was asking me—action to recover the tax as distinct from before the court or the tribunal on a substantive tax liability issue. Is that correct, Senator?

**Senator SHERRY**—Yes. How many taxpayers are taking the tax office to court?

**Mr Fitzpatrick**—How many taxpayers have lodged appeals either to the Administrative Appeals Tribunal or to the Federal Court at this point?

**Senator SHERRY**—Yes.

**Mr Fitzpatrick**—Mr Smith can probably assist me here. My understanding is that there are six cases. These are participants. There might be a number of different amended assessments and therefore the numbers would vary because of that.

**Mr Smith**—There are five at the Administrative Appeals Tribunal and one at the Federal Court.

**Senator SHERRY**—Is that five taxpayers?

**Mr Fitzpatrick**—There may even be more than that. We even count cases where there might be different assessments on different taxpayers, depending on the particular facts of an arrangement.

**Senator SHERRY**—So there could be more taxpayers than five involved in the case of the Administrative Appeals Tribunal and one in the case of the Federal Court?

**Mr Fitzpatrick**—Yes.

**Mr Smith**—There could be more taxpayers. Two cases involve about 22 separate appeals because of the different taxpayers and the different years involved. We are talking about cases: there are five cases before the AAT and one before the Federal Court.

**Mr Fitzpatrick**—I think we had better stick to the cases; it is probably easier for everybody.

**Senator SHERRY**—I am just trying to get an idea of the size of this.

**Mr Fitzpatrick**—Yes, I understand.

**Senator SHERRY**—You say five cases. As a layperson—I do not have the technical knowledge and expertise that you have—that is five taxpayers for one year, but it is a lot more than that.

**Mr Fitzpatrick**—As Mr Smith said, it could be.

**Senator SHERRY**—You have outlined where—

**Mr Fitzpatrick**—That is right.

**Senator SHERRY**—Which company is involved in the case before the Federal Court?

**Mr Fitzpatrick**—I am not sure that is on the public record at this point.

**Mr Smith**—Not as far as I know.

**Senator SHERRY**—How can it be before the Federal Court?

**Mr Smith**—The appeal has been lodged with the Federal Court.

**Senator SHERRY**—Isn't it a public record if it has been lodged? I am not a lawyer, but if there is an appeal lodged, it has got to be a public document.

**Mr Fitzpatrick**—We need to check that. We will take it on notice and let you know.

**Senator SHERRY**—What about the other five before the Administrative Appeals Tribunal?

**Mr Fitzpatrick**—That is not public knowledge.

**Senator SHERRY**—Are you sure?

**Mr Fitzpatrick**—Yes.

**Senator SHERRY**—How can you say it is not public knowledge?

**Mr Fitzpatrick**—Appeals to the Administrative Appeals Tribunal are not on the public record.

**Senator SHERRY**—I am a bit mystified about the Federal Court picture.

**Mr Fitzpatrick**—I understand the point you are making. We will check that.

**Senator SHERRY**—That is a very important issue, because it leads to some other questions and other documents I have. Mr D'Ascenzo, is it true that you, as the chief tax counsel, oversee all of the settlements?

**Mr D'Ascenzo**—No, I do not oversee all of the settlements.

**Senator SHERRY**—In the areas we are talking about?

**Mr D'Ascenzo**—We have settlement guidelines, which have been published. Our officers work in accordance with those settlement guidelines to deliver an outcome, and then we have a whole range of QA processes, which include scrutiny of those settlements.

**Senator SHERRY**—When I say 'oversee', you do not personally do the paperwork or all the research, you have officers who have a certain number of cases?

**Mr D'Ascenzo**—That is right.

**Senator SHERRY**—But, at the end of the day, if a case is going to be settled and it has to be ticked off, signed off, do you do that?

**Mr D'Ascenzo**—No, it is not done by me, it is usually done through authorised officers and then countersigned either at peer or supervisory level. I am not sure exactly who does it, but I do not. Peter, you might be able to help Senator Sherry.

**Mr Smith**—The process that we have followed is to work out a basis of settlement for particular arrangements and then each case is considered on its own merits. Generally, with the employee benefit arrangements, the basis of settlement that has been agreed is a single taxing point, 10 per cent penalty, and interest applying from the due date.

**Mr D'Ascenzo**—I think the question was who, at what level.

**Senator SHERRY**—At what level are these sent back? I was under the impression that Mr D'Ascenzo had to see the final outcome and say, 'Yes, approved,' or 'No, not approved.'

**Mr Smith**—The general basis of settlement is agreed to by Michael Burston, who is the Deputy Chief Tax Counsellor, and myself, and the individual cases are considered by the case officers.

**Senator SHERRY**—So they go across the desks of those two persons?

**Mr Smith**—That is right—the general submission, not the taxpayer specific submissions.

**Mr D'Ascenzo**—Peter, you might want to explain that to Senator Sherry because it might cause some misunderstanding.

**Mr Smith**—Obviously, with the numbers that are involved here, Michael Burston and I are not in a position to consider each and every one of the cases, but we do agree on a basis of settlement, consistent with the addendum to the settlement guidelines, for particular types of arrangements. The basis that I have explained there is the basis that has been agreed for employee benefit arrangements.

**Mr Fitzpatrick**—But individual circumstances are taken into account in each case, of course.

**Senator SHERRY**—I can understand that. Mr D'Ascenzo, what is your role in settlements?

**Mr D'Ascenzo**—In a sense, as second commissioner, part of my duties is more broadly to oversee the quality of technical decision making within the ATO. In relation to settlements, I had a very important role in helping other people in the organisation settle our settlement guidelines. The other side of it is to agree with the broad principles that have been added as the addendum to that guideline. I do not think I have really had any other involvement.

**Senator SHERRY**—Is this the tax counsell network?

**Mr D'Ascenzo**—The tax counsell network is a group of people who get involved in what are significant issues and try to help establish the ATO position. They work through the Office of Chief Tax Counsel, which is run by one of my deputies, Mr Berston, but ultimately I take responsibility for that line of activity.

**Senator SHERRY**—So you are in charge of it?

**Mr D'Ascenzo**—I am a second commissioner in taxation. I am in charge of a whole range of things, but that is one of them.

**Senator SHERRY**—Have you been contacted personally by any of the promoters of the schemes we are considering?

**Mr D'Ascenzo**—A number of letters were sent to me and I referred them over to relevant officers.

**Senator SHERRY**—You would have read those letters?

**Mr D'Ascenzo**—Yes.

**Senator SHERRY**—Do you recall being contacted by Productivity Incentive Australia?

**Mr D'Ascenzo**—I do not think I have. If it has gone to me, it is one that I do not recall.

**Senator SHERRY**—I have a copy of a letter. Maybe it would refresh your memory if I give you the date. It was 5 May 1999.

**Mr D'Ascenzo**—Again, I do not recall seeing it. Is it addressed to me?

**Senator SHERRY**—Yes, it is addressed to you and to Mr Carmody.

**Mr D'Ascenzo**—I could check with my EA—we have a log on letters coming to me and where they have gone to—and provide that to the committee.

**Senator SHERRY**—I did refer to extracts from this. This is about employee benefit arrangements. Their view is:

It is quite clear that, in respect of employee benefit arrangements, there was a long-standing administrative practice in accepting the class of arrangements for which I received several advance opinions and rulings. Accordingly, I turn to the issue of controller superannuation.

The issue of controller superannuation is a clear example of a long held administrative practice. The notion that a controller of a private company can make deductible contributions in respect of him or herself has been consistently ruled upon by the ATO since 1991.

**Mr D'Ascenzo**—We do not accept that.

**CHAIR**—That is purely his view.

**Senator SHERRY**—I am not going to read the whole letter, but it goes on to say:

ATO practice in this area is evidenced by the following: a letter to the National Institute of Accountants in August 1998, from the Chief Tax Counsel, accepting that a controller can be an eligible employee in respect of himself and can therefore make deductible superannuation contributions. This is a clear public expression of the ATO view on the arrangement.

**Mr D'Ascenzo**—I do not think that referred to the same context, Senator.

**Senator SHERRY**—It goes on:

The specialist superannuation technical unit in Bankstown, led by Mr Graeme Colley, has consistently advised as to the taxation treatment of these arrangements, both orally and in writing.

**Mr Fitzpatrick**—Senator, I responded yesterday to your question about advices which we have issued from the ATO, particularly in early 1999. That is the extent of the advices we have issued.

**Senator SHERRY**—This is Bankstown, Mr Colley's—

**Mr Fitzpatrick**—I said that the ATO issued some advices, including three private binding rulings—

**Senator SHERRY**—Which were incorrect.

**Mr Fitzpatrick**—which were incorrect, in our view. Some of those, I also said yesterday, went to one tax agent, I recall, who got, I think, seven or eight on behalf of seven or eight different clients. They were the same basic advice. My understanding is that those taxpayers did not implement the arrangements, as it turned out, but to the extent of our knowledge on advices we have issued I explained our letters to you yesterday.

**Senator SHERRY**—Mr D'Ascenzo, were you the Chief Tax Counsel in 1998?

**Mr D'Ascenzo**—I was.

**Senator SHERRY**—Do you know the letter to the National Institute of Accountants?

**Mr D'Ascenzo**—No, I do not. There have been many letters I would have written. I am certainly happy to find out.

**Senator SHERRY**—If you could.

**Mr D'Ascenzo**—I do not recall its being in this context, though.

**Senator SHERRY**—It was in August 1998, according to this letter.

**CHAIR**—Is the national institute Mr Ray Regan's operation?

**Mr Fitzpatrick**—I do not think so, Senator.

**Mr D'Ascenzo**—I do not think so.

**Senator SHERRY**—So you are saying that this advice that I have quoted is wrong?

**Mr D'Ascenzo**—The earlier part, which refers to consistent advice given by the ATO, we do not accept.

**Senator SHERRY**—Presuming you have received this letter—I am not questioning that you are misleading us at all, because I understand we all get lots of letters and we do not necessarily remember—

**Mr D'Ascenzo**—As I said, it would have been on our log, and I can tell you what has been done with it.

**Senator SHERRY**—you would have therefore made it clear that their view was not correct?

**Mr D'Ascenzo**—I probably would have just referred it over to the relevant people who were dealing with a range of those matters, because basically what was important to me at the time was to ensure that all these sorts of advices were done in a coordinated way by a single group of people.

**Senator SHERRY**—So presumably they would have advised Productivity Incentive Australia that they were incorrect?

**Mr D'Ascenzo**—I do not know what flowed from that process. What is the date of that letter?

**Senator SHERRY**—It is 5 May 1999.

**Mr D'Ascenzo**—I do not know whether that might have been part and parcel of proceedings which Senator Watson warned me not to get too far into.

**Senator SHERRY**—You are saying it is incorrect.

**Mr D'Ascenzo**—Yes.

**Senator SHERRY**—You cannot tell us now, understandably, about whether you wrote back or whether you gave it to another officer who would have written back. Let us assume that Productivity Incentive Australia—

**Mr D'Ascenzo**—I am quite certain that I would have passed it on to another officer.

**Senator SHERRY**—Let us assume that PIA were told in a written reply, 'No, you are not correct.' I assume PIA would have passed that advice on to their clients, wouldn't they?

**Mr D'Ascenzo**—I do not know.

**Senator SHERRY**—Would you expect them to do that?

**Mr D'Ascenzo**—I really do not know.

**Senator SHERRY**—It would seem logical to me. If you get advice from the tax office about a client, you would let your client know.

**Mr D'Ascenzo**—In fact, a number of tax professional bodies are saying that the people who have marketed arrangements have not kept their clients fully informed. Whether that is true or not, I cannot say.

**Senator SHERRY**—Who is saying that?

**Mr D'Ascenzo**—Some of the tax professional bodies. I am not sure that is the case in this case. I just do not know. While you say that it might seem obvious, this is not an area where what might seem obvious has been the way that things have progressed.

**CHAIR**—That would be a worry. There would be professional negligence there, wouldn't there?

**Mr D'Ascenzo**—I think in many of these cases, depending on how it falls at the court level and how the matters have been implemented and what advice had gone between the parties, there might be causes for redress against the people who promoted or advised on these schemes.

**Senator SHERRY**—Do you know of any cases so far?

**Mr D'Ascenzo**—I do not know of any and they probably would wait for the outcome of court proceedings. Excuse me, Mr Fitzpatrick, do you know of any?

**Mr Fitzpatrick**—No, I do not know of any.

**Senator SHERRY**—Mr D'Ascenzo, you gave evidence to the House of Representatives committee, didn't you?

**Mr D'Ascenzo**—I am sure I have.

**Senator SHERRY**—On Thursday, 11 May. I think you said in that evidence that you were pursuing a tactic of taking two taxpayers to court?

**Mr D'Ascenzo**—Did I say two?

**Senator SHERRY**—I am told you did, but I cannot find it in the transcript, mainly because I have not looked through every page.

**Mr D'Ascenzo**—I think the strategy was to take taxpayers to court because we thought the schemes were ineffective. That still remains our strategy.

**Senator SHERRY**—That remains your strategy, but no taxpayers have been taken to court yet?

**Mr D'Ascenzo**—I think Mr Fitzpatrick gave you a different answer.

**Mr Fitzpatrick**—I answered a question before about the number of cases at this stage when we have discussed the progress of cases, et cetera. It is up to the taxpayer, as I said previously, to decide whether or not to appeal.

**Senator CONROY**—Have the penalty amounts been reduced or reduced to nil in the settlements?

**Mr Fitzpatrick**—Mr Smith answered that before I think, Senator.

**Mr Smith**—The position we have taken on penalties is that penalties will still apply in a settlement.

**Senator CONROY**—Full penalty? That is what I am asking: have they been reduced? Are they the penalties that were originally set?

**Mr Fitzpatrick**—It depends on the individual cases as to what their present rate of penalty is.

**Senator CONROY**—So the answer is, yes, the penalties have been reduced.

**Mr Fitzpatrick**—It depends on the individual cases, to the extent that they have been reduced in full.

**Senator CONROY**—But none of them have been reduced to nil?

**Mr Fitzpatrick**—Our general policy is not to reduce the penalties to nil. That is correct.

**Senator CONROY**—Have any in this circumstance been reduced to nil?

**Mr Smith**—I cannot say emphatically that there would be none. Our general position is that the penalty still remains in the settlement. The process would not require further escalation if the decision was to reduce the penalties below the level that we have agreed to at a general level. That would require further escalation.

**Mr Fitzpatrick**—Senator, to assist you in this area, we did issue—as Mr D’Ascenzo referred to earlier—some settlement guidelines with respect to what we call mass marketed tax avoidance schemes.

**Senator CONROY**—You have got some general guidelines, but you have also just said that you usually treat it on a case by case basis. That is what I am asking about.

**Mr Fitzpatrick**—And the guidelines refer to that. I am trying to assist you in the sense of the guidelines outline our approach to settlements in these types of schemes—not just in employee benefit schemes but in other schemes as well—including individual circumstances to be taken into account. In those guidelines, there is reference to the employee benefit arrangements that might assist you. That is all: to know that those guidelines are on the public record and explain our position. We always have to take individual circumstances into account.

**Senator CONROY**—I understand your general theoretical position, but what I am seeking to find out is whether or not any penalties at all on any of these have been reduced to zero. I am happy for you to take that on notice. Mr Smith said he was not absolutely sure, but he could not rule it out. So I am asking you whether you can come back to us on that one.

**Mr Fitzpatrick**—I can certainly do that.

**Senator CONROY**—There is no need for us to keep chasing that around. Could we get an indication of the penalty amounts—what they have been reduced by. I think you are saying that, in general, all of them have been reduced to some degree, depending on a case by case analysis. Could we get some indication of those? In particular, have any been reduced to nil? Also, is there any penalty imposed by way of interest or, if they have been reduced to nil—as a further question—is there an interest payment separate from the penalty given so that, in effect, if there was not, they would be getting an interest free loan?

**Mr Fitzpatrick**—Yes, there is interest built into the taxation laws which is payable.

**Senator CONROY**—Mr D'Ascenzo, I am not sure whether you have had a chance to read the transcript—a fairly substantial amount of the *Hansard* transcript in this inquiry has been devoted to this so far. Mr Petroulias mentioned that he was aware that one firm had put \$2 billion into offshore New Zealand super. Are you aware of that?

**Mr D'Ascenzo**—We had a report of the proceedings—the person from the office reported that that was said. I do not know the basis of it.

**Senator CONROY**—So the ATO has no record of one company putting \$2 billion into this?

**Mr D'Ascenzo**—That is right.

**Senator CONROY**—No record at all?

**Mr D'Ascenzo**—That is right. That is not to say that we are not trying to follow up the matter, but at this stage we do not know the basis of the claim.

**Senator CONROY**—That is a little different from saying that there is not; your answer really is that you are looking into it.

**Mr D'Ascenzo**—Someone said something and we are saying, 'Is it true?'

**Mr Fitzpatrick**—We continue to identify participants, as I said before. On the cases we have identified to date, we are not aware of that. There is no basis for that, to our knowledge.

**CHAIR**—Some of Mr Petroulias's information was based on two parts: firstly, on what information was to hand in the tax office; and, secondly, on what the private sector—

**Senator CONROY**—I was going to come to that. I am happy to read the exact quote. He indicated that he believed that there was one firm, from his time in the tax office, that had put \$2 billion into an offshore New Zealand fund. He then went on to say that, after leaving the tax office, he discovered that there seemed to be an awful lot more companies involved in this and, therefore, the amount would have been higher because there were more companies involved than he had previously experienced in his time at the tax office. I am seeking to establish a factual issue; I am not asking you to give an opinion at this stage.

**Mr D'Ascenzo**—The first I knew of this was when it was reported that claims of that order were made. The position, as I understand it, is that we do not know the basis of those claims.

**Senator CONROY**—There are no documents?

**Mr D'Ascenzo**—None that I have seen and none that officers like Mr Fitzpatrick or others have seen.

**Senator CONROY**—Mr D’Ascenzo, you have been quoted as talking about \$1.5 billion. I think earlier we got an indication of two figures—\$100 million recovered and \$140 million outstanding. Does that reconcile?

**Mr D’Ascenzo**—Thank you, Senator. That provides a good opportunity. We did refer to \$1.5 billion in the previous hearing. In the written advice that we provided to the hearing, we referred to \$1.5 billion in contributions. During the oral session, there was an assumption in some of the questions that it was \$1.5 billion in tax, and I can understand that, having regard to the way the discussions went. I wanted to put it straight that what we had intended to say was \$1.5 billion in contributions. If you multiply that down by a tax rate, that gets you to something like \$600 million in tax potentially involved. At the moment we have raised assessments in relation to about half of that and we have collected half of those assessments.

**CHAIR**—What about the other half?

**Mr D’Ascenzo**—We are busily working to raise assessments on the other half.

**Senator SHERRY**—When do you think you will complete that?

**Mr D’Ascenzo**—Internally, we are trying to shift more resources in what is a very labour intensive exercise of trying to gather the facts and raise assessments. My view is that we are trying to do that as speedily as we can—consider the objections, determine them and get the matters before the courts.

**Senator SHERRY**—Can you give me some indication? I would not hold you to it.

**Mr D’Ascenzo**—I understand that.

**Senator SHERRY**—Will this process take another three months, another year or what?

**Mr D’Ascenzo**—A little bit has to do with how easily we can divert more resources into the exercise, so some part of it is a question of, in managing the tax office, managing the resources and the priorities. Mr Fitzpatrick and Mr Smith both have a very vital role to play. Perhaps their ideas on the length of time taken would be useful. We would certainly like to have it done within a year.

**Senator SHERRY**—From what you are saying, you have not got sufficient resources in this area at the moment.

**Mr D’Ascenzo**—Kevin can tell you exactly the numbers. We have a lot of resources in this area.

**Senator SHERRY**—Yes, but you were just saying that you want to bring more resources in, which means you obviously do not have enough.

**Mr D’Ascenzo**—It is a question of the more you have, the quicker you can do certain things.

**Senator SHERRY**—Sure, but there is a lot of money outstanding.

**Mr D'Ascenzo**—That is right but, at the same time, people want refunds for their input tax credits and people will want a whole range of other things that the tax office is expected to deliver within a budget portfolio.

**Mr Fitzpatrick**—Including dealing with other schemes, not just controlling interest superannuation and offshore superannuation.

**Mr D'Ascenzo**—How many people do we have, Kevin or Peter?

**Mr Smith**—On employee benefit arrangements we have about 50 people.

**Senator SHERRY**—Has that increased?

**Mr Fitzpatrick**—We are certainly increasing it now, for the reasons that Mr D'Ascenzo outlined. But a number of factors, as we have discussed already here, are in play: getting the facts on cases, considering the facts of individual cases and considering taxpayers' offers of settlement and objections—all that. Every taxpayer needs to be treated fairly, obviously, and we are working through it as a high priority measure within the tax office to deal with these arrangements. That is quite clear.

**Mr D'Ascenzo**—Mr Smith mentioned 50 in relation to those particular schemes. More generally, Peter, what is our full complement on some of these scheme activities?

**Mr Smith**—The number all up on all of these types of schemes is 130, plus other people who have varying roles—officers from the Tax Counsel Network, for example, are not included in that figure.

**Senator SHERRY**—Has that increased recently, in the last year or two? It must have increased since 1998, given that you identified—

**Mr Smith**—It has increased since 1998, but we have been at about that 130 level for the last 12 months or so.

**Mr Fitzpatrick**—We are looking to increase it now.

**Senator SHERRY**—This problem emerged in 1997-98. Why has a priority only now been given to resourcing, given the hundreds of millions of dollars outstanding?

**Mr D'Ascenzo**—I think that 130 is a sizeable number of skilled resources and basically it is a question of balancing a whole set of priorities. We want to get these matters over and done with as quickly as possible. At the same time, we have other responsibilities to the community.

**Senator SHERRY**—Ultimately, total resourcing comes back to government, doesn't it, and the resources they allow you?

**Mr D'Ascenzo**—It is a much more complicated formula but all parliamentary bodies have a budget and we live with that budget.

**Senator SHERRY**—At the end of the day, you are set a budget by government.

**Mr D'Ascenzo**—Having said that, the point you make about the profile of the numbers of staff in this area is one that, as you will see in our internal records, we have tried to keep a high focus on for a number of years. We believe that the numbers that were there were sufficient to turn around the facts as they came in. If we had 500 people there and yet had not got the details of the participants in the schemes, then there would not be anything for them to do. We went through court cases to get some of those details. Part of our strategy, in fact, of trying to get details was that strategy of trying to set opportunities for people to come in and have safe harbours if they provided the information for us earlier. This was all about trying to balance—trying to do all the things that a tax office has to do with the number of resources it has to do that.

**Senator SHERRY**—Yes. I understand the balancing act within the constraints of the budget provided by government, but you have told us that you are now increasing the staffing in this area.

**Mr D'Ascenzo**—One of the things we are trying to do, for instance, is to direct a whole lot of the new graduates that we have to focus on this, which is a hotspot area, rather than just spread them out throughout the organisation. We have done some of this work in the past as well.

**Mr Smith**—There is also the process that we go through—that is, we are now at a stage where, having identified all the participants and having done our analysis of the facts and of the law, we are now implementing those decisions in respect of each taxpayer and having to give regard to the individual circumstances of each of those taxpayers. So we are at a point now where our work is becoming more resource intensive than it has been in the past.

**Senator SHERRY**—You referred to monitoring peaking in the 1997-98 period. Have there been any further schemes uncovered since that time?

**Mr Fitzpatrick**—In relation to schemes more generally?

**Senator SHERRY**—No, to the schemes covered by the legislation, the categories of schemes we are covering here.

**Mr Fitzpatrick**—I said yesterday that there was some ongoing promotion of these sorts of arrangements by some people after May 1999, and that was behind our advice to government about recommending legislative change to deal with that.

**Senator SHERRY**—So you would expect to find some more, given the promotion?

**Mr Fitzpatrick**—I said in answer to your question before that there probably are some cases we have not yet identified, but our best estimate is what I said before as to the deductions involved.

**Senator SHERRY**—Going back to the evidence of 11 May, Mr D’Ascenzo, you said the abuse of employee benefit arrangements was contrary to law and would be caught by part IVA, the anti-avoidance rule. Is that correct?

**Mr D’Ascenzo**—When you talk about employee benefit arrangements, there is more than one type. Specifically, I think I was referring to employee benefit trusts of the type that I had seen. I am of the belief that, when those facts are provided to courts, part IVA will apply to those. Part IVA tries to discriminate between what is abusive and what is not abusive. I think these arrangements—the ones that I have seen—are abusive.

**Senator SHERRY**—You obviously had a role in recommending to government the legislation we are considering?

**Mr D’Ascenzo**—Yes. Mr Fitzpatrick kept me informed of the work that he and his team had done in that area.

**Senator SHERRY**—So you would have had an input into that?

**Mr D’Ascenzo**—On 11 May I indicated to the committee that I felt that the action that we had taken had been effective in trying to close off the continued promotion of these arrangements. Subsequent to that, I was advised by Mr Fitzpatrick and others that they had detected the continued promotion of those, and it was in that context that we considered whether or not we should advise government about some sort of legislative change to ensure the marketing did not continue.

**Senator SHERRY**—I am a bit surprised that you then made comments. Had you consulted with Mr Fitzpatrick before you made those comments at the House of Representatives committee?

**Mr D’Ascenzo**—These were detected after 11 May.

**Senator SHERRY**—I had gathered that. In this legislation, it deals with one form of employee benefit arrangement superannuation. That is correct, isn’t it?

**Mr D’Ascenzo**—Mr Fitzpatrick is closer to the legislative proposals than I am.

**Mr Fitzpatrick**—As you know, we have discussed this. There are three measures, two of which are covered by these employee benefit arrangements.

**Senator SHERRY**—Why are we not seeing legislation against employee share schemes?

**Mr Fitzpatrick**—We believe the existing law is sufficiently effective to deal with these arrangements. We do not believe that legislative options are warranted. We have considered that. The Assistant Treasurer announced in June that we would look, on an ongoing basis, at the impact of any ongoing marketing of these arrangements and any options for legislative change. We are very conscious that any legislative amendments we recommended not have adverse impacts on taxpayers who have genuine arrangements.

**Senator SHERRY**—What do you define as ‘genuine’? Anything is genuine if it is within the law, isn’t it?

**Mr Fitzpatrick**—Not subject to the anti-avoidance provisions. We are talking here about options for specific legislative measures which are not the anti-avoidance provisions I am talking about.

**Senator SHERRY**—What about the revenue implications of the employee share schemes?

**Mr Fitzpatrick**—That is nothing to do with this bill, as I recall.

**Senator SHERRY**—We know it is nothing to do with the bill, I am just interested in why it has nothing to do with the bill.

**Mr Fitzpatrick**—It is not in the bill.

**Senator SHERRY**—You have picked on one employee benefit arrangement—superannuation.

**CHAIR**—I think we should confine our remarks to the bill, because we are starting to run short of time.

**Senator SHERRY**—We are making solid progress, but there are still some outstanding issues of concern for the committee, but that is for another time. Just coming back to your opening statement on the first day of the hearing: I want to be clear on this. With respect to non-complying superannuation schemes, it was never envisaged that any taxpayer in this country should be able to avoid tax contributions, tax surcharge, FBT where applicable, on superannuation by any government, was it? It is obvious from your statement.

**Mr Fitzpatrick**—Perhaps Mr Thomas can assist me. I think that is correct.

**Mr Thomas**—That is correct.

**Mr Fitzpatrick**—That is what we said in the statement that Mr Thomas read out—

**Senator SHERRY**—They never envisaged that they would not be paying income tax as appropriate as well.

**Mr Thomas**—The proper tax regime applies to all taxpayers.

**Senator SHERRY**—Yes, but it was never envisaged that these types of taxes would not apply. They apply to almost everyone else in the country.

**Mr Thomas**—Yes. There is a taxation regime, which has been in place since section 82AAE was introduced. It provides for a penalty taxation rate compared to contributions to non-complying superannuation funds; a tax rate of 47 per cent compared to 15 per cent; and fringe benefits tax, where that is appropriate.

**Senator SHERRY**—And then we had the surcharge. That was another 15 per cent, depending on your income level, wasn't it?

**Mr Thomas**—Up to 15 per cent. The surcharge does not apply to non-complying superannuation funds.

**Senator SHERRY**—Okay.

**CHAIR**—Doesn't the 47 per cent actually apply to the assets of a fund, not the income?

**Mr Thomas**—It applies to the increase. Contributions to a fund are counted as income of the fund, and the taxation applies to the income of the fund.

**CHAIR**—To the non-complying fund.

**Mr Thomas**—The non-complying fund. It is the same—47 per cent of the income of the fund.

**Senator SHERRY**—To clarify this, surcharge applies, obviously, to complying superannuation but it does not apply to non-complying.

**Mr Thomas**—That is correct.

**Senator SHERRY**—Why is that the case?

**Mr Coles**—I would have to take that on notice. Essentially, we understood that the tax rates for non-complying funds have been operating effectively as such that—

**Senator SHERRY**—At 47c, and then surcharge comes along. Depending on income level it is up to 15 per cent. That narrowed the differential pretty significantly, didn't it?

**Mr Thomas**—The taxation regime on non-complying funds is already a penalty regime.

**Senator SHERRY**—I understand it is a penalty. There would still be a penalty but the differential has narrowed.

**Mr Thomas**—Not everybody is subject to the surcharge, Senator.

**Senator SHERRY**—I understand that but where they are subject to the surcharge—

**Mr Thomas**—Only high income earners are subject to the surcharge.

**Senator SHERRY**—Yes, I understand that; I am going to get to that in a second. But where they are subject to the full rate, the 15 per cent, the differential effectively narrowed very significantly.

**Mr Thomas**—It is not common for most ordinary taxpayers to make contributions to non-complying superannuation funds.

**Senator SHERRY**—I understand that. But the differential has narrowed because of the surcharge in respect of non-complying funds, hasn't it—where a person has to pay 15 per cent?

**Mr Thomas**—I am not sure whether that is a proper distinction. They are two completely different regimes.

**Senator SHERRY**—Instead of two completely different regimes it is the end impact that I am interested in. We were talking about high income earners. With the type of people who have taken advantage of these arrangements we have been discussing over the last few days, what sort of income levels are we talking about? Are we talking about people earning less than average weekly earnings—\$39,000 or \$40,000—or are we talking about what you would regard as high income earners? Is the ordinary Joe Blow on the street doing this sort of thing?

**Mr Smith**—I do not have an estimate but generally they would be high income earners.

**Senator SHERRY**—What do you define as a high income earner?

**Mr Smith**—I would not like to hazard a guess without further information. I can get that for you.

**Senator SHERRY**—If you could.

**Mr Smith**—A lot of the ones that I personally have seen generally involve incomes before these deductions of more than \$100,000.

**Senator SHERRY**—You might be able to give us some more detail. We are certainly not talking about Joe Blow or Ms Joanne Blow on the street. Are the people generally employees?

**Mr Fitzpatrick**—They would be small to medium businessmen, I would have thought, controlling interest arrangements, rather than normal employees, generally speaking.

**Senator SHERRY**—So the \$100,000 plus is a good ballpark?

**Mr Smith**—That would be my guess, yes.

**Senator SHERRY**—Any particular occupations?

**Mr Smith**—A broad range of occupations.

**Senator SHERRY**—Are there any that stand out?

**Mr Smith**—No, Senator.

**Senator SHERRY**—You might take that on notice as well. I did start this. Mr D’Ascenzo, we had you appearing before the parliamentary committee on 11 May and then seven weeks later, on 30 June 2000, the Assistant Treasurer announced that anti-avoidance legislation would be introduced. From your point of view, what happened in that seven-week period?

**CHAIR**—Mr D’Ascenzo, you do not have to give policy advice.

**Mr D’Ascenzo**—It is not a question of policy advice. As I mentioned beforehand, it came to our attention that these arrangements had not been totally stopped in terms of their marketing by our May 1999 media release and public ruling. It was a question of—

**Senator SHERRY**—You got the new info and you decided to crack down.

**Mr D’Ascenzo**—No, we got the new info and we said, ‘What does this mean and what are the options?’ You will see, even from my 11 May answers to the committee, that we have always been concerned about those taxpayers being duped into arrangements which ultimately will cause them serious financial and business risks.

**Senator SHERRY**—And you received information from a colleague of mine, Ms Gillard?

**Mr D’Ascenzo**—I think something was provided to us over the table.

**Senator SHERRY**—She provided to you a detail of one of these schemes, actually.

**Mr D’Ascenzo**—That is right.

**Senator SHERRY**—Did you take it into account?

**Mr D’Ascenzo**—Mr Fitzpatrick is saying to be careful here because this might be a matter that might affect the proceedings.

**Senator SHERRY**—I do not think it does. It has nothing to do with—

**Mr Fitzpatrick**—It is my understanding that it was nothing to do with the superannuation arrangements.

**Senator SHERRY**—Yes, I understand that. What are you thinking about when you say ‘affecting proceedings’—not the Petroulias matter, surely?

**Mr Fitzpatrick**—My point was that I do not think that the plan was to do with superannuation arrangements, as I recall.

**Mr D’Ascenzo**—I might have misread what Kevin was saying. I thought that he could have been warning me.

**Senator SHERRY**—I have not seen a copy of it.

**Mr Fitzpatrick**—My recollection of the transcript was that it was not the controlling interest arrangements or an offshore fund arrangement.

**Mr D'Ascenzo**—Nor should it be assumed that we did not know about the arrangement.

**Senator SHERRY**—Maybe you can check on that for us—whether you did or did not know. I am just pointing out that Ms Gillard gave you the scheme which obviously had a significant question mark. That was provided to you and if that was useful—which I am sure it was—we are pleased to see you acted.

**Mr D'Ascenzo**—Thank you very much, Senator. As I said, I think we probably would have had that information as well but it did not hurt the process.

**Senator SHERRY**—I think it helped it, didn't it?

**Mr D'Ascenzo**—It always helps when people come forward and provide information. Thanks, Senator.

**Senator SHERRY**—You are obviously continuing to monitor employee share schemes?

**Mr Fitzpatrick**— Yes, we are continuing to monitor schemes generally.

**Senator SHERRY**—And concerns about employee share schemes?

**Mr Fitzpatrick**—The ones we have identified we believe the existing law will deal with.

**Senator SHERRY**—Do you have any data on flows of moneys into employee share schemes—minimisation of tax—

**Mr Fitzpatrick**—We are moving into a different territory here, Senator, aren't we?

**Senator SHERRY**—Are we?

**Mr Fitzpatrick**—It is outside the bill.

**Senator SHERRY**—Are we?

**Mr Fitzpatrick**—I thought we were.

**Senator SHERRY**—I do not think so.

**Mr Fitzpatrick**—In relation to employee share schemes, I did not think that was in the bill. We are happy to assist as much as we can, obviously, with the bill—

**Mr D'Ascenzo**—Senator, this was covered a little bit in the previous committee's deliberations and there was a thought, I gather, through the report that the tax office—and we are not the only regulator in that area—should have a more organised or consistent monitoring

of flows. That was not the regulatory scheme that had been established in the current law, and one of the discussions that came out of the *Shared endeavours* report was whether there should be a much more regulatory process there. I indicated to the previous committee that we tried to provide as much information as we could but, no, we did not see ourselves as having full regulatory responsibility for that area.

**Senator SHERRY**—But still, you do monitor the financial impact of the schemes, don't you?

**Mr D'Ascenzo**—This was in relation to tax avoidance schemes not in relation to employee benefits schemes.

**Senator SHERRY**—In relation to employee benefits schemes you surely must monitor the revenue implications.

**Mr Fitzpatrick**—We continue to identify what is going on as best we can and we welcome, as Mr D'Ascenzo says, any information or intelligence that people can give us in relation to that.

**Mr D'Ascenzo**—When you are talking about schemes, are you talking about someone who enters into a division 13A employee share plan or are you talking about an abusive arrangement?

**Senator SHERRY**—I do not know division 13A.

**Mr D'Ascenzo**—That was the provision—

**Senator SHERRY**—I am speaking about employee share schemes in general. There may be, but I do not have the detailed knowledge.

**Mr D'Ascenzo**—What I was trying to do was to make a distinction between arrangements that are abusive and arrangements that are not abusive. Normally when I refer to schemes it is usually with that pejorative, abusive character to it. We are certainly monitoring that as part of our scheme activity. In relation to the regulation of the total range of non-abusive employee benefit arrangements, we have given in evidence that we have not kept a regulatory process on all of those arrangements.

**Senator SHERRY**—There is always a definitional argument about what is abusive and what is not abusive.

**Mr D'Ascenzo**—People have said that. I do not think it is all that difficult in the situations that I have seen. I use the example of the employee benefit trust arrangements that I have seen which, as I have indicated before, have the hallmarks of the paper schemes of the 1970s.

**Senator SHERRY**—Did the tax office write to RPC in late 1997 advising them that at least some of the schemes they were promoting were contrary to law?

**Mr Fitzpatrick**—We cannot divulge who we have written to.

**Senator SHERRY**—You may be able to; you had better check on that.

**Mr Fitzpatrick**—You heard my answer before.

**Senator SHERRY**—Yes. With regard to the incorrect advice that was referred to yesterday by the officers, what actions have you taken in respect of those officers who gave incorrect advice? I am not talking about the Petroulias matter; put that aside.

**Mr D'Ascenzo**—I do not know.

**Mr Fitzpatrick**—We have made our view clear as to what the ATO's view is in relation to these particular arrangements. As I said yesterday, we are bound by law to—

**Senator SHERRY**—I am not after names. But mistakes are made, revenue is lost, it is embarrassing and there is a nasty headline which I am sure you would not like.

**Mr Fitzpatrick**—The headline does not necessarily reflect the true position or the evidence I gave.

**Senator SHERRY**—I did hear you say the words 'incorrect advice'.

**Mr Fitzpatrick**—Yes, that is correct, I did say that. I think some of the other words probably were not quite consistent with my evidence, but I can understand the difficulty; it is a complex area of the law. People in the tax office know our position on the law in relation to these arrangements.

**Senator SHERRY**—What do you do with people who make a mistake on this? It has significant implications.

**Mr Fitzpatrick**—We develop their skills and improve their knowledge—what any good organisation should do.

**Senator SHERRY**—Is that what has happened in this case with the individuals concerned?

**Mr Fitzpatrick**—I am not talking about particular individuals.

**Senator SHERRY**—I am. I am concerned that some officers made a mistake. I do not want to know their names, but surely there is a process of counselling to make sure that they do not do it again.

**Mr Fitzpatrick**—There are the normal performance management processes.

**Senator SHERRY**—Are you saying to me that nothing happened to those officers outside the normal performance evaluation?

**Mr Fitzpatrick**—Performance management occurs on a regular basis, as you would appreciate.

**CHAIR**—We are short of time, and whether or not officers have been disciplined is outside the bill.

**Senator SHERRY**—What happened as a result of the errors made?

**Mr Fitzpatrick**—We clarified our view of the law so that taxpayers and advisers know our position. We have processes in place, as we always try, to ensure that we give correct, accurate advice. If mistakes are made—

**Mr D'Ascenzo**—And to make sure that mistakes are not repeated.

**Senator SHERRY**—I understand that: to make sure mistakes are not repeated. Normally, there is ongoing checking. Do these people who made the mistakes get performance pay or anything like that?

**Mr Fitzpatrick**—I do not know the people concerned, so we cannot answer that. We cannot name individuals anyhow, as you have already said.

**Senator SHERRY**—I do not want names. I am just interested in how this has been handled.

**Mr Fitzpatrick**—I cannot add any more to what I have already said. We obviously do not like making mistakes, and we have checks and balances and procedures and practices in place, as any organisation should, and we continue to look at those—as the commissioner mentioned in a speech the other day which I understand the committee has a copy of. It is on an ongoing basis.

**Senator SHERRY**—I am not interested in any sort of witch-hunt on the individual names of people. That is not of interest to me. I am just interested in the process to minimise this happening again.

**Mr Fitzpatrick**—I think the speech the commissioner gave the other day is the best way for us to help you here, outlining what we are doing and have done in this particular area of giving advice.

**Senator SHERRY**—Have you read Mr Petroulias's evidence?

**Mr D'Ascenzo**—I have not.

**Senator SHERRY**—Has anyone read Mr Petroulias's evidence?

**Mr Fitzpatrick**—I have read some evidence. But I caution, Senator—

**Senator SHERRY**—I understand your caution. I have been very cautious in this so far.

**Mr Fitzpatrick**—We are here to assist the committee, of course, but as I said before we are conscious of the current court matter, as to what evidence we can give which might impact on that—as Senator Watson, the chair, has already indicated to us.

**Senator SHERRY**—Mr Petroulias referred to a number of rulings that were given, not by naming officers but by quantifying the number of officers involved in the rulings that were given. I think he mentioned that in each ruling three officers are involved. Is that correct?

**Mr Fitzpatrick**—I do not understand the basis for that. In assisting the committee I explained yesterday the position for the rulings and advices in relation to this area. I do not see how I can add any more to the evidence I have already given, Senator.

**Senator SHERRY**—I am just looking for it. He gave his evidence in two parts. When a ruling is given, are there three officers involved? How many officers are normally involved?

**Mr Fitzpatrick**—It depends on the particular matter. We have processes in place, as I said, concerning the giving of private binding rulings and, previously, other advance opinions or other advice.

**Senator SHERRY**—I cannot seem to find that part of his evidence, for some reason. We have got only two minutes left, so I will move on. Just before we conclude, I firstly thank you, Mr D'Ascenzo, but I did make the point that there were a number of other officers we sought, aside from you, Mr D'Ascenzo, and you, Mr Fitzpatrick. I believe it still would have been preferable to have had access to those. There just seems to be a reluctance to provide the committee with the witnesses that were requested. We have struck this problem with some of these promoters as well—all of these promoters, unfortunately, that we have been able to identify.

**Mr D'Ascenzo**—Senator, the letter I provided was not intended to be anything but an honest portrayal of who I believed were the people who were closest, in terms of their involvement, to the bill. When you get to some people in that list, some of the people have absolutely no involvement in relation to the bill at all, and others you would put in a position of having to say things that might affect the current proceedings, which Senator Watson said we should not be doing. So you would have people sitting here having to say, 'I can't answer that. I don't know anything about that—'

**Senator SHERRY**—Sorry, on that issue, at least they would have been here and Senator Watson could have given us the very wise counsel he has continued to give us from the chair. That is up to him as chair.

**Mr D'Ascenzo**—Again it was a situation of trying to help the committee, rather than to accept having people having to say, 'No, I don't know anything about that,' and, 'No, I'm not in a position to say anything about that,' which I thought would have wasted everybody's time.

**CHAIR**—Order! The time approaching 5.15, given that the privilege provisions will expire at 5.15, on behalf of the committee I must now thank all those witnesses who have given evidence for their participation. This is one of the longest bill hearings that I can recall we have had, certainly by this committee and perhaps by most of the other committees. I thank the tax

office for their tolerance, particularly in an environment where it has been difficult in terms of responses to questions. We will provide you with a copy of the report in due course.

**Mr D'Ascenzo**—Senator Watson, could I just ask Senator Sherry to please take my assurance that we were not trying not to help the committee. The officers I have here are the ones that are best placed to provide the committee with assistance.

**Senator SHERRY**—I think there is a differing perspective. I know that there are some court actions.

**Committee adjourned at 5.15 p.m.**