COMMONWEALTH OF AUSTRALIA

JOINT COMMITTEE

of

PUBLIC ACCOUNTS AND AUDIT

Reference: Tax Law Improvement Bill (No. 2) 1997

SYDNEY

Thursday, 29 January 1998

OFFICIAL HANSARD REPORT

CANBERRA

JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Members

Mr Charles (Chair)
Mr Griffin (Deputy Chair)

Senator Coonan	Mr Anthony
Senator Crowley	Mr Peter Baldwin
Senator Gibson	Mr Beddall
Senator Hogg	Mr Broadbent
Senator Watson	Mr Fitzgibbon
	Mr Georgiou
	Mr Sharp
	Mrs Stone

Matter for inquiry into and report on:

Tax Law Improvement Bill (No. 2) 1997.

WITNESSES

JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

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SYDNEY

Thursday, 29 January 1998

Present

Mr Charles (Chair)

Senator Gibson	Mr Anthony
	Mr Beddall
	Mr Griffin

The committee met at 9.10 a.m.

Mr Charles took the chair.

BRYANT, Mr Robert James, Executive Director, Corporate Tax Association, Level 11, 455 Bourke Street, Melbourne, Victoria 3000

GAYLARD, Mr Simon James, Tax Law Improvement Project, 2 Constitution Avenue, Canberra, Australian Capital Territory 2601

GLASS, Mr William Douglas, President, Corporate Tax Association, Level 11, 455 Bourke Street, Melbourne, Victoria 3000

HARDERS, Mr Geoffrey, Consultant, Australian Taxation Office, 2 Constitution Avenue, Canberra, Australian Capital Territory 2601

NOLAN, Mr Brian Martin, Project Director, Tax Law Improvement Project, 2 Constitution Avenue, Canberra, Australian Capital Territory 2601

REID, Mr Thomas Johnston, Second Parliamentary Counsel, Tax Law Improvement Project, 2 Constitution Avenue, Canberra, Australian Capital Territory 2601

CHAIR—Welcome. The Joint Committee of Public Accounts and Audit will now resume taking evidence, as provided for by the Public Accounts Committee Act 1951, for its review of Tax Law Improvement Bill (No. 2) 1997. Mr Glass, would you like to make a statement to the committee?

Mr Glass—Yes, I would. I would like to generally introduce myself and then I will formally hand over to our executive director. I am President of the Corporate Tax Association. I am also Group Taxation Manager at Pioneer International Ltd. CTA is grateful for the opportunity to appear before this committee to present our concerns and recommendations in relation to the tax law improvement project.

CTA represents Australia's top 100 companies on tax issues. In 1996-97 this group of companies paid approximately $6.8 billion in company tax out of a total of $19 billion—about 36 per cent of the total. We also contributed around 25 per cent of all federal tax revenues in that year.

From a corporate standpoint TLIP is creating significant difficulties for our companies. We are already burdened by an excessively complex tax system. We are finding that the time and cost of researching TLIP affected issues has increased by up to 30 per cent. This is a burden which we are finding both costly and time consuming. From a corporate standpoint, when our management asks for a quick response to an issue it is making it increasingly difficult for us to do so. One of the major concerns is that this complexity will further increase in coming years. Also, the level of uncertainty being created will become increasingly unacceptable not only from a corporate standpoint but also from the standpoint of any taxpayer whatsoever.

The CTA has made a significant contribution to the project. During the past 2½ years we, together with the Business Council, engaged a consultant to work exclusively on TLIP matters. However, because of a squeeze on our financial resources and our perceived stance that the money that we were putting into the project was not actually drawing the benefits that we would have hoped—in other words, we were finding that the submissions that we were putting to the TLIP team were having little effect—we decided that we would not proceed with the employment of this full-time consultant. Consequently, our responses to the project since July 1997 have been predominantly from our resources.

The only other point I would like to emphasise is the increasing complexity of having to deal with two acts. The uncertainty that that brings about is making the life of corporates from a tax standpoint increasingly difficult. I would like to commend to you the CTA's submissions of 8 and 27 January. At this point I would like to hand over to our executive director, Mr Bob Bryant. Bob will run through more of the detail of our submissions and also more pointedly highlight some of the major issues.

Mr Bryant—You have our submissions and we have put that material before you. I do not want to repeat ground that was covered yesterday. In essence, what we would like to put to the committee is, first of all, our concern that the material we are looking at, which is the bill that is presently before parliament, is incomplete and inadequate and certainly should not be passed in its present form. I think there is further detail to come through today on top of yesterday's material which will add to that level of concern.

What we are looking to do is stay with some of the process issues as to how we might deal with these difficulties and to make certain recommendations to you. Bill has already articulated the level of complexity and the growing uncertainty that is arising through our involvement this process. It is presenting us with a very fluid state of the law. It is very difficult to know exactly what some of the precise expressions are really saying.

I would like to address about three key issues in the process, taking a snapshot of where we think the TLIP has got to after 3½ years. Our first concern deals with the accelerated deadlines. I want to give some evidence of that and the problems it is causing. I want to deal with what we see as a serious deterioration in the consultative process, especially in having disputes resolved. We want to make a point, too, that either wittingly or unwittingly there has been seen to be a certain Taxation Office bias in some of the decision making on certain key issues. Also, not wishing to be too accusatory about this, there are levels of error that need to be addressed and will obviously continue to be addressed, but it does call into question the need for a more robust testing of the law.

I will start with accelerated deadlines. When this project started back in 1994 the expectation was that we would have exposure drafts that would be issued for public comment and review for periods up to around three months. That was the process we experienced in the earlier stages, but that has been significantly truncated in recent times. There is a variety of reasons for why this has happened, but it does mean this material is

not being given the opportunity for testing in the marketplace.

I think evidence of that can be best seen from some of the documents we picked up yesterday. The two green volumes show that, as a result of the introduction of the bill itself and the invitation for taxpayers generally or other bodies—all various stakeholders—to make submissions and representations to this committee, there have indeed been very few. There is ours, the joint body's, one from Deloittes and other peripheral ones. There has not been time to give adequate response to this material.

Having attempted to address this as best we could, and with the incompleteness of the material we had, we did not meet the due date of 2 January. We were four or five days late. And, having completed that submission, we received that very day a comprehensive package of consequential and transitional provisions. We have not done justice to that by any means. We have still got to work through that. But it demonstrates, I think, the impossibility of the task of responding to this material. The question of the shorter time frames is an issue which does need to be addressed,

As regards consultation, through various earlier hearings and certainly through this one, I think we are bringing to bear evidence to suggest that we have got concerns with the consultative process. That was eminently defended, I thought, by Brian yesterday, but we do not agree with all that he said. There has certainly been dialogue, there has been communication, but there has not been an adequacy of what I say is genuine consultation, particularly where you identify something that has a disputed quality to it, and the process whereby that might be adequately tested and resolved.

With regard to the accelerated deadlines, there just is not the time for this to be properly addressed. The only feedback, for example, that we have had to our major submission on exposure draft No. 10, which was lodged towards the end of September, is the material that I have now picked up in this document that I received yesterday. It is disappointing to me that the material dated 23 January could not have been made available to us prior to or round the time of last weekend to give us a chance to reflect on those issues. We only got that material yesterday and there is further work to be done in proceeding through that.

To give an example—I beg your indulgence, Mr Chairman, because it is an aspect not entirely covered by the current bill but I think it is very important and significant in the context of where we are at—we had an experience last year in the drafting of some material that found its way into I think exposure draft No. 12 but which has not proceeded to bill form of an attempt to rewrite the non-cash benefits provisions of the law. These are quite important not so much for our constituency but for taxpayers at large. The attempt that was made there was to try to address the problems associated with barter transactions. We have a conversion of an existing 1½ or two pages of law into about 23 pages of new material. In our view, that did not really go to the heart of the objective of seeking simplification. It sought to deal with situations of how should, for example, farmers with adjoining properties, one who provides labour and the other materials, go about addressing

the tax implications of developing an adjoining fence, or a tradesman, an electrician, who might put a fan in a restaurant in exchange for a free meal, and dealing with these sorts of provisions. I have got to say that the level of effort, with a very strong academic approach, produced a body of material that had very little practical effectiveness.

We dealt with that very early in the piece and made recommendations that that be revisited, and we were effectively ignored. That was conducted in April 1997 and then we had the release of the exposure draft much later, I think about August-September, exposure draft No. 12, which contained the very material which we had strongly criticised and sought to work through but with no success. I must give credit to the Assistant Treasurer, Senator Kemp, who, having made representations at that level, he caused that material to be withdrawn. I would, through you, Mr Chairman, seek to question Brian and the team—whether now or later in the day—as to where that material is at. That has a significant importance to the taxpaying community and we would expect to be involved in a further reformulation of that.

While I am on the subject of non-cash benefit, I wish to pick up something from one of the submissions made in this material. I would again seek a response from the TLIP team. It was not something we identified, but an academic from the University of Canberra has pointed to a concern that suggests that the revamping of the law through the core provisions has produced a gap so that there is no linkage to enable non-cash benefits which are covered by certain provisions of the law to come within the tax net.

Under the old law, in the 1936 act under section 25 dealing with income in general terms and then picking up the implications of an old section 21A, it was clear that benefits in kind—and there were some very celebrated tax cases around this—would be brought within the tax net. This academic has pointed to the fact that there has been a failure through the rewrites of sections 6-5 and 6-10 to make the necessary linkage with section 21A, which will be now subsequently rewritten. The proposition that he is putting about non-cash benefits typically involves cases where, for example, a contractor, as well as getting a cash payment for a job, might be given a benefit in kind, such as a holiday trip, an air fare or something like that.

I refer you to the first volume commencing at page S12 in volume 1. It is a submission from a Michael Dirkis, a senior lecturer in law at the University of Canberra. It is all produced under their letterhead so it is effectively a submission from people in that area. In the material presented on page 4 of the attachment to that submission, on page S16 he articulates this very point about non-cash business benefits and makes a recommendation that amendments to the law be effected immediately to shore up this flaw.

I raise this only on the basis of saying that this would appear coming from an eminent source of that type—and we have not fully tested it—obviously to have some merit. If it were correct, it shows that the rewrite process has a propensity to fail in

adequately bringing together the necessary mechanics of the law, leaving something of this type out on a limb.

We have encountered that elsewhere early in the piece. In the rewrite of some of the company provisions we put forward a suggestion—with a view to helping government and the revenue of course—to show that in 1996-97 there was a weakness in the rewrite in the transitionals such that company tax may not have been payable at all. That was embraced by the TLIP team. All we are saying is that the task is so big and vast that it is not surprising that weaknesses of this type emerge.

What we are submitting is that further time is needed for more robust testing. But I do specifically ask—if it could be addressed either now or later—where that recommendation has gone with this section 21A, because it ought to be a matter of serious concern to government.

Finally, on these areas of process—and I did develop this yesterday and will not repeat it—we gave an example in section 118-25 where, in a rewrite of an earlier provision, namely, section 160L(3), the exemption for trading stock was not faithfully reproduced in the new law. We had some dialogue around this and some difference of opinion. There was a decision process that went on through that that certainly favoured the tax office position. We have encountered that before, certainly in the mining area. There will be other examples as well. We see that as an area of concern. It is a failure within the process that when disputes of this type arise we have seen far too often a decision that favours the tax office view without, in our considered opinion, an adequate analysis of what is being said from the other side.

Finally, in these areas of concern we are continuing to detect errors and I have no doubt, as you have recommended in earlier committee reports, that these will be addressed as quickly as possible, but they continue to arise and inevitably that process will continue to frustrate us. Again it all points to the need for a more vigorous testing of what we have before us. So, as a result, we reiterate the concern we have that there is incomplete and flawed material before you, before us and certainly before parliament and it just needs to be more vigorously tested before being passed. The current bill before you is not in a fit state to be passed by parliament and I think we had plenty of evidence on that issue yesterday.

As to recommendations, we are saying that because of these deteriorations—this is with your forbearance because this matter of delivery option has been addressed at earlier hearings—we are looking to resurrect the spectre of what we call ‘warehousing’, or causing with all future legislation the process to continue, but the proposition is put that it should not be enacted with an immediate commencement date. Brian and his team have responded that that is not practical. All we can say in response is that from our point of view, sitting as major taxpayers, it is grossly inadequate to have delivered to us flawed and incomplete legislation that has the potential to produce disadvantageous outcomes or

not be a faithful replication of what has been there before. I think the major companies and other taxpayers deserve better.

The only solution that we see that could be adopted is to continue with this material, allow it to be stored until the complete rewrite is undertaken and then move forward with an enactment of that at that particular final stage. It would allow for the more robust testing of the law that we think it demands.

I reject Brian's proposition about this. He suggests that that material, if it were stored like this, would not get sufficient review. It certainly would from us and our members—I can guarantee you that—and the project has gone sufficiently far now to be seen as inevitable and that testing is taking and will continue to take place, but I think in the interests of taxpayers it is not fair that they be caused to deal with what is inadequate legislation. The matter has been addressed in earlier hearings, particularly in report 345 of an earlier JCPA, but we say that the framework has deteriorated and changed significantly from the environment in which that debate was then conducted. The matters that I have raised before regarding problems with acceleration of deadlines, the lack of a consultative process and certainly the errors and the problems with decision making around the process have all deteriorated to a stage where we believe the question of delivery option must be revisited. We would look to this committee to give serious consideration to the representations we have made on that issue.

Secondly, and we have put this in our submission, when we do encounter these disputed items—we certainly raised one yesterday on trading stock and there was a much celebrated event around trading stock 12 months ago which, again through the good graces of the Assistant Treasurer, was finally sorted out in a manner that satisfied the interests of pretty much all of the stakeholders—we are getting a bit fed up with the energy required to pursue those sorts of disputes and to bring to bear the vigour necessary to get a fair result. We are seeking from the committee a recommendation that when disputed issues of the type we articulated yesterday do come to the forefront some process be provided where this might be more objectively reviewed rather than as happens under the present process in which it seems to us that there is a power of veto within the TLIP team and we have little scope but to challenge that.

Finally on that point, as an absolute minimum when a dispute of this nature arises—and it did arise, as I say, in the mining provisions—the outcome should be a fall back to the current words of statute and they should not be interfered with.

The third concern that we have deals with what we see is retrospective application of this law. Again, some of this has been addressed in earlier hearings. By way of example, we raised an issue yesterday with the transitional provisions regarding capital gains tax. The inequity that can arise—already rising for companies with December balance dates disposing of assets today—is that they have great uncertainty, potentially, as to what the cost base of some of those assets will be. They certainly know where they

stand under the 1936 act. The draft legislation you have before you produces variances to that. If that were effected as of 1 July 1998, meaning that for these companies that would apply on 1 January, they would be caught in the midst of this very serious transitory problem and will not know at this stage the consequences for disposal of such assets. That is totally unacceptable.

I give that by way of an example. We say that first of all our prime position is that warehousing be embraced but, in relation to the specific body of law that you have before you—the draft legislation; we discussed this towards the end of yesterday and we want to repeat and strongly ratify the view—as an absolute minimum, if this were to proceed in the manner proposed, our view is that it be given a commencement date of 12 months later—namely, 1 July 1999.

I leave with the committee the other material that we have submitted—some of the detail. We have raised issues regarding intellectual property and the like; I do not wish to repeat those now. Unless there are some questions, I think that is as much as we need to say at this stage, Mr Chairman.

CHAIR—Mr Nolan, before we start asking questions, would you like to respond, through me, to questions asked by Mr Bryant?

Mr Nolan—There were a number of points made by both Mr Glass and Mr Bryant. Much of it was along the themes that you heard yesterday. I believe that the overall tenor of what you have just heard represents a fairly coloured position. It is the position taken by Bob and Bill, and no doubt it was honesty put, but I believe it presents quite a distorted picture of the accuracy or otherwise of the legislation and of the processes that have been carried through.

The reference to consultation processes having broken down are, in particular, I think, quite unfair. Probably of all groups, the Corporate Tax Association representatives have had more ready access—virtually open door to project team members—to the minister. Mr Glass mentioned that their engagement of Ian Phillips terminated last year. It was their choice whether to spend that money in that way. But, when Ian Phillips was working with the Corporate Tax Association, there were literally scores of points being raised with us and acceded to. In the capital gains tax provisions of the bill alone at least 40 different adjustments have been made to the provisions to take into account points that Ian quite ably and professionally raised with us and which were debated out and accommodated.

Bob mentioned the excision from this bill of provisions relating to non-cash benefits. He wanted to present that as some sort of a failure on our part, putting in flawed legislation. I would have to say that it actually represents our willingness to listen to the Corporate Tax Association. Instead of one more, there is a whole litany of things we have actually taken into account that the Corporate Tax Association has put to us. That is one

area where we did actually agree with the Assistant Treasurer's concurrence to not proceed with those provisions. They are not in the bill so, in a sense, they are not immediately relevant to—

Mr GRIFFIN—Can I interrupt there so that I can be clear on the understanding of that point. I thought that what Bob said happened was that it was raised with you but that there was no comment back to him and to the CTA. It then came out in a near final exposure draft, unaltered. They then raised it separately—and from the way it was said, separately from this process—with Senator Kemp as Assistant Treasurer. Senator Kemp then convened a meeting where the matter was discussed and there was acquiescence to withdraw it from the draft. Is that correct? Rather than it being TLIP's initiative, if you like, it was more a question of the CTA imposing themselves on the process.

Mr Nolan—What it gets to is that where there are disputed issues the minister is brought into the picture.

Mr GRIFFIN—I agree with that, but what I am getting at is that there is a question here of whether it is a process which basically not only has your approval and acquiescence but has been part of the process that this has occurred. It appeared to me from what Bob was saying—this seems to be the defining difference; Bob can correct me if I am wrong—that the CTA had to impose that part of the process in order to get TLIP to adjust, to move, to consider the change. You seem to suggest that it is part of the normal process in these circumstances. That, to me, is the key difference. Is that the case, or have I got it wrong?

Mr Nolan—There has been quite a difference of opinion, I think, over whether the provisions that were presented by TLIP in the exposure draft were appropriate provisions or not.

Mr GRIFFIN—What discussion occurred with CTA before it went to the minister?

Mr Nolan—I am sorry that I do not have the officers who were working on that here to fill you in on the detail of it, but there were discussions between two of my staff and the CTA. As to the actual substance of those provisions, which we cannot debate here because they are not on the table and we have not got them to show to you, there is a difference of opinion about the content of them, but they have been withdrawn temporarily. We do need to come back to them, and that will happen because there is a need to have efficient provisions for dealing with non-cash benefits. Barter transactions are in fact much more than two farmers dealing with each other across the boundaries of a fence; it is a much larger issue than that.

CHAIR—Is the bill incomplete in that respect?

Mr Nolan—We have provisions that were drafted as an exposure draft. We have agreed that they need to be reviewed, and that will happen. There is no intention that they go into this bill.

CHAIR—Does that make the bill incomplete?

Mr Nolan—No, it doesn't. It is just one more part of the income tax law that is yet to be rewritten. In this case, a lot of work has gone into it, but it is incomplete.

Mr Bryant—Mr Chairman, can I ask a question on that specifically? Brian may or may not be in a position to comment on this—it was only last night in going through this material that I discovered the point put by this academic in Canberra—but is there a reaction to the proposition that the existing non-cash benefits provisions in 21A will not find their way into the 1997 act?

Mr Nolan—Can I ask for some assistance from my colleagues on that, because I think that they have been looking at the matter?

CHAIR—Absolutely.

Mr Reid—I have read the note in the submission, I have heard Mr Bryant's account of it and I have looked again at the relevant provisions. It is not clear to me what the point is that is actually being made. I do not think it is an assertion about the way that the 1936 act provisions are expressed and how they in and of themselves plug into the 1997 act. It seems to be an argument based on a change of wording between section 25 of the 1936 act and the rewritten equivalents. As far as I can see, there is no substance in the point.

I would also point out that if such an important error had been made I would be very surprised if it had not been picked up already in the very extensive scrutiny of the core provisions that went on in the course of preparing the first bill. I could raise the matter directly with the academic and discover a bit more about what his thinking is, but it does not appear from the submission what the point actually is and I do not believe there is any substance to it.

CHAIR—Could you get back to us on that?

Mr Reid—Yes, certainly.

Mr Nolan—I am aware that there have been discussions directly with Michael Dirkis, the person who made that submission, by members of the project who are not here today. They have reached a different view to the one that he has, but we will convey that to you.

CHAIR—If you could do it on the telephone today, that would be terrific. If you cannot, we will have to wait.

Mr Nolan—We will do our best to accommodate that.

Mr GRIFFIN—Can I come back to that consultation point again. Rather than being the specifics of the bill, it is a key issue about the actual consideration of the whole process. I reiterate what I was saying before. I would like comments from the CTA and TLIP on this. I am going to make an assertion along the lines of what I said earlier and I want to get a comment on that assertion.

It appears to me that what was being said by the CTA was that there was a breakdown in the consultation process. The breakdown in the consultation process in essence is that when a controversial matter is raised there has been an inability to get firm advice from TLIP with respect to resolving the issue or at least agreeing to disagree. That has led to a situation where the CTA has had to appeal to the umpire on at least one occasion—and I thought on a second occasion—and go to the Assistant Treasurer to get redress. That redress may be only getting TLIP to actually look at the issue seriously. Is that the case or isn't it?

Mr Nolan—It is not the case that it is only when the CTA or anybody else goes to the minister that their points of view on disputed items get considered seriously. I absolutely reject that as a proposition. We will reach positions where we differ, but we are always willing and have on many occasions debated the issues out with people with different viewpoints. I do not believe we have ever said that we are just not going to listen any more. In fact, we are very open to—

Mr GRIFFIN—The suggestion was that it was not a question of you saying you wouldn't do something; it was a question of not getting a response.

Mr Nolan—I do not believe that that is the case. There has been an inability for us to respond fully in writing to larger submissions. As I indicated yesterday, that is a process that we are completing. There have been many responses that have been sent back to the Corporate Tax Association. Even where the written response may have been tardy—and not through any unwillingness on our part but because of competing pressures—there have been expressions of view over telephone conversations, face to face conversations. So I really do not believe that that is an accurate observation. The fact that on occasions—and they are not common—matters are elevated to the minister is a healthy thing, I think. Frankly, that is what ministers are for: to be the umpire where a matter cannot be resolved and where you need a—

Mr GRIFFIN—I guess the question is always: if you have a process where that is where you end up, okay, that is part of the process as to how you end up there.

Mr Nolan—I believe that is the case. I believe that the process is a very open and full one. But ultimately, if that is what it takes to get a decision, all that demonstrates is that there is a higher power than the TLIP leadership.

Mr GRIFFIN—Can I get a view from you, Bob?

Mr Bryant—I can only tell you what we know. The experience of this issue was that earlier last year—and certainly April comes to mind and I could check records—we did have, as Brian said, an occasion to have interaction with members of his team around the draft rewrite of these provisions. I have to say that we were aghast at what we were seeing and that we conveyed that. It seemed to be an exercise that was taking this sort of material well beyond its practical bounds. It was seen as a litmus test as something that would do serious injustice to the project as a whole, especially if you are aiming at simplification. We conveyed those sorts of messages verbally—certainly through Mr Phillips, who was working for us at that stage—and he created some notations and comments and gave examples of possible implications around that time. We really heard nothing further at that stage.

Mr GRIFFIN—For a month, a week, a year?

Mr Bryant—No, some months—I think around April 1997. We were just keeping a watchful eye—we were doing plenty of things to keep us occupied—as to where that was going, because nothing came back to us with any further feedback. And we were surprised—I suppose that is the right word—to find that that material, notwithstanding our earlier comment and every thing else, found its way into exposure draft No. 12, which was released towards September seeking comment by October. We put that into our submission and gave a seven-page commentary on that, pretty much regurgitating what was said before. It was around that time that we also informed the Assistant Treasurer. Subsequently, the feedback we got was, I think, some time in November when Mr Glass and I met with the Assistant Treasurer—not specifically on this issue but on some wider issuing relating to our concerns with TLIP. We were informed at that stage that the Assistant Treasurer had decided to withdraw that material from the forthcoming bill and that it was not to appear. That is as much as we know. One would only be surmising as to what might have happened within—

Mr GRIFFIN—How many times have you had to approach the Assistant Treasurer regarding queries that you have not been able to resolve with TLIP?

Mr Bryant—Not very often on a specific issue. The one that springs to mind was earlier last year in a preceding bill, the rewrite of the trading stock provisions, when the Assistant Treasurer took the step to involve himself as almost an arbitrator around that issue. Ultimately, after a lot of blood, sweat and tears, that was reasonably satisfactorily resolved. It is not a path down which we would see ourselves going, but we do keep liaising with him and his office on various tax matters.

Mr GRIFFIN—To change tack a bit, what I am getting at is the fact that over three bills, dealing with something like 40 per cent of the overall rewrite of the legislation, you have had to approach him a couple of times. I would have thought that was not bad in an overall sense.

Mr Bryant—No. It is only as an act of desperation.

Mr GRIFFIN—We all get desperate sometimes, Bob. All I am saying is that when you put that into perspective it is not much really, is it?

Mr Bryant—No, and I am not suggesting that we seek that regularly; it is not the right vehicle to resolve them. What we are saying, though, is that when this does happen there is nothing else there.

Mr GRIFFIN—Sure, but I guess it has worked though.

CHAIR—So what?

Mr Bryant—There are a lot of others too that we have not bothered him with, and have not sought that approach—

Mr GRIFFIN—That would have been left unanswered.

Mr Bryant—that have been left fermenting.

Mr GRIFFIN—Were they again being resolved on a progressive basis with TLIP?

Mr Bryant—We will continue with that process. Brian rightly pointed out that on the CGT material, in relation to the exposure draft, I found out yesterday that 40 issues were favourably dealt with in the response, but there were more than 60 that were not.

Mr GRIFFIN—Sure, but most of the issues you have raised are in terms of process issues, which is most of what we are talking about today because we did most of the specifics yesterday, and most of the process issues you have raised really relate to one thing: time.

Mr Bryant—They do essentially, I think. That is probably right.

Mr GRIFFIN—Essentially, from your perspective, the problem we have with the consideration of this legislation as against the earlier piece of legislation is time. The issue then was time as well, but the issue is even more of time on this occasion than on earlier occasions. In many respects, that is also not really TLIP's fault.

Mr Bryant—No. I accept that too, but it is still a huge problem.

Mr GRIFFIN—Agreed, but it is a timing problem on the basis of how government is trying to progress this matter, because it is an important matter in the situation where, from your point of view and most of the private sector's point of view, there is an element of indecent haste.

Mr Bryant—Yes.

Mr Glass—From our particular point of view, yes, it is a question of time. But the other important issue from a corporate standpoint is the fact that whenever there is a significant area of disagreement—and we are now not talking about minor issues but substantive issues—where we are saying that the current law is or should be interpreted in a particular way and Brian's team and/or the ATO is saying that there is another interpretation, our perception is that in 99 per cent of cases the interpretation that the ATO puts forward is the interpretation that is adopted. We believe that there should be some other process that will at least filter that because the ATO cannot be right all of the time.

CHAIR—With respect, that sounds awfully subjective. Can you make that objective and give us a list? Is that possible?

Mr GRIFFIN—Why is it only 99 per cent of the time that the ATO's view gets up? What is this one per cent?

CHAIR—Can you give us a list?

Mr Glass—Yes, we can do that.

CHAIR—That is a pretty serious accusation: 99 per cent of the time we raise a serious issue, we lose.

Mr Glass—That is the perception that we have.

CHAIR—I would like it documented.

Mr Bryant—We can do that.

CHAIR—Mr Nolan, this issue of section 21A raises the question that I think the committee would be interested in of how complete the bill is. I note that, in documentation TLIP sent to us on 23 January, attachment 4 lists four provisions that have not been included in the bill or in the proposed amendments to the bill, but that does not include section 21A.

Mr Nolan—The matters that we were talking about in that response effectively related to capital gains tax issues. The 21A matter is a different area of the law. This bill contains rewrites not just of capital gains tax but of a number of discrete areas in addition

to that. The non-cash benefits area was one that, in effect, stood alone. It was taken out of the bill. It does not need to be dealt with in this particular bill and it does not alter the efficacy of the provisions that do remain in the bill.

CHAIR—Altogether, how much is missing and yet needs to be drafted by way of amendment or whatever in order to make the bill complete?

Mr Nolan—Again, with your indulgence, I will get some assistance on that.

CHAIR—I think it is an important question.

Mr Nolan—Yes, of course it is.

CHAIR—Our job is to try to advise the parliament and the minister.

Mr Nolan—In terms of volume, the amount yet to be rewritten is not very great. I will ask my drafting colleagues to advise you in more detail on what is still proposed to be added. Overall, the bill is 95 per cent complete, to use the same sort of language that we were just discussing.

Mr Reid—On the 21A point, as I indicated before, we do not currently regard that point as having any substance, so to that extent the bill is not incomplete at all. As Brian said, the non-cash benefits rewrite is under further consideration but it is not necessary for the law to have a proper operation.

CHAIR—Does the existing provision stand?

Mr Reid—Yes, it does. It is currently in force and we believe that it is correctly picked up by the operation of the new law. As we undertook before, we are pursuing that matter in terms of discussions that may have happened between Michael Dirkis and the project team or, indeed, clarifying the basis of Michael Dirkis's view. So far as that side of it is concerned, the bill is not incomplete at all. It is complete in terms of all matters other than CGT.

Mr Harders—On the CGT aspects, the main things that are not represented in the documents before you are catch-up amendments which are basically picking up amendments of the existing CGT law that have been made in bills before the parliament now or that are proposed to be made. There are probably about another 25 pages of material that are already before the parliament, or a rewrite of that material, to go into this bill in the CGT area.

CHAIR—Are you telling me that we have been passing bills that are written in the old language—the 1936 act—rather than the new language and now we have to go back and revise them again?

Mr Nolan—I do not think it is that so much. The parliament has been continuing to amend and add material to CGT within the framework of the 1936 act.

CHAIR—And in the same language?

Mr Nolan—I would not say that it has been written without reference to the language of the TLIP style but the fact is that the rewrite of CGT is not yet law, so it has been necessary for those business as usual changes to CGT to be put into the 1936 act.

CHAIR—I accept that.

Mr BEDDALL—Are the changes to capital gains tax rollover for small business part of this or are they part of the amendments? They have not been rewritten in this?

Mr Harders—They are part of the amendments to be included.

Mr BEDDALL—Are they written initially in the new language or in the language of the old act?

Mr Harders—Pretty much in the new language. We have made a few changes here and there.

Mr Reid—Can I just add to what Geoff Harders was saying before about the need for our bill to have further amendments included in it to cope with changes that were introduced in the parliament late last year. A very important aspect of the proposal to defer commencement of this bill for another year is that during that year there will continue to be amendments of capital gains tax in other areas introduced into the parliament of the kind that we have been talking about. So, if our bill is not passed by 1 July, there will be further double handling work of the kind that we have been talking about where amendments are made of the 1936 act in order to have immediate operation because the 1936 act is still in operation. But then we have to sort of run along beside it, as it were, and accept the baton and rewrite that material again for inclusion in the rewrite, because the rewrite is not due to commence until next year.

CHAIR—Thank you for making that point.

Mr Bryant—There is another side to that coin. That is true, and that has been long argued from the TLIP side as a defence for the more precipitate passage of this legislation. But the consequence of what is happening is the list of tidy-up is excessive. For bill No. 5 last year we have 60-odd pages of technical corrections, so it almost does not really quite matter which way you go. There is an inevitability about follow-up work of a very significant magnitude. One way or the other it means it is not impossible but very difficult to often know what is the current status of the law. We say we have had enough, shore it up now and wait until it is all finished.

CHAIR—Wouldn't you be better off to get this new bill in operation and have a better chance of catching the other amendments and getting it tidied up so people know where the heck they are, particularly if it is in language they can understand better—notwithstanding, we understand, your client can afford very expensive accounting practices and very expensive tax lawyers?

Mr Bryant—You need to be a little circumspect about embracing that view. We already had the admission yesterday, I think, that a division like 138, value shifting rules, is barely an enhancement of what we presently have. When we get into these more complex areas, it is not necessarily true that what we are getting is this you-beaut product. A lot of the residual roadblocks and problems are still there. We can reasonably read some of the old. That is not the problem more often than not. It is the design features within the law, and they are not really being addressed in this project.

Senator GIBSON—Mr Glass, in his opening comments, was critical about the process. I am just wondering whether there has been a perception problem about timing of what is going on. This committee is well aware of criticism during this process about the perception of ATO dominance of decision making in TLIP. As a consequence of this committee's recommendations, the government has appointed three private sector people to go on TLIP during the last six months. Is that sufficient? You are not regarding that as being sufficient to help set the perception scenes better to your ends?

Mr Bryant—First of all, there is a great bevy of talent that has joined the team. We are very happy to acknowledge that. We are not privy to the decision making processes. We would have a great expectation that that body of expertise would enhance the quality of the project, but they are not positions of any significant authority within the decision making process. No doubt they would contribute. I think our bigger concern is in the resolution of those areas of tension. I think they would be perceived as adding a better external influence to the processes—I thought we had very excellent input from them yesterday—but that is not sufficient to move us significantly far on that broader perception that, when the really tough issues arise, we are getting the necessary degree of objectivity.

Senator GIBSON—I guess the other thing from this committee's point of view is the complaint that further time is required. Part of the timing problem has basically come from this committee trying to fit in the TLIP work with the parliamentary program. We have brought forward these hearings, contrary to normal procedure, so that we can deal with them and try to speed the process up, to get to the end point more quickly than we otherwise would have. I am not too sure whether people in the commercial sector understand that we are endeavouring to help. Perhaps that leads to some complications down at your end, but we are trying to speed up the total process.

Mr Nolan—I would like to make an observation on something Bob said. He said there were 60 pages of corrections in the Income Tax Assessment Bill No. 5 last year. The impression that would leave is that there were huge numbers of errors that needed

correcting. We are not dealing here with anything like 60 pages of corrections. Because of the way in which parliament deals with amendments to legislation, just to put an asterisk on a defined term probably takes three or four lines, and there were scores of those.

The actual material included quite a small number of actual changes in substance, correcting what could truly be regarded as errors. There were something like 17 of those, where we acknowledged that we needed to tighten up the legislation. They made up only an extremely small part of the 60 pages of parliamentary material needed to effect corrections and changes. Many of those were just further enhancements—signposting, putting in additional notes, making clearer references to definitions and that sort of thing. The bulk of the material was taken up with those kinds of quite minor but useful things.

So it would be wrong to leave the impression that there are 60 pages of written corrections to the legislation in that bill. But it does show that the project team takes seriously and honours its commitment to make corrections when they are needed.

Mr GRIFFIN—I want to talk about that process again, but I will come back to that. Given that we are on the question of the operation of what is in place so far—the earlier stuff that has been passed—there were 60 pages of amendments but, as Brian has said, a lot of those amendments were extremely technical and the nature of parliamentary language requires 60 pages to do just about anything. From the CTA's point of view, what has been the experience of the actual operation of what is currently in place from the rewrite? On from that, I would like a response from TLIP with respect to what feedback they have got about the operation of those tranches that are currently in place and in operation.

Mr Bryant—The feedback we are getting is that the impact of being caused to deal with that new body of law and with its linkages to the 1936 act, if necessary—transitional consequential amendments, as Bill pointed out in his opening remarks—is that it is making life more difficult. We are going through a very difficult transitional period. We are finding experiences where a company looking to do something significant in a certain area and looking to research an issue finds that the legislation affecting that has been rewritten or whatever. It is involving an increase of workload—time and effort and cost—which in some cases is as much as 30 per cent. It is putting a further layer of uncertainty onto what was there before. But I have not had any catastrophe experiences yet.

- **Mr GRIFFIN**—I think I can see someone else from TLIP who is not at the table who wants to say something.

Mr Gaylard—I would just like to make a few comments. Mr Chairman, you were fortunate enough to miss some of the earlier hearings. If you had been here you would have heard that the world was going to come to an end almost immediately the first lot of legislation was passed. In fact the world did not come to an end. I am a partner in

Coopers & Lybrand. When we merge with Price Waterhouse shortly, I hope, we will become by far the largest accounting firm in Australia. I scan our database regularly. I have seen one or two queries in the last 12 to 18 months that have raised issues. Those issues have been quite easily dealt with.

The fact is that I think it is really straining language in the extreme to say that people have been terribly badly disadvantaged. Certainly there is an enormous amount of tax law coming through the system—business as usual tax law—and this is putting additional strains on all tax personnel. There is now a much greater tendency to specialise and those sorts of things. But the world did not fall apart. It is not going to fall apart when capital gains tax comes in.

There is evidence that a lot of people are using the capital gains tax legislation—the new legislation—already to deal with current problems, even though it has not become law. I know that some of my staff in various places are actually going to the new law—I repeat that it has not become law yet—because it is so much easier to use. We know there are very few changes, very minor changes. So people that do not want to do that can still get about their business knowing that things are very much the same.

Just on the non-cash benefits issue, if I could just come back to that for a minute, I think Bob has an issue that often it is perceived that there is a delay in responding to queries. I think, as I said yesterday, there is potential for criticism. But it is a question of what you do. Do you get the law written first and then answer the queries or do you answer the queries and delay writing the law? Brian's view is that you write the law and then you deal with the queries.

But, as far as the non-cash benefits are concerned, what the project was trying to do there was to produce a much more coherent structure—albeit it was a lot longer than the existing provisions in section 21 which are only a few lines—that dealt much more adequately with this issue and that people were going to find more helpful. After the CTA made some queries on it, I know that there was a complete re-run through those provisions. That may not have been relayed back to the CTA. But certainly there was a lot of further work done on it. The final decision that the leadership group made, a group comprising the senior people in the project, was that the provisions would be exposed to get people's comments. If those comments were that the provisions were not appropriate, then we always left the option to go back and simply rewrite what was there, albeit that it was very plain.

I can say from my own point of view, just before I go back to my seat, that Brian gives both me as a private sector representative and now the new private sector representatives a very good hearing. We do not always get our way, but I can honestly say that, in everything I have had a look at, the matter has been debated and I think appropriate decisions have been made. As for the 99 per cent of things going taxpayers way, if Bob can produce 99 points out of 100, I have said that I will give Bob $1,000 and

he does not have to give me anything.

CHAIR—Did Hansard get that!

Mr Gaylard—It will be more like fifty-fifty in resolution.

Mr GRIFFIN—So you are confident you can produce one where the ATO does not have its own way?

Mr Nolan—Finally, on non-cash benefits, there seems to be a concern from the Corporate Tax Association that that material had been put out for the wider public to express its views. Although the Corporate Tax Association quite properly had its right to express its views about non-cash benefits, it has a much wider coverage than the membership of that organisation, and we felt it quite appropriate to canvass a wider range of views. Putting it out in that way actually allowed that to happen.

Mr GRIFFIN—I guess the question is consultation around whether that is what is happening. If they had been told that that is why it was happening, that would be cool. If they have not, I think there is a bit of a problem there. I have a couple of questions that follow on from that earlier issue of process. Bob, you may remember that in our first report, which came out in August 1996, after the first tranche of legislation, recommendation 11 talked about suggested processes for the government to provide additional resources for the consideration of policy or small policy matters. I take it that most of these disagreements on the question of interpretation had revenue implications and therefore were what we called small 'p' or larger 'P' policy matters. Is that correct?

Mr Bryant—No.

Mr GRIFFIN—No revenue implications at all?

Mr Bryant—The ones I am really concerned about are those of the type we raised yesterday where there is a current provision of the law and then there is an effort to rewrite it and a tension arises as to what those earlier words mean. It could be that there is a creepage factor, but I do not think it was really about the revenue implications necessarily.

Mr GRIFFIN—The Assistant Treasurer has said that he is going to set up a process, as I understand it, for the consideration of these types of matters on the policy level. Would you see that as being an appropriate forum for the consideration of these big 'T' technical matters?

Mr Bryant—There can often be a policy matter in that it flags the potential that that is the body of the law. If it means what we think it means—

Mr GRIFFIN—That is what I was going to say. People do not talk about grammar too much unless there is some implication.

Mr Bryant—If you would like it to encompass something else, then, 'Here is a better set of words.' What it really raises is whether a change is being effected. We argue—I am going to provide you with a list and pick up my $1,000 off Simon—that that is exactly the sort of position we are in: there has been some shiftage.

Mr GRIFFIN—Essentially, what I am getting at is that, if there are technical matters and there is an argument or a lack of agreement about them and the odds are they have some revenue implications, or at least some suspicions of potential revenue implications, that process that has been talked about for some 18 months now, since our first report came out, is a way those sorts of things could be dealt with. Given it is some 18 months since we made that recommendation, and given there has been a concession from the Assistant Treasurer that we should do something about this some 18 months later, hopefully we might see evidence of something happening.

Mr Bryant—That would be useful.

Mr GRIFFIN—Hopefully before the bicentenary of the issue.

CHAIR—Thank you very much, gentlemen. We will break for morning tea.

Short adjournment

[10.40 a.m.]

KIRKWOOD, Mr Jon Barton, Member, Taxation Committee, Institute of Chartered Accountants in Australia, York Street, Sydney, New South Wales 2000

PETERSSON, Mr Karl Geoffrey, Member, Australian Society of Certified Practising Accountants, the Institute of Chartered Accountants in Australia, and the Taxation Institute of Australia, c/- 9/64 Castlereagh Street, Sydney, New South Wales 2000

ROBERTSON, Dr Mark Louis, Spokesperson, Australian Society of Certified Practising Accountants, ASCPA House, Level 7, 170 Queen Street, Melbourne, Victoria 3000

SPENCE, Mr Kenneth John, Senior Vice President, Taxation Institute of Australia, 64 Castlereagh Street, Sydney, New South Wales 2000

BACK, Mr Gavin Alexander, Assistant Commissioner, Tax Law Improvement Project, 2 Constitution Avenue, Reid, Australian Capital Territory

BURGE, Mr John Gregory, Senior Officer, Tax Law Improvement Project, 2 Constitution Avenue, Canberra, Australian Capital Territory

NOLAN, Mr Brian Martin, Project Director, Tax Law Improvement Project, 2 Constitution Avenue, Canberra, Australian Capital Territory 2601

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

Mr Petersson—On behalf of the Australian Society of Certified Practising Accountants, the Institute of Chartered Accountants in Australia, and the Taxation Institute of Australia, I thank the committee for the opportunity to appear with my colleagues before the committee to give evidence on the critically important capital gains tax aspects of the Tax Law Improvement Bill (No. 2) 1997.

I note, however, that the time allocated to us does not permit us to cover all the issues that we would like to cover. The bodies have provided to the committee a joint submission which sets out our major concerns with the rewrite of the CGT provisions. The submission makes a number of specific recommendations, including the need for the deferral of final consideration of the bill until such time as the government's tax reform proposals are known and also for the inclusion of a no disadvantage rule in the bill.

The bodies are concerned that there has been only a limited period allowed for the review of the bill, as was mentioned yesterday by the members of the consultative committee. This, coupled with the fact that the time allowed for the consideration of the second CGT exposure draft was considerably contracted, has meant that the bodies are far

from satisfied that the CGT provisions as redrafted adequately represent a significant overall improvement in the law.

We recognise that there are many improvements in the rewrite, such as the adoption of the CGT event approach. However, the bodies believe that the rewrite of the CGT provisions represents a lost opportunity in terms of addressing the more than 230 technical and small 'p' policy issues raised by the bodies in their joint submission which was delivered to the TLIP team during 1996 and which is appended and incorporated into the bodies' current submission.

There are many other technical issues listed in the TLIP's compendium of technical issues as referred to yesterday that have also been ignored in the rewrite. The bodies are far from satisfied that there is a mechanism in place that will permit technical and small 'p' policy issues not so far addressed to be brought forward. The bodies reinforce the concerns expressed yesterday by the consultative committee as to the lack of any formal response to the bodies' joint submission to the TLIP program.

The bodies are particularly concerned that the rewrite of CGT provisions, as presented before the committee, is far from complete, making reasoned appraisal unnecessarily difficult. More than 100 draft amendments circulated on 8 January are indicative of the chaotic nature of the current process. We understand there are more amendments to come.

We have yet to see the important rewritten small business rollover and retirement exemption provisions, which were mentioned earlier this morning, and we understand that division 19A, dealing with the transfer of assets within corporate groups, is to be withdrawn from the bill and reworked. There is also the new division 20 which is yet to be rewritten.

Further, the long awaited release of the transitional and consequential provisions reveal many potential concerns with, for example, the taxpayers being potentially disadvantaged by having to apply the proposed rules to assets required previously on the basis of the then existing law. For example, taxpayers with long held investments in unit trusts will be required to recalculate their cost basis in accordance with the new rules, adding at the very least to their compliance cost.

Notwithstanding these comments, Brian Nolan, John Burge and his instructing and drafting teams are to be congratulated for their work on the rewrite in so far as it goes. We do not underestimate the considerable work and effort that has gone into the rewrite over the last 2½ years.

CHAIR—Thank you for that. Anyone else have a statement they would like to make? The first issue that the committee wants to raise is that on 13 January 1998 the CPA issued a press release which uses some rather strong language. It accuses TLIP of

making a mockery—and I emphasise that word—of the consultative process. It says:

If this legislation is passed . . . the situation will have become farcical.

But, more important, as far as this committee is concerned, is the fact that the CPA said:

The review has given us time to again raise our concerns with the Government. However, the Joint Parliamentary Committee only recently allowed draconian anti-trust bills to continue through the parliamentary process following a similar review. Nothing was changed. They didn't listen and the cost to small business could be substantial. We hope the Government does better this time . . .

May I say to you—without interruption, please—that I may be new to this committee but this committee has a very longstanding history and it values its integrity highly. It has almost universally brought down unanimous reports to both the parliament and to government, and it is highly respected by the parliament, the government and the community for integrity and its non-partisan nature and the nature of its advice. May I say to you that the committee is not happy with the press release and it is disappointed that after a telephone call there has been no formal retraction.

Dr Robertson—For the ASCPA I am instructed to make a deep apology to the committee for wrongly identifying it with another government committee. The reference was entirely inadvertent.

CHAIR—May I correct that. We are not a government committee and neither is any other committee you are talking about. We are a parliamentary committee.

Dr Robertson—Yes, Mr Chairman. No aspersions were cast on any parliamentary committee. It was expressed as a hope that the government—and, as you pointed out, that is wrong—review the legislation with perhaps some fairness which those who were at the Senate committee on trust losses—and I have read the *Hansard* transcripts—felt was not put due to them since it was passed without amendment. In other words, it has nothing to do with this committee, and the ASCPA apologised for any wrong impression that was caused.

CHAIR—Do you intend to issue a withdrawal?

Dr Robertson—The ASCPA would endorse the press release which was subsequently issued by TLIP and corrected the position.

CHAIR—With respect, that is not a CPA press release.

Mr GRIFFIN—I am pleased to see TLIP and you are getting on better on the basis that you endorse their press releases now. That is a major step forward.

Dr Robertson—Mr Chairman, Hansard has recorded the apology and the

withdrawal.

CHAIR—I leave it up to you. Does anybody else have questions on this issue?

Mr GRIFFIN—I just hope that from that the analysis of the legislation is more rigorous and correct than the press release. I am sure it is. With respect to some of the other terminology you have used with TLIP, it is fairly emotive. Would you care to expand on it?

Dr Robertson—No. It is not a part of the joint submission of the ASCPA-TIA and the ICAA here today.

Mr GRIFFIN—But it is in effect a press release that has been issued with respect to the proceedings today, isn't it? It is not part of your submission yet it is something you announced publicly with respect to the fact that you are making a submission today. You are trying to have it both ways. You cannot go public and dance around and say, 'Isn't this terrible. We're going to go out there and fight the good fight,' and then come in here and say, 'Well, you know, that was the other me.'

Dr Robertson—I am happy to address it now. It would probably be better if I addressed the particular technical points which are raised in the context of the order of—

Mr GRIFFIN—I think also they need to look at the question that, if you are prepared to make emotive claims publicly by virtue of a press release in order to engender some publicity around the question of these proceedings, you ought to be able to be prepared to come along here and defend that language rather than basically say that that was something I did last week and now I am going to talk on technical issues. If there are technical issues here which in fact led to terms like 'farcical', then I would like to hear what they are.

Dr Robertson—All right. I can address them now if you would like. No changes have been made to the substantive provisions on capital gains tax and trusts. The TLIP team have been made aware on a number of occasions, including in a formal ASCPA submission, that capital gains tax is, under the present provisions, optional. It is very easy to create a capital loss out of thin air by using the present trust law provisions. Nothing has changed in the rewrite. So tomorrow I can walk down the street and create a capital loss which will make sure I never pay capital gains tax again. TLIP have been made aware of that. It is a flaw in the legislation. They have done nothing about it. They say that the whole review of the trusts area is up in the air so they are not going to bother with it. Would you like me to go into details of the technical loophole?

Mr GRIFFIN—I would be keen to get representatives of TLIP up to the table to deal with some of the issues as we go through them.

Mr Burge—When the project was established, it was recognised that there could be concurrent policy reviews with the work of the project. There have been a number of those. In the last budget the Treasurer announced that there would be a review into the taxation treatment of trusts. There was also a review foreshadowed into the taxation of limited partnerships, and that is entirely appropriate. It is the case that our rewrite has its primary focus on rewriting and restructuring the existing law to make some minor changes to the effect of the law to complement the improvements in that rewriting and restructuring, but other issues need to be dealt with through other mechanisms. The government announced the review into the taxation treatment of trusts. It would not be appropriate for us to delve into that area while that review is going on.

Mr GRIFFIN—Can I get a response on that?

Dr Robertson—The TLIP process has been going on for a number of years now and the TLIP team has had the benefit of these submissions for a number of years, so if it were the case that they were just shelving trusts why have they spent so much time in redrafting the trust provisions in the new TLIP style rather than shelving them completely?

Mr Nolan—It is not the case that all of our work has been going on for years; we have been doing it serially. We did work out a program for the rewriting of the law. We cannot do it all at once. The rewriting of the trust area was one that we got under way and made a lot of progress on prior to the time when the government, for its own reasons of policy review, decided that it would look more comprehensively into that area. By that stage, we were a long way down the track with rewriting those provisions. That rewrite, to the extent that we believe it elucidates the present law and is therefore a good background paper, a good basis for policy review, has been passed on to that review team. But it is not the case that, in the face of a review, we embarked on a rewrite of an area that was to change. The reverse is true. We were well down the track before the policy review was decided on.

Mr GRIFFIN—Do we know when that review is going to be completed and what is going to be in it? We obviously do not know what is going to be in it for sure.

Mr Nolan—I really am not in a position to respond to that. The policy review is being dealt with by others within Treasury.

Mr GRIFFIN—I will put it another way, Brian. I would have thought that one of the problems that TLIP has with waiting on government of any persuasion to actually rewrite sections of the act and its intent is that you could be waiting 12 months or 12 years and you cannot be sure what is going to come out of it. So in a process as long as TLIP, in terms of the detail required, you cannot really afford to wait for changes that may occur to make the rewrite complete.

Mr Nolan—That would be true if that were the case. I believe that in the case of the trust policy review there will not be a much more protracted decision making process, but I cannot speak with authority on that. My information is that there will be a decision taken on that and it will be done in a time frame that will allow us then to get on with whatever rewriting we need. But, in fact, if changes emerge in the trust area as a result of that review, they will already have a flying start because of the work that we have done.

CHAIR—Your next criticism, Mr Robertson?

Dr Robertson—Perhaps you could ask Mr Nolan whether these changes which are under way or on the drawing board do address these concerns which have been raised by the ASCPA.

Mr GRIFFIN—It is a question of a review process, isn't it?

Mr Nolan—You can ask me, but I cannot respond, because it is being dealt with by others.

Dr Robertson—The next area, which is a related area, is that TLIP has recently seen fit to introduce a special section on partnerships in the new act as a sort of guide that was not in the previous act. The exposure drafts on the area show that there has not been any rigorous testing of various scenarios in the partnership area. In fact, the example which was given in the exposure draft was obviously wrong and has been replaced with another example. Unfortunately, in a number of circumstances, that new example which is in the bill is also wrong. The reason is that the area of partnerships is a difficult legal area and one must appreciate fully partnership law concepts before taxation law can be superimposed upon them. This has not been done. I can give you a number of common examples which will lead to great anomalies in the area of small business and partnerships.

The ASCPA submission is that the bill should be delayed so that rigorous testing of this new area can take place so that there will not be these anomalies cropping up all the time. You just cannot introduce such a fundamental area where it was not introduced before without spending time going through worked examples to test the provisions.

For example, this document here, which is my thesis on the trusts area, spends 100 pages rigorously testing examples to make sure all the provisions work. This just does not seem to have been done in the partnership context and yet it has been introduced. It is too rushed.

Mr Burge—Division 106 in the bill deals with the partnership provisions. It is important to emphasise that these provisions are not just a guide or some useful explanatory material. It is fully operative material. It reflects the existing law but in a way

in which it can be far more easily understood than in the existing law. When capital gains tax was introduced there were difficulties with knowing how the law applied to partnerships. The Taxation Office issued a detailed ruling on the point—taxation ruling IT2540—which indicated that for capital gains tax purposes you tax the individual partner on the capital gain and it does not flow through the partnership return.

In 1991 the parliament clarified the operation of the partnership provisions to put beyond doubt that that was the appropriate treatment. Yet the way that the parliament did it in 1991 did not make it perhaps as clear as it could have been. It was done through particular provisions rather than dealing with partnerships expressly. We have, in a division, brought all of the rules together and we have sought to include useful examples so that people can make sense of the provisions. We released exposure draft No. 11 and we had consultation on them, including detailed discussions between members of the TLIP team with particular responsibility for partnerships and members of the tax profession.

We refined the examples. We believe that the examples get you a very long way to understanding the provisions and are basically there to shine some light on the operative provisions. The operative provisions are clear in themselves. The examples just help the process along a little. If there are any further refinements that are needed to those examples, then we will be delighted to consider them.

Mr GRIFFIN—Dr Robertson, you said that some of the examples were wrong.

Dr Robertson—Yes, that is right.

Mr GRIFFIN—Have you had a chance to produce that evidence to TLIP?

Dr Robertson—No. The example in the exposure draft has been introduced and has been corrected or removed and replaced with another example, which, on its face, looks right. However, there are a number of circumstances where that example will be wrong. I have not demonstrated that to TLIP as yet.

Mr Burge—In relation to that point, I think it is important to note that, after the ASCPA released the press release to which we have been referring today, a member of the TLIP team contacted Dr Robertson and at that stage Dr Robertson accepted that the example was correct. So the concerns that he now has with the example as revised have arisen since that discussion. They certainly have not been brought to our attention, but when they are we will be delighted to consider them.

CHAIR—Is there someone in the room from the consultative committee who is familiar with this area?

Mr Spence—On behalf of the Taxation Institute of Australia, perhaps I can redirect the discussion to the broader issues, given the very limited time that we have got

for our joint submission to you. Basically, we see four areas of a general nature. Firstly, there is the limited time frame for reviewing these provisions. That has been previously discussed in the CTA and possibly was discussed yesterday, but I was not present.

Secondly, there are some small 'p' policy issues or big 'p' policy issues, if you like. Thirdly, there are some more specific areas and, fourthly, there are the transitional areas. They were the subject of the comments that Geoff made previously, but I think that it is very important that in the limited time available we discuss those particular four areas.

In relation to the time frame, in the previous discussion of the CTA it was suggested that this compressed time frame for reviewing these provisions is more a problem brought upon by the parliament itself by accelerating this meeting and other meetings. I and the Taxation Institute beg to differ on that. In the early stages of this process it was indicated that a bill would be available on the CGT provisions in November 1996. That was the initial projection; that is what we were originally told. There was a slippage there. There have been continual slippages through the process.

We are not sure why that has occurred but it has. For example, exposure draft No. 10, which was issued in June 1997, indicated that the following exposure draft, No. 11, would be produced in July, a month later. It was not actually produced until September. So there has been a continual slippage along the way which has made it very difficult for us to seriously consider these provisions and really address whether they are doing what the government wants them to do and what the Australian people want them to do. Personally, I have been involved in most of the consultation processes and have tried to keep up with this and I thought I was not doing too badly. The bill introduced a number of other changes when it was released in late November and I was trying to get on top of them when on 8 January we had all these further amendments back into the bill itself—not just transitional, not just consequential but also back into the bill itself.

Also, we discussed previously what has been omitted from the bill. There are a number of things omitted from the bill. I understand that the TLIP team has agreed to totally redraft one of the major divisions—division 138, which affects a number of corporate situations—but there are also the small business rollover provisions which are very lengthy. They have yet to be rewritten. There is a division 20 of the act which runs presently to over 20 pages. It was enacted and received royal assent last July. It has not been redrafted and there are other specific operative provisions which similarly have not seen the light of day yet.

In my estimation we are looking at 75 per cent of the bill, not 95 per cent. That means that it is really a case of undue haste. As I have mentioned to John Burge, whom I speak to about these things from time to time, I would think that he is probably the only person in Australia with a grasp of what it all means and where we are all going on this. He has been involved in the whole area, across the whole field.

One of the judgments you will have to make, even when you make your recommendation to parliament, is this: does parliament sign off on this—and, sure, this is debated—with basically such a limited ability of the tax community, the taxpayers, to absorb these changes? I cannot think of a precedent where that would have been the case. Most other tax bills, even the most obscure ones, would have 10 people in Australia who had at least got into them and had been able to assess the whole balance of things. That is not the case here and nobody can profess it is the case here. So I think that is one issue that you have got to consider.

We are also mindful of the fact, as Brian Nolan mentioned later, that if you defer the introduction of this then subsequent bills that are drafted will have to be redrafted again to get them into the TLIP form. Our recommendation, as contained in this joint submission, is that there be an anti-detriment type clause which would allow a period of two years for people—the government, the TLIP team and the taxpayers—to work out whether there really is some slippage in this which is either costing the revenue something substantial or taxpayers something substantial.

That is a rather messy and awkward proposal, I suppose, but it is in the circumstances in which we now find ourselves the most practical way of dealing with this. The better solution would have been to have the delivery date as promised in November 1996; we would have had well over a year before we would even have met today to address these issues and to have them on the table. In the circumstances, we think that is the best way of putting forward the provisions.

Also, during that period we should very much encourage the TLIP team to embark on a fuller, public consultation education program very similar to what they did in relation to the first exposure draft, No. 10, where they did a roadshow around Australia. A number of people attended those. I would think well over a thousand people attended around Australia—an excellent event. That is the sort of thing that you need to get people into this, to get people's mind around it and get some of the issues coming out of it. I was just looking at something yesterday and saw some areas that I had not picked up before—quite major changes—that I am sure the TLIP team has not focused on because they are a major detriment to the revenue. If necessary, we could get into those later on, but there will be a number of those that come up, just due to the process. That is in relation to the time frame—some of the things that we would like the committee to consider. I am not sure whether anybody else, on that timing factor, would like to—

Mr Kirkwood—I would certainly agree, especially regarding the education program. My understanding is that these provisions are aimed at the common man. They are aimed at the professional adviser who is more likely to be in a suburban practice and to taxpayers generally. That is going to be the big benefit of the rewrite: that these people can pick up legislation and read it and understand it, which is, I think, barely the case under the old rules. If that is the case, then I think those people are going to approach written law for the first time and the education program which I think is being scheduled

is going to be very significant. The question is: how long does it take to get those people to the point where the government can rely on their ability to understand the law as it is written, having approached it for the first time?

Two years is probably barely enough. What it really needs is for them to rely on their advisers, based on the old law, or to take the benefit of the new law if it is available to them. To be able to go on with the process but to allow a two-year period when you could take either the old law or the new law, whichever gives the greater benefit for the taxpayer, on the assumption that this is rewriting the old law, there should be in most cases no detriment to the revenue from doing that.

Mr Spence—Unless, of course, there has been a notified change in policy in the bill itself where it has been disclosed and quite clearly identified to the population and to the taxpayers that there is a change, then surely those provisions would clearly commence to apply, but where there is no stated change one must assume that there has been no change and therefore let us work on that basis for a two-year period until there is a bit of a settling out time.

CHAIR—Hang on. Let us do this in order now. We have got three issues here that have been raised. The first is slippage, the second was missing bits—my interpretation; in other words, what is not there—and the third is an anti-detriment clause running two bills concurrently. The mind boggles. Anyhow, would TLIP like to comment on those three issues?

Mr Nolan—Perhaps on slippage, it is true that at an earlier point we were trying to predict when the exposure draft material would be available for people to comment on it. Those estimates were given in good faith at the time, but also with some reservations in that when you are only part way through a task the ultimate size of it—the issues that will come up—is not always absolutely clear. They were given on a best endeavours basis.

What happened after that was that we did receive the joint submissions that have been referred to, with something like 230 issues, and we worked our way through each of those. We effectively downed tools to a large extent on the preparation of the legislation to work our way through each of those issues to see whether they were or were not revenue costly or large or small 'p', which often turned on the same issue. That involved going back into policy files—background papers—from when the original legislation was introduced and so on.

That was a very time consuming process and it was very largely because of those processes that the amount of time that it has taken to produce the legislation blew out. It blew out not because of any lack of endeavour on our part or through anything other than an attempt to produce the best product that we could and to seriously take into account the points that had been raised with us. Sometimes that involved us getting into dialogue with tax policy people in Treasury and so on. So it was a process that extended the period

when we could produce the legislation, and we do not apologise for having taken that trouble.

CHAIR—The next issue was completeness of the bill.

Mr Kirkwood—Mr Chairman, could we make a comment against each answer there rather than accumulate the three of them? Which way would you prefer to take it?

CHAIR—You made a series of statements. I was asking TLIP to respond. If you want to come back, then I will come back to you afterwards. Could you comment on the completeness of the bill, Mr Nolan.

Mr Nolan—A little earlier, Geoff Harders talked about the amount of material still to be added to the bill. I think he said that there would be something like 20 pages of material, largely based on incorporating into the CGT rewrite material that has, in fairly recent times, been added to the CGT provisions in the 1936 act by other amendment processes. On the suggestion—I think it may have been made by Geoff Petersson—that there was this dump of 100 pages of additional material on 13 January, that material is very largely taken up with transitional and consequential provisions. I am not saying they are unimportant but they are not the substantive CGT provisions themselves.

Relatively small amounts of that additional material were adjustments, corrections, mostly again in response to comments and submissions that have been received, but also to work that TLIP team members have taken on. I do not believe that there is a huge amount of additional material to be added, but that material will be brought together quite quickly.

Mr GRIFFIN—So you and Mr Spence are at odds on that point? He is saying that 75 per cent of the bill is out there. You are saying that it is a lot more than that.

Mr Nolan—Very much. As to the substantive rewrite of the capital gains tax provisions as distinct from the transitional and consequential provisions which are very detailed and necessarily elaborate closing off the 1936 act provisions and giving a commencement to the new rules, they take up a lot of room but, putting those aside, the actual rewrite—what will be in the ongoing law as the capital gains tax rules—is virtually complete, with those fairly minor exceptions that Geoff Harders referred to.

Yesterday, we talked in discussions about division 138 and a willingness on our part to do some reviewing of that. We have already given some attention to that. Again, it is an area of the law that I suppose mainly relates to an anti-avoidance area which, for the general tax practitioner, will not have a lot of relevance. For the basic tax agent out in the suburbs, the bill is virtually complete now. We have talked a lot about where there are some grammatical changes. Yesterday, there was a bit of toing and froing over a whole range of relatively small things that can be tidied up, but they do not go to the heart of

things.

Mr Burge—I would like to endorse the point made by Brian Nolan that the bill is indeed virtually complete. To correct a point that Ken Spence made, Ken indicated that existing division 20 has not yet been included in the bill; it in fact appears in division 149. So that part of the law has been rewritten and included in the bill.

The areas that still need to be included in the bill, apart from the transitional and consequential amendments package that was circulated on 8 January, appear at the back of the second green volume, the smaller volume. They are catch-up amendments where provisions have been either very recently introduced into the parliament or only very recently enacted by the parliament.

I would like to emphasise the point that Mr Reid made earlier this morning that, if the bill were to be deferred for another year, we would have exactly the same situation. While the CGT provisions stay outside of the new act, you do get that double handling and there will always be some degree of catch up. But the basic rules are there and understood. Relatively speaking, there is very little to come. The materials are there. Some of these provisions were introduced as late as November of last year, but we are getting on to it now. It is simply not true to say that the bill is virtually incomplete.

CHAIR—What about the anti-detriment clause?

Mr Nolan—We already have a provision in the legislation which was introduced in the first stage, section 1-3, which effectively gives a signal to the courts that, in a rewrite exercise such as this, the law should be interpreted as having the same meaning as the old law unless it is clear that that was not the intention. That provision is based on a provision that has been in the Acts Interpretation Act for 15 years or so. It did not change the law, but it gave a point of emphasis to that provision.

CHAIR—Can you tell us, in your view, how complex it would make it for business and practitioners if we had two bills running concurrently and you could pick one or the other?

Mr Nolan—That is exactly the main concern that I have with the idea of a no-detriment provision that says that if you do not like the outcome or you think the outcome is different, which probably means the same thing, under the new law you can for a period of time—two years, three years or whatever it is—rely on the 1936 act. I would think that would be an extremely messy outcome for tax advisers and the general community. They would be left with this spectre of uncertainty. Why would the parliament have passed such a provision unless there was seen to be a real risk of this?

You would have tax advisers, especially with the professional liability insurance premiums that they have to carry already, taking very cautious attitudes, saying, ‘We’d

better study this particular client issue. We'd better study that under the new law which applies to it, but also with a belt and braces view of things go back and pore our way through the 1936 act provisions as well and make darn sure that there's no possibility of difference because somebody will sue us if we don't. But I do not know how we will manage to get paid for that because a client is not going to be wanting to pay you for doing the one job twice.' I really believe that that would be an extremely difficult situation for average tax practitioners.

Mr BEDDALL—Let me get something clear. We have this bill that is going to go to the House, then we are going to have, somewhere down the track, divisions 17A and 17B introduced, so there will be another bill over here. If you are simplifying the act, why isn't it all done at once? Why are those provisions left out, which are very important to the small business sector? Why are the rollover provisions and the retirement provisions not in this act?

Mr GRIFFIN—And when are we going to get those ones?

Mr BEDDALL—Are they going into this bill or are they going to come down in six months time or whenever?

Mr Burge—What will happen is that those provisions will be included in this bill by way of parliamentary amendment. It is that general issue that when provisions have only recently been introduced into the law there does have to be some catch up. In the context of the small business rollover, the government announced in response to the small business deregulation task force report that it was going to extend the rollover and that further amendments were needed as a result of that. They are now before the parliament. That made it impossible for us to include the provisions in our bill until final consultation in relation to that issue had been completed because the government had indicated that there would be consultation, and there was consultation.

Mr BEDDALL—They were consulting on this? Why could we not consult on the other one at the same time? Why could it not be included in this bill?

Mr Burge—It could be included in the bill only once the final decisions had been made as a result of that consultation process. The final decisions were made. The amendments have now been included in the parliament and we are now, very soon after the introduction of those amendments in the parliament, ensuring that our bill reflects them.

Mr BEDDALL—Let me get this straight. What we will have then is government amendments to this bill, the Tax Law Improvement Bill (No. 2) l997. We have government amendments which reflect 17A and 17B which will not be part of this consultative process that we are undertaking.

Mr Burge—The bill will include those provisions. We have indicated to the JCPAA secretariat that we will be making copies of that legislation, the proposed amendments in that area, available to the JCPAA as soon as it is available.

Mr BEDDALL—We have to report by March.

Mr Burge—We expect to have that material available by about mid-February.

Mr GRIFFIN—So by mid-February that will be it then, that will be all that you have got to do? So the additional percentage, which is arguable as to how big it is, that is supposed to be in this bill will be released by mid-February. Is that right?

Mr Burge—In terms of the catch-up amendments as shown at the back of the second green volume, the last page there, yes, we expect to have those all available by mid-February.

Mr GRIFFIN—Is that all there is or is there more?

Mr Nolan—The only additional material will depend on the consideration of things that we have talked about yesterday and today. We have already indicated that we will look at a range of issues. Most of them are fairly minor in terms of their substance.

Mr GRIFFIN—What you are saying is that by mid-February, everything that there is, from your point of view, will be out, other than things that may via consultation processes require further amendment. Is that correct? The issue here, from the association's point of view, and also from yesterday with the consultative committee, is having a situation where they have got it all to have a look at so they know there is not more coming.

Mr Burge—I suppose the one area where the consideration would go beyond that date would be basically the restructuring and further improving of division 138. That is unlikely to be ready by the middle of February.

Mr GRIFFIN—When do you reckon that might be ready?

Mr Burge—The expectation there is that we will have it ready by the time that parliament resumes.

Mr GRIFFIN—The beginning of March?

Mr Burge—Yes, that is when we would have that ready.

Mr GRIFFIN—So by the beginning of March it is all going to be there?

Mr Burge—Correct.

Mr GRIFFIN—Mr Spence, how long do you think you need to consider the bill to be in a situation where you think you can speak with some authority on the question of what is in it?

Mr Spence—We have not caucused over this, but there is an awful lot here. I would have thought, when it is all together, we need three to four months to expose it to people, to get views in and to really have a chance. There is a lot here. And, given the other tax legislation that is around, such a period would give people the opportunity to deal with it. I do not think that is really a big ask.

It is not just this bill and this CGT issue, but this slippage really is a broader issue in the whole TLIP process. We have got CFCs, the foreign subsidiaries, FBT and all those types of things to come. It would be good if some ground rules were established for a full, on-the-table piece of legislation for people to absorb before you meet and before the government discusses it and have that set up as a guarantee so that slippage does not mean that it is only at the cost of the taxpaying community being able to absorb this; that is, the people who suffer in the middle here. There ought to be a guaranteed buffer that people can rely on knowing what they will have, and not just legislation being introduced possibly two or three days before it is debated in the House.

CHAIR—If the bill were an improvement on language, which is what it is intended to do, to simplify the language and the law to make it easier for both practitioners and other people to deal with the tax law, why would you want to delay giving people the opportunity to use it? Are you saying that it is not an improvement?

Mr Spence—No. We do not want to deny people the opportunity of using the legislation. We would have been delighted if this had been brought forward on the original time frame but, even so, this two-year transitional period gives the people the advantage of using some of the enhancements in this legislation, but it is the unintended, unidentified detriments that they know that they are protected for from that period.

On some of those other points, if I could just refer to some of the other points that Brian Nolan mentioned, the slippage being due to our submission is absolute news to us. Basically, with a couple of very minor exceptions, we got limited feedback about it at all. We certainly had the impression it had fallen into a back cupboard or a dark hole.

As to the fact that that has taken their eye off the ball and they have had to spend months reviewing our submission—it is encouraging to know that they gave it so much thought—there has certainly been no indication of that. The only response we have ever got is what I saw in this paper here when I picked it up today. That is the only formal response we have got to any of the points over 12 months. So if they have done a lot of

work on it, they certainly did not share that work with us.

Also, on the two acts running concurrently—and Brian indicates that that would be very confusing—in his response to that issue in an earlier point about uncertain law and changes, he said that people can always have, under sections 1-3, the relief from the existing provisions. So to a certain extent, on that analysis, advisers still have to jump between the two acts if there appears to be a change because, if it is not intended to be a change, you may still be able to apply the previous provisions.

Where we are primarily concerned is where there is clearly a change—albeit unidentified, perhaps unknown to the people who have drafted it, and I can cite the case of some of the situs dealing with sale of pre-1985 shares—the existing provisions give indexation relief, and the new provisions do not appear to give indexation relief. There are other areas like that as well where—

Mr GRIFFIN—Taking that issue up, let us look at the question of a change of some significance which was not intended; let us say, for argument's sake, that the clause on farnarkeling is an unintended change. It goes through. What happens?

Mr Nolan—If there is an error of a substantial kind drawn to attention then a process is set in train to have that corrected by parliamentary amendment.

Mr GRIFFIN—Going from that, I am a taxpayer, I go and see my agent, he comes across this farnarkeling clause and says, 'Aha! Look at this. This will save you some money or whatever.' He acts upon it in good faith on the basis that that is what the legislation says. ATO spots it and says, 'Oops. What's going on here?' Do I get in trouble?

Mr Nolan—At the moment we are talking about a hypothetical. But what would happen is that the issue would be drawn out. The implications of it for taxpayers likely to be affected would be considered so that in framing the amendment and, more particularly on this issue, in deciding how that amendment is to apply, from what date and to what transactions, then all of those issues would be considered in the context of the likely detriment to taxpayers or maybe, if it is a major thing, of detriment to the revenue. That would be weighed up too. It is something that would be looked at on the basis of that kind of in-depth consideration of who is affected and what is the fairest way of dealing with it.

Mr GRIFFIN—What does that really mean to me, the taxpayer? You are going to dud me, aren't you?

Mr Nolan—You know that that would not be the case if I am looking after the issue.

CHAIR—You know he is not going to answer that.

Mr GRIFFIN—I just think it is an important point, though. In relation to the intention of 1-3, my recollection of the various inquiries we have had and the whole raison d'etre behind this issue is a situation where it is simplification but not change. One thing that I found a bit bizarre about the proceedings on each occasion that we have had them is that we have had associations coming along and arguing for change and I feel like saying on each occasion, 'Hello! It was made clear last time. This is not about change; it is about simplification.' That may lead to some change as such but the issue was not change.

One of the things certainly when we have talked about it in the past has been about mechanisms to actually, first, look at the issue of how you do small 'p', big 'p' or whatever you want to call them changes and hoping that there is some movement from government on those issues at some stage before the year 2000 and also safeguard the rights of people within the system from unintended consequences, with the whole idea being a situation where the legislation as changed is in effect the legislation before it was changed but there is no change in terms of actual impact—and 1-3 is in line with that.

But, having said that, if we then look at a hypothetical as to what you would do in that situation, the worry I have is that I may not get the answer that I would have hoped I would get from TLIP, which is that the intention has always been not to change the act through this process. Therefore, if something that would lead to a change was found, there ought to be a firm statement about what would happen in those circumstances. I would have thought what would happen in those circumstances is referral to 1-3. It is about the original act unless it is clearly notified that a real change has occurred. That would provide in effect the no detriment clause, although it could lead to a no benefit clause as well. But that issue is central.

Mr Petersson—I suppose the thing about section 1-3 is that it is certainly designed to provide a safeguard of a limited kind. The interesting thing about it is that, as Brian mentioned before, if we had a no detriment clause effectively we would have to work with two acts. The fact that we have 1-3 means that effectively we have to work with two acts now anyway, because we have got to go—

CHAIR—Isn't 1-3 really by exception?

Mr Petersson—Not necessarily.

CHAIR—You are making it sound as though you sit there with two lots of books all the time. I would think that is rubbish.

Mr Petersson—No.

CHAIR—It is only if something goes wrong. It is like a safety valve on a blessed pressure line and a steam line so that you do not blow the line up.

Mr GRIFFIN—That is the problem. They are not sure how the line works at the moment. That is why they are actually checking it both ways.

Mr Petersson—I think it is quite incorrect to suggest that it is rubbish that tax advisers do not need the two pieces of legislation side by side. In fact, you cannot operate one without the other. They are totally cross-referenced. If you use the 1997 act to look at a provision it may refer you to the 1936 act. That is a fact of life. That is what we have got with the current situation. So that is our starting point: we have the two acts anyway; we cannot avoid that.

The problem with 1-3 is that it is only a very limited safeguard. It depends on whether or not the intention of the rewrite is to express the same language as the 1936 act. Of course, that begs the question of why you have to go back to the 1936 act to find out what the 1936 act told. That helps us to some extent but only to a very limited extent.

The second point, therefore, is that the chaotic state that we find this CGT rewrite in means that taxpayers and their advisers are in an even less certain situation to be able to provide advice on any particular issue. That is why we are suggesting that it is necessary to have a further safeguard. We are talking about an anti-detriment clause for a limited period. We have acknowledged that that may well be messy, but the point is that it is no less messy than the current situation that we find ourselves in. But it at least does provide the safeguard that we do not get under the current provisions.

One of the things that we mentioned in our submission is that existing rulings are expressed to apply to the new provisions in a sense that the tax office has put out ruling 97-16, which purports to apply existing rulings to the new law. The problem is that the new CGT provisions have been so radically changed in their format. Also in terms of actual changes, one reads in the explanatory memorandum that there are no less than 142 documented changes, so to say that there has been no change or very minor changes is not quite correct.

The point is that because of the radical rewrite in adapting CGT events, as distinct from the traditional provision, what we have now is a radically different piece of legislation. So the very idea of being able to rely on the existing body of rulings that the tax office has put out that apply in relation to the existing law is a real issue that concerns the bodies. In other words, we doubt whether we can actually rely on those rulings. That comes back to 1-3. It means that 1-3 is less valuable. So we are left with the situation that we virtually recognise that the government is intent on bringing the law into operation on 1 July. If that is the case, what can we do? We suggest that the only possible thing to do is to bring in an anti-detriment provision.

CHAIR—I want to return to this consultation business. Would Gavin Back care to talk to us about that issue to provide some enlightenment?

Mr Back—Mr Chairman, perhaps the time has passed a little bit but I was just getting a little perturbed about the joint submission from the joint bodies and the perception that they thought nothing was being done with the 230 recommendations that they put to government progressively over quite an extended period. That joint submission raised issues that went from minor technical issues to very large 'p' policy issues—230 of them by their own count. They put those to the Treasurer, with a copy to TLIP, in four instalments to make it easier for us to look at all of them. Why they would continue to actually put them to us in instalments if they thought we were not doing anything with them is an interesting question.

What I want to make quite clear to the committee is that for an exceptional amount of the 2½ years that people have been working on the CGT rewrite, which is an extraordinary contribution of resources and perhaps unequalled for any piece of legislation, those people—up to 20 to 25 of our resources—were doing nothing really but looking at the 230 recommendations put to us to try to discern those which could fit within our terms of reference.

In the course of that, we were able to fairly quickly dismiss some which, just by their articulation, were clearly beyond our terms of reference. There were a lot of issues there that were potentially ones which, by requiring a policy change, could at the end of the day have produced no losers and no revenue adjustments, and therefore were things that TLIP has a sort of de facto mandate to bring forward; that is, nothing which is controversial but something which is really positive for everybody.

What nobody seems to appreciate is the extensive amount of analytical work that needs to go into identifying which of those proposals actually has no losers. During that year which people spent on that exercise, and during which there were frequent discussions between our people and representatives of the industry, there was a lot of feedback that came about. If they are asserting that we could have done that analysis and had no contact with them at all or that there was no perception that it was going on, I am surprised by that.

I want to make the point that for over a year we had the most exhaustive resources fine combing those 230 recommendations to find which ones we could bring forward. That is simply unparalleled. That is why those initial indications of when that legislation would be available slipped: just add on a year, as a minimum, to what we initially predicted. I think there needs to be some recognition of that.

Mr Spence—In response to that, I am delighted if you spent that much time looking at these submissions, but why hide your light under a bushel? There was really no—

CHAIR—Hang on a minute. You two are not going to sit at the table and have a discussion.

Mr BEDDALL—Would someone explain to me why we did not get this piece of legislation, which is no more than 10 years old, right in the first place?

Mr Kirkwood—I would like to pick up on that point because that is exactly where I was going to start. Rules that are being written are just over 10 years old. Over that period, from 1986 onwards, there were a number of amendments. But, even at June last year, the compendium of CGT issues that had been drawn up in cooperation with the ATO and the externals, the bodies that are here before you today and others, numbered 157 matters, some of which are big 'p' policy matters, others small 'p' and other technical issues. That compendium of issues had been drawn up over a long period of time.

The consultation process works in this respect. Every time a piece of legislation was given to us—we are a disappearing, dying breed; there are fewer and fewer of us prepared to spend the time that Gavin Back was referring to spending in reviewing our submissions—we spend a lot of time too. We have practices to run. We are not totally dedicated to doing this work. We spend the time, we review it and fortunately some changes are made, but it seems to be a process that takes too much time. We get some legislation and we are not given enough time to review it. Our submission at the moment focuses on what we consider to be the big issues, the critical issues. I have no doubt that, given another few months that Ken is talking about, we will discover many more. Of that many more there will be some, perhaps a number, that would result in further amendments. That is why we are saying the compressed time period and the consultation process are leading to something that is quite likely to end up as faulty law, law that does not work or law that does not work as intended.

CHAIR—If you had 10 years would it be perfect?

Mr Kirkwood—No. Mr Chairman, that is quite correct. But I think the very question that Mr Beddall asked is a key question because law will never be perfect. But how will parliament and the bureaucracy handle that when it comes before them and the law does not work as intended? Our experience in the past is that the ATO view prevails until parliament sees fit to amend the law and more often than not that change is not retroactive. That is the problem we have. We need a dedicated process of regular, annual technical amendments. That has happened on a couple of occasions, but in the United States it is a mandate that parliament consider—

CHAIR—With respect, you are now getting way out of the area that we are here to discuss. You are talking about major policy decisions and we are here to talk about this bill.

Mr Kirkwood—The care and maintenance of law.

CHAIR—We are already 20 minutes over your time.

Mr Back—Mr Chairman, could I just make some brief concluding comments?

CHAIR—Yes, Mr Back.

Mr Back—There was an assertion earlier, a discussion about the so-called 60 pages of technical corrections, which are not 60 pages of technical corrections. In fact within those 60 pages probably only about 20 pages are technical corrections. We are talking about asterisking and the likes of that. About half of that, 10 pages, is to the first tranche of our rewrite, the first bill, which was extended for a year to allow people further time to work out whether there were errors in it. That is all that came out of an extra year.

CHAIR—You are telling me that the first rewrite bill, after being in operation for one year—

Mr Back—No. In relation to the first rewrite bill, we agreed to extend the date of its operation. For that extra year to let people have more time to get across it and to see whether there were errors in it, all that has come out of that in terms of technical corrections as opposed to a better signpost and all that is about 10 pages.

CHAIR—That is very useful. Thank you.

Mr Back—The other thing I would like to point out, because there is obviously some dispute about whether we are consulting, is the extreme disappointment that we had when the Tax Institute indicated that it would not consult with us on our exposure drafts but that it would save it all up for the JCPA hearings. A lot of our decisions have been taken on the fact that, if they are opting out of the consultation process that we have been spending so much time on, what is the utility of that if they are saving everything up for the second tier of review, which is this body here? If they are cutting themselves off from the consultation process, how can they then come and say, 'We didn't actually know you were looking at our proposals'?

Mr Spence—Can I respond to that. On behalf of the Taxation Institute, I have attended every liaison meeting that has been run on the bill. We have had regular discussions through John on a whole lot of aspects associated with the bill. We generally do not have any problem with the consultation as a tax institute process other than the truncated time frame and the fact that nobody got back to us on our submissions. But, in relation to the way that the various meetings around Australia have been run, we have been very supportive of them and attended each one. I hope it is recognised that we have made a contribution in each one.

Mr GRIFFIN—Ken, on that issue, though, what you are saying is that—

Mr Spence—We have not opted out of the consultation. We are here. We have put various submissions in. The submission to your gathering today is a very extensive

submission.

CHAIR—Why doesn't everybody kiss and make up!

Mr Spence—I was not aware that there was this problem until just five minutes ago.

Mr GRIFFIN—Your concern on consultation is with respect to the formal response to your submission from TLIP? You have been involved in all the consultation processes that have been going on, TLIP is saying that there has been lots of informal contact between its officers and, I take it, your officers around the detail of those submissions. So it is a question of formal response; is that it?

Mr Spence—Our concern is firstly that it did take considerable resources, financial and member input, to produce that submission. We were anticipating some response back so that we could go back to our members and say, 'They may not agree, but here are some considered thoughts back. We have now got that in here.' We have not had that to date. That is one point.

As to whether the TLIP team chose to pick up those recommendations or respond is one thing. Effectively it is being portrayed that the joint bodies are now the reason that everybody has got such a limited period of time to review this legislation. Until 10 minutes ago, we had absolutely no reason to believe that we had in any way truncated or confused the whole process by a valid input into the process. If the process cannot handle a valid input, then there is something wrong with the process—or at least some communication back saying, 'Guys, you've stuffed the thing up; it has just compounded it. Can we work out some way of handling this within a reasonable time frame?' We would have been willing to accommodate that. We are trying to get better law here. That is what we are in it for, and no doubt the TLIP team think that they are in the same boat. But to find this sort of misunderstanding at this very late stage is amazing.

CHAIR—Mr Gaylard of the consultative council wants to make a comment, and I will allow it—very briefly.

Mr Gaylard—To try to take a fraction of the heat out of this: these guys down here—I am disappointed personally in the ASCPA's comments because I think they should have made a better attempt to apologise—have done an absolutely wonderful job in this whole consultation process for a capital gains tax. Ken Spence has given up enormous amounts of his time and John Kirkwood and Geoff have also given up enormous amounts of time and the tax audit improvement project really does appreciate the effort that they have put in.

What is happening here—and I do not think it has been terribly well explained—is that we started off with a three-year project. The three years have already expired and

Brian has been told that he has to have the project finished by June 1999. There is going to be this tension. There are things that the project would like to do—things that I would certainly like to do—that Ken has made mention of in previous submissions, but there does not seem to be time to do them. That is really the issue. These guys want more than the time limits can give them but their input has been absolutely first class.

Mr GRIFFIN—It is a time line set by government, which makes the whole thing very difficult to achieve; that is basically what you are talking about.

Mr Nolan—Again, in terms of reducing the heat, I want to endorse everything that Simon has just said. I, too, value very highly the input that people like Ken, Geoff and the others have made to the project. That is absolutely invaluable to us. That does not mean that the process that Gavin described of going through those 230 issues did not take all the time and effort that we said it did. It did. Nevertheless, whilst we regret that the Taxation Institute decided not to put in a further formal submission, we do know that these informal discussions—extremely valuable ones—have been continuing between John Burge, Ken Spence and others and that, to a large extent, that has been as valuable as a formal submission would have been. Nevertheless, there has been some tension around that issue.

I wish to pick up on something that Mr Griffin expressed disappointment about in my response on the hypothetical question: how do you fix up a change? My caution in responding was purely because of the hypothetical bases on which we are having this discussion, but I would expect that a government properly advised would not introduce correcting legislation that had any adverse retrospective application.

Mr GRIFFIN—For example, what can we do about a statement about that? Is it a question of something that can be included in the legislation? Is it a question of rulings from the tax office or is it a question of statements from ministers? If you are looking at addressing that issue of concern, how can that issue of concern be addressed? I do not want to go into this now because time is getting away from us; I just want to leave that with you. The second thing I want to say to you is that you now have a formal response, in effect, to your submission. Heads are nodding.

Mr Spence—Yes, we have.

Mr GRIFFIN—Ken, you have a response but, Geoff, you have not. Ken, seeing that you have a response, when would you be in a situation to be able to review that response and respond to it?

Mr Spence—Put very quickly, we raise four points up front and that perhaps moves on to the second one about their saying that some of these are policy changes. That really leads on to the Assistant Treasurer's statement that they will pick up policy changes. That process, in my mind, is very hazy and fuzzy.

Mr GRIFFIN—But very crucial, isn't it?

Mr Spence—Very crucial, and that is really where I do not think the TLIP team has done its bit. It has said, 'We cannot deal with these.' Really it is up to the government to decide how they want them dealt with and whether they want them dealt with. Having cleared one area, it now puts the focus on to the Assistant Treasurer's office to review that.

CHAIR—I have a question about this consultation and then we have to quit, with respect to our next witness. If TLIP had written a letter saying, 'Dear Sir, We have received all your suggestions. We are working actively and will consult with you over the telephone and in person. When the whole lot is finished, we will ultimately at about the time the bill is produced, or some time thereafter, give you a formal response to each one,' would that have made you happy?

Mr Spence—That would have been nice, but it would have been nicer if they had have given us the formal response a little bit earlier so that we could have taken it up then with the government. Until you have cleared one process, you cannot move on to another. If they did this work a year ago, they could have put it out a year ago.

CHAIR—I think we are going to have to bring this to an end or we—

Mr GRIFFIN—Can I just say one thing before we do, though? As a committee, we still have to consider what is our process from now on with respect to this. There are some things which I think we have clarified today but some things we have probably confused more. I am sure we are quite happy to take additional written comments that have come out of today if there are some issues that you do not believe we have been able to get to.

Mr Spence—Transitional would be one.

Mr GRIFFIN—Yes. I would also suggest it may be worth while tick-tacking with people who were here yesterday because a lot of the stuff that I think that I have seen in your submission was dealt with yesterday. So you might want to check that too.

CHAIR—Good.

Mr Kirkwood—Could I make just one comment? I started mentioning amendments to the act. I think it is a critical process to dedicate a time in parliament after this legislation comes in place for this to be reviewed—not to rely on the process of people saying it does not work, or the ATO saying it does or does not work. There has got to be a dedication to a review of this legislation.

CHAIR—Mr Kirkwood, that is not up to this committee. With respect, that is up

to the minister.

Mr Kirkwood—Okay.

Mr GRIFFIN—It is an issue we have raised in earlier recommendations.

Mr BEDDALL—Time is running out.

CHAIR—You are going back to big 'p' policy issues again.

Mr BEDDALL—Big election year issues.

CHAIR—Yes, whatever. Thank you very much. We will call the next witness.

[12.07 p.m.]

BAXTER, Mr Duncan Robert Charles, Partner, Deloitte Touche Tohmatsu, 505 Bourke Street, Melbourne, Victoria 3000

GARDAM, Ms Kim Louise, Tax Analyst, Deloitte Touche Tohmatsu, 505 Bourke Street, Melbourne, Victoria 3000

BURGE, Mr John Gregory, Senior Officer, Tax Law Improvement Project, 2 Constitution Avenue, Reid, Australian Capital Territory 2601

NOLAN, Mr Brian Martin, Project Director, Tax Law Improvement Project, 2 Constitution Avenue, Reid, Australian Capital Territory 2601

CHAIR—Welcome. Do you have a statement you would like to make to the committee?

Mr Baxter—Yes, I have. Clearly, given the time constraints, I will try to be as brief as possible.

CHAIR—We will extend this session until 1 o'clock and have an hour for lunch and then recommence for the last round table at 2 o'clock, and at 3 o'clock I turn into a pumpkin!

Mr Baxter—I really wanted to express, first of all, my gratitude to the committee for this opportunity to appear before it and also to the TLIP committee for the way in which it has dealt with our submissions. In terms of my statement, I want to cover off on two particular aspects—one is the consultative process, which has clearly got a lot of discussion today, and the second is some aspects of the draft legislation itself—and, in a sense, to draw out the major themes from our submission.

Turning first to the consultative process, clearly it is highly unfortunate in the way that it has been truncated. I believe that at the end of the day that is probably nobody's fault. It is something that we essentially have to live with as one of the factors of getting legislation agreed, going through a consultative process and then presenting it to parliament. From our experience in making submissions on the process, I felt it really commenced very well indeed with ED10. There was plenty of time for submissions, and the submissions were clearly taken into account in preparing the Taxation Laws Amendment Bill in its current form. There were, of course, aspects of the ED on which we made comment and suggestions but which did not make it into the final bill. As a general rule, we could see the logic behind the decision that had been taken. We certainly did not agree with all of the decisions that were taken but we had the feeling that our submission was properly taken into account.

Regrettably, with ED11, because of the truncation of the time available for comment, we were not able to make what I felt was a submission of equal standard to that on ED10. This was doubly unfortunate in view of the fact that ED11 was obviously much larger than ED10, it covered much more complex divisions than did ED10 and it finally allowed us to look at the entire rewrite in one block, as opposed to merely looking at a subsection and leaving us wondering what was in the other shoe, if you like, that had not yet dropped. We also, therefore, had much less time to look at the rewrite in any event. So some of our comments, I think, probably would have benefited from additional time.

We then turned to the actual bill itself and that, of course, is larger even than ED11, since it includes ED10, ED11 and additional material. It included further changes from those two and it was now the actual legislation, so it warranted a more detailed review. But, again, there was a very short time frame available for comment. I would note that anybody familiar with business would not have made 2 January the deadline if they could possibly have helped it because 90 per cent of the country goes on holiday for two weeks as of Christmas. We certainly found it impossible to meet the deadline for that reason, if for no other. But we are grateful for the flexibility shown by the committee in accepting the late submission and in the fact that clearly the TLIP people had put in a lot of effort in looking at the comments that we had to make. We are clearly grateful for the opportunity to appear in person and clarify the issues we have raised.

I turn to the draft legislation itself. I really have two main themes at the technical level. The first is that, when you look at the legislation as a whole, the approach of the separate CGT events, in my view, has been carried too far. The second issue is that, notwithstanding the fact that we do understand why certain decisions have been taken, there do seem to be too many instances of legislating the Australian Taxation Office position on particular matters. This is an opinion and it is not necessarily going to be decided by a raw comparison of which way particular issues went, because there are important and less important issues. I would not want to leave the impression that we believe the committee was totally biased. As I say, we were very pleased at the reaction that some of our suggestions may have got. But there does appear to have been a tendency, where issues which required a small ‘p’ policy decision arose, to have protected the revenue perhaps sometimes at the expense of clarity or at the expense of the taxpayer.

I will go into the first theme in more detail. That is, of course, the use of the CGT events. One very strong reason why the current provisions in the CGT rules are difficult to understand is that they try to fit everything into this model of a disposal of an asset. In many cases we are attempting to tax a transaction which does not involve the disposal of an asset. So essentially we have to force every square peg, being a taxable transaction, into a round hole, being the disposal. For those purposes, we deem our square peg transaction to be round and we force it into the hole and proceed on that basis.

The wording therefore does not correspond in many cases with the legal or the commercial form of the transaction. I am thinking particularly of what have been

described as the terrible twins, 160M(6) and 160M(7), the provisions dealing with leases, the provisions dealing with options, the provisions dealing with value shifting that I understand were discussed in some detail yesterday, and also the provisions dealing with group exit charges. They are all provisions which do not involve the disposal of an asset but which nonetheless the legislation tries to force into that mould.

We therefore welcomed in principle the use of CGT events as a way of making sure that the legislation accorded with reality, that the things which it was describing and the things which it was taxing were things which were actually happening. But unfortunately this was then carried through into two additional areas. First of all, it went through into the special rules—things like cost base and things like consideration—where, by specifically mentioning that those rules would apply only to certain CGT events, we have raised the spectre that some commercially or legally equivalent events might have quite different capital gains tax treatments. In our detailed submission you will see that we have cited a number of occasions on which we feel that may happen. I note that there are some submissions back from TLIP suggesting that some of those are policy areas. I accept what they say, but I do not believe that is the end of it.

Secondly, there are areas involving exemptions where the exemptions themselves have been confined to particular CGT events. Once again there is a danger that we will have commercially or legal equivalent transactions, some of which will benefit from a particular exemption and some of which will not. I think particularly there we have the main residence issue—the exemption for that—some of the transitional provisions where you change a main residence, and also some of the provisions relating to qualifying shares and potentially disposals of goodwill.

We feel that this is actually likely to introduce anomalies into the legislation in an attempt to clear up perhaps a lack of clarity. In the balancing act of what the TLIP process was supposed to achieve, we see an improvement in clarity as being outweighed by the fact that we have potentially introduced additional anomalies into the legislation. That is a source of great concern because the one thing that should never happen in this process is that we in fact end up with a more anomalous, a more unfair, set of CGT provisions.

Turning now to my second theme, which is the ATO position: the current legislation contains a number of areas in which the law is unclear and on which the ATO has formed a particular view, which is generally favourable to the revenue, and on which taxpayers and our advisers have formed a different view—clearly one which is favourable to taxpayers and their advisers. We certainly see examples of the ATO view being legislated into the new rules. Those examples tend to be relatively consistent. They are often unannounced. Certainly in our submission on ED10 we identified a number of those, which again appear to have carried forward into the final legislation. To the extent to which some of those issues have been addressed, we have tended to see them relating to perhaps announced changes of a policy nature by the government.

The second aspect of it is that there are a number of areas in which, notwithstanding that the wording is relatively clear, the ATO has generally applied a different administrative policy—sometimes for perfectly valid reasons; often, I think, to protect the revenue, again.

So once again we have small 'p' policy changes which in effect switch the existing language into something which is more consistent with the way the ATO has administered the law. That is a clear departure from the existing state of the legislation. When it goes in favour of the tax office, I think it goes some way towards explaining the focus of the professional bodies and taxpayers on getting adjustments back again to ease their own concerns with particular provisions. So this debate about small 'p' versus big 'p' policy changes in part is a consequence of that approach.

Some of these changes were caught by practitioners. We raised an issue, for example, in relation to the old section 160ZZT, which is a tracing provision where you sell pre-capital gains tax shares, where it was quite clear—to us, anyway—that the ATO had attempted to legislate its own view in direct contravention of what the law actually said. However, we are certainly not pretending that, given the time available for our review, we would have caught all of those changes or, where we have identified them, we have given them the proper amount of additional thought.

If I could leave the committee with a summary of our comments. I think the consultative process has been very helpful. It is most unfortunate that it has been truncated in the manner that it has. I believe we need to look very closely at the approach which has been taken to CGT events and in particular the application of that CGT event approach to special rules and exemptions. I believe we need to look very closely at some of the small 'p' policy changes which have been made to ensure that we are not enshrining ATO practices to the detriment of taxpayers.

CHAIR—On the consultation and timing issues, some if not all the professional bodies have recommended that the bill be delayed—at least, its proclamation—until 1 July, 1999. What is your view?

Mr Baxter—I tend to support that. I understand the need for legislation to be introduced quickly to create certainty, but these are tremendously complicated provisions which to date really have not circulated much beyond the people who have made submissions to the committee. It will take a long time for taxpayers and their advisers to work through them, and I take what has been said about the ordinary person being able to read these provisions. I myself would like to sit down with a bunch of ordinary people, give them the legislation and say, 'What do you make of that?' But I suspect the answers would not be as rosy and responsive as would be hoped. In fact, there is a long educative process which we will have to go through in order to actually achieve the desired effect. Certainly, from my perspective, being confronted with this largely unannounced, it would take me a great deal of time to get to grips with it.

Mr GRIFFIN—How long?

Mr Baxter—It has taken us the best part of a couple of months at least, with Kim working almost full time, just to go through the draft bill itself and identify the changes, and we have then discussed those.

CHAIR—When tax law improvement bill No. 1 was introduced, did you appear before the committee?

Mr Baxter—No.

CHAIR—If you had appeared before the committee and had made a comment then, would you have recommended that that bill be delayed?

Mr Baxter—In fact, I would have supported the delay that was put in, which I think was by a further year. The comment from one of the ATO representatives, to the effect that there were only 10 pages of amendments, was perhaps unfortunate and potentially misleading. Any amendment to legislation which is already implemented and affecting taxpayers is a source of some concern. And the fact that there was additional time, additional submissions and additional adjustments is inherently of value.

Mr GRIFFIN—I think you would need to have a look at the question of what those amendments were, though.

Mr Baxter—Certainly.

Mr GRIFFIN—That is a question I might ask TLIP after the lunch break.

Mr Baxter—There is certainly some value in that.

Mr GRIFFIN—On the question that was also raised by the associations prior to your coming on, of the matter of having a no detriment clause of some sort for a two-year period, have you got a view? In particular, a question was raised by TLIP in response that this in fact would be quite an onerous burden on the people in the system, because they would need to be basically zig-zagging across two different acts.

Mr Baxter—Of course, there is precedent for anti-detriment in the amendments back in 1988 to the superannuation provisions. Provision was made for what were called anti-detriment reductions, for the express purpose of shielding people from the impact of new legislation. In this case, whilst I take on board what was said about section 1-3 and its impact and relevant clauses of the administration bill, it is important to recognise that a lot of this legislation does change the law, and in unanticipated ways. So I do not believe there would be anything wrong in providing an anti-detriment clause of that nature.

It would also be very helpful to suburban practitioners, in particular, who could simply rely on the old law to some extent: for the most part, since they are relatively familiar with that, it would give them additional time in which to come up to speed on the new law. I take what was said by our ATO colleagues in relation to personal liability—it is obviously a subject dear to my heart, as a partner—but I would imagine that a suburban practitioner faced with an almost overwhelming task would be grateful for any support and, since that is the main target of the TLIP amendments, it is something that is very well worth considering.

On the question of looking at two different kinds of legislation at once, I am in total agreement with the representatives from the associations. We have to do it anyway. It does not make any difference to us really because we still have to understand what the law was before. In many cases, we have to recalculate cost bases anyway, determine there is a difference and then determine whether it was an intended difference. So you have 95 per cent of the work done in any event.

Mr GRIFFIN—You talked about the issue of contentious issues and the law being clarified as per the ATO's view. Just so I have that clear, though, are we talking about a situation where that clarification is a change of current practice? Current practice is often the ATO view; let us be blunt. So if there is a clarification required around the question of how something works, you would expect it to be the ATO view because that is the way it is. Or is it a situation where you are saying there are extensions or alterations occurring in the law by clarifications being along the road of a new ATO view, if you like, or an extension of the ATO view?

Mr Baxter—I was talking about two kinds of amendments. There is one where there is some genuine doubt in the existing law and the ATO has formed a particular view. Those clarifications I can generally accept as being recognition of current administrative practice. That is not a problem. There are other clarifications where the law as it stands is relatively clear and the legislation as introduced which attempts to clarify administrative practice is in fact inconsistent with that. An example would be—and this was something we raised in relation to ED-10—that the commissioner has for a long time attempted to attack what are known as Everett assignments.

CHAIR—Sorry?

Mr Baxter—They are called Everett assignments. They are named after the case in which they were first approved by the High Court. He has issued rulings. He has provided amnesty periods. He has warned people of the horrible capital gains tax consequences of these things.

When we first looked at ED-10, we were, I suppose, not surprised but in a sense shocked to see a provision which appeared to be aimed directly at Everett assignments. There were all sorts of arguments about the cost base of the partnership interest that you

assign in an Everett assignment. There are all sorts of arguments about the consideration you get for it but they seem to come down to a relatively clear view, in many cases, that the transactions are not taxable because you ought give either a proper cost base to the thing or proper consideration but you cannot do one without the other.

In that legislation, we had a specific example of what appeared to be an Everett assignment and the statement that this was now taxable, but it was not disclosed as one of the main changes. It was in fact hidden away at about CGT event 18. We put in a submission on that point saying that we felt there should have been much more made of this change if it was intended to do that. In response, all that happened was that that example was removed but nothing was done to the provisions. So we still have that problem.

CHAIR—Would somebody from TLIP like to join us at the table and respond to that?

Mr Nolan—Thanks again. Duncan and Kim have addressed their concerns around two issues—firstly, the treatment of CGT events and, secondly, the fact that there is a pro-revenue bias in the way in which the rewrite team has gone about writing areas of the law where there is some clarification put in. There was what I regard as a quite extraordinary statement, which was that the clarity of the rewrite—which I think has been acknowledged pretty widely as an improvement—has been outweighed by anomalies. I found that quite out of step with what we have heard generally, even from people who have had unfavourable things to say. That came out of left field a bit and would require some sort of justification.

On the question of a pro-revenue and pro-tax office bias, we really do not believe, despite the constant reassertion of that, that the facts will sustain that proposition. In fact, in the small 'p' policy changes, on the minor improvements that we have made towards assisting compliance and reducing costs, I think John Burge will support me that a very large proportion of those, certainly about 80 per cent of the changes that have been made, are ones that are favourable to taxpayers. Of the remainder, there are very few where they would be in any way detrimental—

Mr GRIFFIN—Brian, with respect, John Burge is always going to support you.

Mr Nolan—I meant he would support me in showing the detail.

Mr GRIFFIN—With respect, I would like you to address the specific example of the Everett issue in your comments.

Mr Burge—I would be happy to address that. On 12 January 1994, the then government foreshadowed changes to the taxation law, and that package of amendments included provisions dealing with what are called pre-admission Everett assignments. We

do not have to go into the details of that now, but as a particular type of Everett arrangement that was reflected in the law later that year and in the rewrite we have preserved the effect of that provision in CGT event E9. The tax office has views about Everett assignments generally, but we went out of our way to ensure that taxpayers arguments were not weakened in relation to them. So it is not an area at all where we have weakened taxpayers arguments in relation to Everett assignments.

Mr GRIFFIN—What about the example that was in the exposure draft and then removed? Correct me if I am wrong, but I think that appeared to be a definite change in existing practice and it was removed. What was it doing there in the first place if it was a definite change? Or have I got it wrong?

Mr Burge—The rewrite makes extensive use of examples to illustrate the application of particular provisions. When those amendments were foreshadowed on 12 January 1994, pre-admission Everett assignments were specifically mentioned in that press release. Our thinking was that it was appropriate to give examples illustrating the type of arrangement to which that was directed. We thought that we were in line there.

Mr GRIFFIN—Can I get a comment from Mr Baxter, please?

Mr Baxter—There are actually two comments on the table. One was the comment that Brian found so surprising—and I would like to clarify that a little bit because there is a reason why it seemed to come out a left field: that is not what I intended to say. In relation to this question of Everett assignments, what I find interesting is that certainly on reading the legislation that appeared to be new. The inclusion of that particular example certainly alerted that issue and made it appear as a direct attack—I should say one more in the series of direct attacks on Everett assignments by the ATO and its legislature. The fact that that was then removed went some way towards suggesting that it was not intended to be such a direct attack in the first place. I would certainly welcome comments, from John perhaps, as to why the example was then removed afterwards.

CHAIR—Does TLIP have a response to that?

Mr Burge—Yes, I do. We removed the example basically because the point had been raised with us and we recognised that the area of assignments can be a controversial one and we thought the provisions stood on their own. Given that the point was raised with us, we thought the appropriate response was to be as responsive as we could to the suggestions made and we were not going to die in a ditch over that example. So, after having had Duncan Baxter put it to us, we decided there was no harm in removing the example, and that is what we did.

CHAIR—Mr Gaylard seems to want to make another comment.

Mr Gaylard—Just very briefly. I am sure the committee must be a bit confused

about this question of bias. It has come up at each of the meetings.

Mr GRIFFIN—We are not confused at all, Simon; we understand it fully.

Mr Gaylard—It may be helpful to you to know that where changes are made to the law, based on recommendations and submissions that are put to us, those changes are often just made and the law is, we think, improved by it. What generally happens is that there remains a residue of two, three, maybe four issues and it does get down in the final analysis to which way you go.

There are three possibilities: one, you can clarify the law the way taxpayers would like, and that may or may not have a revenue ramification; two, you can leave the law uncertain, the same way as it was in the old law—and I personally find it extremely disappointing when that happens; or, three, you can take the way that the tax office currently interprets the law. They do not generally get that out of thin air; normally there is a fair amount of research that has gone into that position.

I see all of this as a balancing exercise. You might allow 40 or 50 small suggestions that have been made by the professional bodies and maybe on two, three or four other issues there is a digging in. Our job is really to try to clarify the law one way or the other. It seems unfortunate if you have to just say, 'Let's satisfy no-one and leave it unclear and let the courts belt it out.' We have done that. That was the solution for the mining provisions that were referred to extensively during this session. In the end, we left everyone's option open and we left the law unclear. But I personally have a problem with that.

So you have to see this in the context that there are a lot of measures just going through without any problem at all, a residue of issues. There are some very tough decisions that have to be made, and they are often not made the way taxpayers would like. But it is a balancing exercise.

Mr GRIFFIN—The problem I have with this particular consideration of legislation is that on previous occasions we have appeared to know, or everyone has appeared to agree on what those issues are. The problem I have this time is that there appears to be a situation where people are not prepared to agree on what those issues are.

Mr Gaylard—Well, you are talking about a much bigger body of law, and it is an extremely important area of law. I think the professionals are right—they do need some more time. As I say, we think the overwhelming benefit to the community is to try to get these things resolved as quickly as we can, get the legislation through and get on with the rest of it and let the other forces at work come along and make substantial reform if that is what happens—that is what we hope will happen—to the tax law and really make some major changes.

Mr GRIFFIN—Brian referred to the question of the clarity versus anomaly issues, and, Duncan, you said you wanted to make a comment on that. Would you like to make a comment now?

Mr Baxter—Yes. I was actually talking in relation to a particular amendment. If the effect of that amendment is to clarify the law but introduce anomalies, then the introduction of anomalies is a detriment which outweighs the advantage of more clear legislation.

I certainly did not intend to say that when you look at the legislation overall we have gone backwards. That would be a grossly unfair imputation. What I am saying is that, in relation to these particular provisions where we have made them more clear by using CGT events for special cases for exemption, if the result is the introduction of anomalies then for those particular provisions we have not progressed; we have gone backwards.

Mr Burge—Brian Nolan mentioned that the changes proposed in the bill overwhelmingly favour taxpayers. Of the changes which do more than just change a label from, say, 'principal residence' to 'main residence', those which can have an actual effect on the application of the law, we have identified that 85 per cent of them unequivocally favour taxpayers. In many cases they enshrine an ATO view of the law that is favourable to taxpayers. I think that is worth mentioning.

There are a number of occasions where the ATO has taken a more favourable view of the law than the strict terms of the law would necessarily require. For example, there is some doubt in the existing law whether, if you re-finance a loan, the interest on that re-financing arrangement can go into the cost base of the asset. The basic rule is that, if you have non-deductible interest on an asset you acquire after 21 August 1991, you can get it in the cost base. But, if you re-finance, it is arguable under the existing law that you do not get it. The ATO accepts that you do, but the rewrite has put beyond doubt that that is the case.

Of the remaining 15 per cent, the vast bulk of those deal with situations where there is a clarification of the law—we believe the existing law does support that interpretation already, but the position needs to be clarified; we have done it, but we have not done it invariably. One of the points raised by Duncan Baxter in his submission to us—a very useful submission—was about the rewriting of section 160ZM and whether that should apply to distributions only of cash or whether it also extend to non-cash distributions. We realised that we were clarifying the issue in favour of the tax office's position. But when we were briefing the Assistant Treasurer on the point we mentioned the fact that we had received a submission where this issue had been raised. We said that we thought it was appropriate from a policy perspective that the ATO view be reflected in the legislation and that was agreed to as part of those processes. We do take that type of clarification very seriously indeed.

CHAIR—Is there any more you would like to say to the committee?

Mr Baxter—I will just clarify one aspect which I think both of the gentlemen from the TLIP committee mentioned. They proceeded on the assumption that you can determine what represents a change from the existing law. It seems to me that in many cases what has actually happened is that, if it is a change from ATO policy, then it is regarded as a change from existing law. Otherwise it appears that merely enshrining an ATO interpretation or an ATO administrative policy is not regarded as a change to the law and therefore will not be included in the figures that John cited. So that is the first point that I make—that in fact the identification of what represents a change in the law will be different depending on which side of the fence, in a sense, you are sitting on.

The second is that, as I mentioned at the start, a direct numerical comparison is not appropriate. You need to look at which issues are being decided in favour of the taxpayer and which issues are being decided in favour of the revenue. Certainly from my perspective the ones which were being decided in favour of the taxpayer were kind of, 'Of course this should always have been the case; it would have been an act of almost negligence to have allowed the current situation to continue.'

A couple of examples there might have included the first rewrite of these payments in kind provisions where the rewrite in fact achieved the effect of multiple taxation at the same payment. Clearly an adjustment to amend that in favour of the taxpayer is not one for which taxpayers should be overly grateful. It merely set the situation back to the previous law. Similarly the adjustments to ZZT that I referred to again merely set the situation back to what the existing law was. So I do not think you can simply say, 'Here are all the adjustments that we made. Eighty-five per cent of them were in favour of the taxpayer, therefore there is no bias.' You need to look at those two particular issues.

As I say, it is clearly a question of opinion. I respect the opinion of the people in the TLIP process and in fact would be quite prepared to accept that they have gone through a process which may have led to the balancing up of the competing alternatives. But, at the end of the day, looking at it in a sense as an outsider with my own particular biases, it did seem to me that the result was too far in favour of the commissioner compared to a straight down the line result.

Mr Nolan—Assertions of bias are easy enough to make and it is very difficult to finally quantify all of that and say, 'Yes, it's true' or, 'No, it isn't'. We do maintain that we have tried very hard to take a fair, straight down the middle approach. I think there has been an element, not just today but yesterday too, of dismissing the things that we have done favourably and sort of putting those in the back pocket and saying, 'They're givens. Of course you should have always done those favourable things. They should have been in the law anyway,' and just focusing on what is left. I think that taking things that way is not really fair to the project.

I do think that you have to look at the totality of the things that we have done as well as look at the individual examples, which we are happy to debate point by point if that is required. But, in the responses that John has provided on particular issues that have been raised, you can see that they have been reasoned, considered positions—that they have not been just, 'Well, let's plonk in the ATO view.'

Luncheon adjournment

[2.02 p.m.]

BACK, Mr Gavin Alexander, Assistant Commissioner, Tax Law Improvement Project, 2 Constitution Avenue, Reid, Australian Capital Territory 2601

BAXTER, Mr Duncan Robert Charles, Partner, Deloitte Touche Tohmatsu, 505 Bourke Street, Melbourne, Victoria 3000

BURGE, Mr John Gregory, Senior Officer, Tax Law Improvement Project, 2 Constitution Avenue, Reid, Australian Capital Territory 2601

DEUTSCH, Professor Robert Leslie, Director, ATAX, University of New South Wales, Sydney, New South Wales 2052

FRESHWATER, Ms Lyn Margaret, Technical Officer, Tax Law Improvement Project, Australian Taxation Office, 140 Creek Street, Brisbane, Queensland 4000

GAYLARD, Mr Simon James, Tax Law Improvement Project, 2 Constitution Avenue, Reid, Australian Capital Territory 2601

HALY, Miss Margaret, Assistant Commissioner, Tax Law Improvement Project, Box 10422, Adelaide Street Post Office, Brisbane, Queensland 4000

HARDERS, Mr Geoffrey, Consultant, Australian Taxation Office, 2 Constitution Avenue, Reid, Australian Capital Territory 2601

KIRKWOOD, Mr Jon Barton, FCA, Tax Committee Member/Representative, Institute of Chartered Accountants in Australia, York Street, Sydney, New South Wales 2000

MAGNEY, Mr Thomas Waymouth, External Consultant, Tax Law Improvement Project, Australian Taxation Office, 2 Constitution Avenue, Reid, Australian Capital Territory 2601

MORGAN, Mr John Frederick, Private Sector Representative, Tax Law Improvement Project, Australian Taxation Office, 2 Constitution Avenue, Reid, Australian Capital Territory 2601

NOLAN, Mr Brian Martin, Project Director, Tax Law Improvement Project, 2 Constitution Avenue, Reid, Australian Capital Territory 2601

PETERSSON, Mr Karl Geoffrey, Member, National Technical Committee, Taxation Institute of Australia, 9/64 Castlereagh Street, Sydney, New South Wales 2000

ROBERTSON, Dr Mark Louis, CGT Spokesperson, Australian Society of Certified Practising Accountants, ASCPA House, Level 7, 170 Queen Street, Melbourne, Victoria 3000

SPENCE, Mr Kenneth John, Senior Vice-President, Taxation Institute of Australia, 64 Castlereagh Street, Sydney, New South Wales 2000

CHAIR—We will now commence the final stage of this two-day public hearing. This session is designed as a round table discussion to allow participants to make final comments. Would you please try to make your comments concise and to the point? That would be most helpful, considering the time, and would also give us a chance to consider your final comments. Who would like to start?

Mr Spence—I am from the Taxation Institute of Australia. Perhaps I could just raise one issue and ask the committee how they will be dealing with the transitional provisions—which really were not part of submissions, because these transitional provisions were only introduced after submissions were due. They raise a number of very separate issues which I do not believe have been dealt with at all in the hearing today and possibly yesterday.

There is a proposed commencement date. Whatever date that is going to be, it is a proposed commencement date: you effectively throw out the old act and you apply this new act exclusively. In a number of circumstances that could be seen to have retrospective application. Perhaps just one simple example, which I know you have been through, is this trading stock issue which the CTA has raised on a number of occasions and how that interacts. It has been acknowledged that there was some divergence of views in the past about what the previous provisions did. Would the way the transitional provisions would apply mean that it would effectively apply on a retrospective basis where you did not sell the shares in the relevant underlying companies until after the new act came into place?

So while, when you talk about an issue like that, you might think, 'That is okay. There is a change there. It was a bit fuzzy in the past, but it is on a go forward basis that the law is being changed,' I think you would have to accept that that is not the case. In many ways that affects transactions which may have occurred in that case at any time over the last seven years but in other cases since 1985. To the extent it affects cost base, that cost base does not crystallise in a gain until you sell the asset. That is an issue which I do not know whether the committee has considered and how it will consider it, given that it was not the focus of any submissions to your committee because the legislation had not been proposed.

CHAIR—I cannot give you a definitive answer to that. I think it is up to the committee to decide how it deals with that issue. But since you have raised it we will certainly take it on board.

Prof. Deutsch—I would just like to make a couple of comments, and I will keep them as brief as I can, on a couple of specific things on certain sections and a couple of very general things. There is one that I do want to mention because I raised the question of divisions 138 and 140 yesterday and raised my concerns as to whether there was a significant improvement in the way that they are drafted, and there was some disagreement with my comments.

One thing that I specifically want to get across is section 140-22(2), which I have talked to a couple of people about already. It is drafted in a way which I think is very cumbersome. It is the kind of drafting that I would prefer to see not appear in this rewritten legislation because it talks about applying another section of the act in a modified way, with certain modifications spelt out—and there are six of them spelt out there. What that means to a practitioner is that you effectively have to photocopy the other section and then rewrite it yourself, crossing out the bits that are being suggested in 140-22. To my mind, that is a very unsatisfactory way of drafting it. I had assumed that that was not going to be repeated here. There are problems in the alternative, but there has to be a better way of dealing with it.

The second point that I would make, because it came up this morning, is in relation to partnerships. When we were invited to respond this morning I had not had a chance to look at partnerships because I spent the last week looking at the second half of this legislation and not so much at the first half. I have not checked through the examples which Dr Robertson referred to, but the legislation itself is very brief—this appears at page 79, 80 and 81—and simply reflects what I think should always have been the law, which is that partnerships are look-through entities and you look at the partners individually. That has certainly been the case in relation to ordinary income tax and probably should always have been the case in relation to capital gains and capital losses. There has been some toing-and-froing on that issue, but to my mind the legislation itself now accurately reflects what should be the position. I do not see a real problem with them. As I said, I have not checked the examples.

There are two final comments that I would make. One is that there was some talk in a couple of the submissions this morning that this legislation is for ordinary people. I must say I disagree with that. This is not for ordinary people; ordinary people would not read and understand this legislation, no matter how easy we try and make it. The intention here—and this is an important point that should be re-emphasised—is to, in a sense, take it away from the so-called experts and allow the suburban practitioner, as the classic example here, to be able to read and understand more of this than he or she at one stage could have. That has arisen because of 20 years of extensive amendments to the legislation. I think it is important to recognise whom we are focusing this at, and I do not think it is at the ordinary man in the street.

On the question of delaying the legislation to a 1 July 1999 start date, I express my view on that emphatically: I am opposed to that. I am an educator, most fundamentally,

and we put on a lot of seminars. What we always find with these things is that, if it is going to start on 1 July 1999, we will put the seminars on in the first week of June because that is the only time that people will come. If you give it an extra year, the whole process of analysis will just be delayed a year. More selfishly, we have structured seminars for May of this year already, so this is going to be a big problem for us if this gets delayed. Quite apart from that vested interest, I do not think that there is merit, quite frankly, in delaying it. There is work to be done, and it is going to have to be done in a hurry. I will leave it at that.

CHAIR—Do the TLIP officials want to comment on that first issue?

Mr Harders—I could respond on 140-22. I accept the criticism of that provision; I agree with the comment. It is done in that way because it is picking up the control provisions of part X of the 1936 act, provisions which are very complicated and will hopefully be rewritten shortly. When that is done, this provision will be able to be replaced. It was basically a holding measure.

CHAIR—Thank you for that.

Mr Magney—Mr Chairman, I would like to endorse the remarks of Bob Deutsch. I do not believe the legislation should be delayed for a year. I have spent quite an amount of time this month looking at the structure of the new CGT provisions and the introduction of events in lieu of deemed deemings. I found it much easier to understand, much more logically constructed and much better in every way than the existing legislation, and therefore much more useful to the ordinary general accountant or lawyer.

I have looked at each of the 36 events and compared each with its corresponding provision in the 1936 act and I have not been able to detect any major changes—and, indeed, there are hardly any minor ones—in the effect or scope of those events, as compared with their relative provisions in the old act. Dr Robertson referred to many defects in the existing legislation and to the fact that he could go down the street and create capital losses which would keep him out of capital gains for the rest of his life. There was a small business newsletter that used to be brought out in the days of roaring tax evasion, wherein they guaranteed to get you out of tax for the rest of your life. But the point is that those problems are in the act now.

Take the problems with partnerships: as Bob says, all that has been done with partnerships is to enshrine in legislation what is already in a ruling and has been tax office practice. The problems are there now, arising out of partnership law and trying to apply capital gains tax at any level to a partnership. There is nothing in this act that creates the problems; the problems are there anyway. How you are going to solve those problems, if indeed they are soluble, is a matter for very big ‘p’ policy, which will have to be looked at over a period of time. In fact, most of the weaknesses in the new legislation are merely weaknesses that exist from the old legislation. Somewhere along the line, probably, there

will have to be a complete look again at the whole concept of capital gains, and that will probably come within the context of the government's tax review.

I personally think that it is a mistake to keep working with two sets of provisions. Bob Bryant and Bill Glass this morning started off by saying how much time, energy and expense was involved in having the two provisions. Well, the quicker you get rid of two systems the better. Once you have done that, you get into the new system; it may have its problems, but they will be ironed out as you go. As several people have pointed out—John Burge, Bob Deutsch and others—people will not really start applying their minds to the new system until they actually have to work with it.

Debbie Boyd tells me that last year there were seven bills making changes to capital gains tax, and this year even more are expected; so the sooner you get the new legislation up and running, the sooner the changes can be slotted into the new legislation. That also gives plenty of opportunity for correcting any errors that have been found in the working of the new legislation. This is very different from the necessity to go back under section 1.3, where there may be thought to be some difference between the old law and the new law. As for section 160ZZT, which was referred to, that is known as being a very defective provision; but to change it will be a matter of big 'p' policy, and again that will have to be looked at as a separate exercise.

Finally, take for example the Everett problem: I looked at that when I was comparing the various events with the old law and I could not see any difference between the operation of the old law on Everett and the operation of CGT event E9. They seemed identical to me. So, with the greatest respect to the learned brethren here, I would say that I do not think there are as many serious defects in the drafting of this legislation as may have been suggested. For all those reasons, I am very much in favour of bringing it in and getting it up and running as soon as possible.

Mr Kirkwood—The legislation, if it is introduced in the 1998-99 year, applies to some taxpayers now. Those taxpayers did not have a reasonable opportunity to determine what their position was under the new law. Those taxpayers are the substitute accounting periods, early balancing companies whose taxable year of income commenced on 1 January this year. I think it is unarguable that the legislation in front of us now is incomplete. The degree of the incompleteness has been debated this morning, but it is incomplete and those companies have had no reasonable opportunity to work out their position and they will be subject to tax based on the new law if the start date is 1 July 1998, for the 1998-99 year.

I believe that the answer to that, if that just has to be the way it proceeds, is a no disadvantage arrangement. Really, in my view the only fair thing that can be done is to enter into a no disadvantage arrangement once the start date is set, and I am arguing for a later start date. I hear the views against that but, once that start date is set, there has to be a no disadvantage arrangement for a period: we say two years, but that is debatable as

well. The old act established a cost base and that carries on into the new provisions, and the transitional provisions are truly critical in relation to that. There has been no opportunity, subject to a few days, to really examine those provisions. We need to do more work on that and to test that.

The question of trusts has been raised on a number of occasions this morning, and I did not comment at the time, but the trust rules under the old act do not really work in relation to employee share plans. You pick up your cost base in determining when you acquire shares, and shares go into trust quite often in relation to employee arrangements. We are talking about tens of thousands of ordinary Australians—shop floor workers, blue collar workers—who are not advised. They do not have accountants to help them. The only place they can turn to is the company that has granted them the right to obtain these shares.

There is a terrific advantage in rewriting the law as it has been happening. There is no doubt that that law will be more readable, but at this stage I still do not believe that the provisions work in relation to employee share plans where trusts have been used. There has been an offer of further consultation; I have no difficulty with that. But it is not, in my view, ready yet. So there are provisions that are not really ready. I think we have had an offer in relation to a number of the areas for further consultation and further work to be done; so, if the start date has to be set as 1998-99, to me it is unarguable: there just has to be a no disadvantage arrangement in relation to such an early start.

Dr Robertson—Perhaps I should respond in relation to trusts. I agree with what Professor Magney says about the problems with trusts in that they are existing, as far as the present legislation is concerned, and TLIP has not changed anything because they have just re-enacted it in nicer language. I disagree with Professor Magney's statement that the change requires big 'P' policy change. In fact it does not require any policy change at all. It just requires proper and correct thinking about trust law in the first instance when reformulating the provisions. The recommendations are all there and they have been there in detail for at least the last year and a half. So if the bill is delayed, it would give TLIP a great opportunity—also bearing in mind trust law reform at the moment—to properly redraft these provisions so that they do make sense and the existing problems, which everyone knows are there, disappear. That will not happen if things are just railroaded through right now.

Mr Petersson—I would like to make two points. Firstly, in the TLIP's response to the joint submission which is in the second of the green volumes, there are a number of undertakings on behalf of the TLIP team to look at issues that have been raised in the joint submission. We appreciate that. I suppose our concern is that those indications of further work are likely to get lost in the process in view of the short time frame in which you have got to report back to parliament. So I wonder whether the committee should be seeking to make recommendations in relation to those issues to ensure that they are in fact followed through.

The second issue concerns the no detriment provisions. I would certainly endorse what has been said on behalf of the professional bodies that we need a no detriment provision. There are certainly a lot of beneficial changes within the rewrite—I am talking specifically CGT here—that will benefit taxpayers by having an operation date from 1 July this year, but of course we have heard today and yesterday that, because of the incomplete state and the short time frames that have operated, there is very real confusion and lack of knowledge as to the effect of the rewrite as it stands.

To talk about the rewrite having no changes, or only minor changes, ignores the fact that, as I mentioned earlier this morning, in the EM there are at least 114 changes that have been documented. There are many other changes which have been undocumented, some of which have been noted in the body's joint submission.

Finally, in relation to the small business rollover and small business exemption, again, those provisions are extremely important for lots of small business people and their tax advisers. The fact that in their present draft they are written in a somewhat difficult style means that the benefits those provisions seek to confer are potentially being lost to many taxpayers. The fact that, again, the intention is to have those provisions rewritten and included in this bill for operation from 1 July means that it will be very difficult for the committee to see those rewritten provisions before it is due to report.

Again, I would like to see some recommendations by the committee to ensure that those provisions are able to be reviewed by the committee within a reasonable time frame or, alternatively, that further consideration by the committee be given to those provisions when they are available.

CHAIR—All I will say about what the committee will or will not do is that the committee will do what it does, when it does it. We thank you for your advice.

Mr Spence—I would like to raise another point concerning two areas that were dealt with in our submission. We would be encouraging the committee to recommend to the government that these areas also be addressed within this rewrite process. They clearly fall into the area of ambiguity and bringing the law into line with current practice. That is one of the stated objectives of the process. They are in relation to both damages payments and in relation to the sale by taxpayers of assets they acquired before 1985, shares in unit trusts being the ZZT provisions which have been previously touched on.

In both of those areas, the existing law has not operated well. In relation to compensation payments, the tax office put out a very comprehensive ruling, TR9535, in 1995 which dealt with those areas and tried to make the existing law operate and cover compensation and damages payments. That might be very good from an administrative point of view, but it is not satisfactory that it be dealt with on a long-term basis by a ruling, particularly when the underlying legislation is being amended. It would be a clear enhancement to the certainty that taxpayers should look for in the law that those issues be

dealt with in the legislation itself. There are no policy issues involved. They have already been encompassed by the way that the ruling now operates. It would just be giving taxpayers a clarity that the law can provide, which sometimes a ruling cannot.

Secondly, in relation to the ZZT issue, as has no doubt been referred to earlier, it is riddled with ambiguities. The tax office's own working papers and various committees that I have been involved in have recognised at least 37 ambiguities and uncertainties. It is not a matter of policy changes in most of those. In that respect, I refer to Tom's comments previously. Nobody knows how these provisions operate in a number of circumstances. The law is just a black hole. On a number of occasions we have discussed those at other meetings. There was a meeting on 16 July 1996 with some people from TLIP and from the rulings panel which was a very constructive half-day meeting. A number of recommendations came out of it. I was devastated when I saw from the rewrite that none of them had been picked up. These issues have been identified for more than six or seven years. We have been promised changes and clarification and they have never come. We have been held off by, 'TLIP will fix it. Don't worry about that.' If we miss this opportunity, when do we sort these things out? I would have thought that your committee, after reviewing those areas, might be able to make a recommendation that those two areas need to be addressed at this stage.

CHAIR—Thanks for that.

Prof. Deutsch—I would like some clarification here. I fear that we are going to go down a path that is going to give us more problems. If we were to adopt what Mr Spence is putting, would we not be confronted with a situation in certain circumstances where people will say, 'Well, that's the ATO view that has been put into the legislation.' We have got 37 ambiguities. I am familiar with a number of them in relation to ZZT. There are issues as to who is right or what the correct argument is—gross basis evaluation, net basis evaluation. Once we go down that path, we end up with the sort of criticism that has already been levelled today that a view has been adopted. No doubt, it will be said that it is the ATO view.

Mr Gaylard—I would like to talk on that. I completely share Ken's view on that. On Bob's point, which I do not disagree with either, it would have been an issue that you may not have been able to go to the full 37 points. But there was an area though where you could have got some broad agreement. Whether you had to fix every ambiguity was one issue, but you could fix 10, 15 or 20 of them. It is something on which, within the project—and John will support me—I pushed very hard for some resolution. I think I had good support and was listened to on that. Two issues came to dominate. One was the time that it would take to fix those matters. If we had only kept it at the level of everyone agreeing on every issue—which may not have got the whole lot—that would have been one thing. But at the end of the day that was an area where the government, in this trust review project, said, 'We do not really want you to get involved in that in any event because it does touch on that area.'

People can say that is an excuse, but the instruction that I certainly was privy to on the government's direction on the trust project was, 'You stay out of anything that will attempt to change the trust environment from precisely what it is at the moment.' I think that is an unfortunate position that we were subjected to. We had some good changes in the deceased estate area as well and that was put on hold for the same reason. I do support Ken on that. It was something that I was very keen to make some progress on and I think it is a shame that we have not been able to do that, for reasons that I have described.

Mr Nolan—I was delighted to hear the wise counsel of Tom Magney who, having come to this project fairly recently—but with a lifetime of experience in tax and a great reputation—has pored over the capital gains tax part of the bill in recent weeks. We heard him say that, with minor exceptions, it faithfully reflects the existing law and that it is unlikely to cause the kinds of concerns that we heard about in fairly coloured language which might have made you think that this was life threatening stuff. It was good to hear that, in fact, that is not the case and that the provisions really should be allowed to have a run, to reach their audience, in a way that will actually make the audience sit up and start using the provisions and take notice of them—which will not happen if the legislation is deferred. I support everything that I heard Mr Magney say on that score.

On the issue of whether there should be a no detriment clause, as I think you indicated earlier, there is a real problem if we have to, in substance, have people working with two sets of legislation. I think there is all the world of difference in having a safeguard in the form of the general propositioning in section 1-3 that says, 'Don't go looking for differences unless they have been spelled out to you,' and something that says, 'You really need to look at both sets of legislation and work out whether you are better off under one set of laws or the other.' I think that really does make you start to work with two acts. That would be a very unfortunate outcome if that were to happen. It would put off the time when practitioners and the wider business community can put the 1936 act behind them.

I would also like to record that we have handed up to the secretariat a response on the point referred to in the submission of Michael Dirkis from the Australian National University on whether there is a hole in the linkage of non-cash business benefits with this legislation. The response has been put together by the project team and it is provided for your benefit. In handing that up, I would like to also note that, having looked at the overall submission of Michael Dirkis, it is a very supportive submission in its tone. You might have got a different impression from the focus on this one point, but I think his submission is very supportive.

Mr Morgan—As every other private sector representative has mentioned their position on some of the important things, I thought I should mention mine. I think Tom Magney's evaluation that the changes are probably only minor, if any, is right. He would be in a better position than me and has spent more time on it. On the question of the introduction date, it would be nice if we could keep it on track for this year, but I

recognise the very real disquiet out in the marketplace about that.

It is in that context that I wanted to record that for a while I have been suggesting a form of anti-detriment approach via ruling, which I mentioned in describing the work we have done so far. Brian and I have not agreed yet that it would be a good idea. As someone keeps saying, I have had a good hearing on the subject. I just thought it was worth recording my view on that, given that everybody else has recorded theirs.

Miss Haly—This morning Mr Griffin said that he wanted us to give some indication this afternoon of the type of corrections that were in the Taxation Laws Amendment Bill (No. 5) 1997 that have been referred to as technical corrections. I am in a position to read that onto the record or we can advise you in writing later.

CHAIR—Okay. Go ahead.

Miss Haly—The Taxation Laws Amendment Bill (No. 5) which is intended to have operation from 1 July 1997—which is the operative date of the first two instalments of our rewrite—basically contains four types of minor amendments. The most important are those which are substantive and affect the law. As was said this morning, there are approximately 17 substantive amendments. Because of technicalities, some of those require two or three amendments to attain one outcome. Those technical corrections do things like rectify cross-referencing errors. In some sections, there are a couple of omitted consequential amendments that are quite minor at a very deep technical level of the law. There are also some minor corrections which rectify or ensure that the 1997 act operates in the same way as the 1936 act did. They are the most significant, but they are small numerically.

The second category is non-substantive, technical corrections, which correct errors in formatting and non-operative material, such as examples and notes. They insert additional reader aid material, such as new entries in the check lists, deductions and additional signposts people have said would help navigation through the law. Then there are some drafting technical corrections to improve readability. They include some clearer identification of defined terms, some deleting and inputting of asterisks, and some link notes to identify where the non-operative guide material ends, which is something that people have requested of us.

The last series of amendments contained in that bill are what we call update amendments, which have had some airing this morning. They are the type of amendments which are necessary from time to time to bring the 1936 act and the 1997 act into line. Sometimes when bills are introduced into the House amendments cannot be synchronised. Those are the four types of amendments.

CHAIR—Thank you. Is there anyone else?

Mr Baxter—One of the principal concerns aired in our submission was the way that the CGT event approach had been carried through into things like exemptions and special rules. It seems to me that that is a fairly far reaching concern which, if it is properly addressed by TLIP, may require a number of changes to the legislation of a substantive character.

My concern would be that we end up passing legislation quickly without an appropriate forward consultative process. Then over the course of the following year we have to introduce urgently not minor changes like those but real substantive, important changes to taxpayers' liabilities because there has been something missed; there has been an anomaly created between different provisions.

Notwithstanding the enormous respect I have for Mr Magney and his views, there have been a number of provisions mentioned in the various submissions and particular concerns expressed on them by people who are relatively disinterested in the result. These are not issues which are being raised for anybody's particular benefit. These are genuine concerns about the current state of the rewritten laws and we need to focus very effectively and in a very concentrated fashion on making sure that that legislation is right before we pass it, not have to rectify it afterwards.

Mr Gaylard—In that submission there are some very well made points and I can assure you that they are going to be looked at between now and when the legislation is completed. I still do not take that as being a mandate to delay the legislation by some extraordinarily lengthy period of time. Those sorts of things can be looked at in the short term. I think that there is a testing process that the team has already gone through, but in the main residents' exemption there are some things that I, independently, felt were a potential issue. The points you have made that further highlight that will be looked at.

We are not going to just recklessly put something through parliament that we think is not right. We have got as much a vested interest in getting this right as the professions have, believe me. So some testing needs to go on and that will be going on over the next few weeks, but I do not think that is necessarily saying that it has got to go on for a period outside our proposal and that the legislation becomes law on 1 July 1998.

Mr Spence—One of the questions raised by Mr Griffin in his questioning was how to deal with any unanticipated errors identified after the legislation becomes law. The response—it was an off-the-cuff comment—seemed a bit fuzzy as to how the Taxation Office in a real sense would apply changes. If there is to be no anti-detriment period, which we suggest there should be, I wonder whether the committee could recommend a way for subsequent errors that are identified to be dealt with as far as the timing and perspective are concerned.

For example, there is one in here in ZZT—as I mentioned earlier—where it appears that the exclusion from the provision has been enormously widened. That may be

unintended, but it is on the table now to be identified. If that had not occurred, we are now into the law and somebody looks at the law and says, 'I am out of ZZT. I am going to sell my shares in this company. I have got the exemption.' Then people realise there is some error there and that they did not mean that to occur. What happens to that taxpayer? Again, this deferral or anti-detriment arrangement would address those types of situations.

Senator GIBSON—Have you any comment on John's suggestion about covering that sort of thing by tax ruling?

Mr Spence—It could be done by way of a tax ruling. John's suggestion in relation to a tax ruling is that taxpayers cannot be disadvantaged if they adopt a policy consistent with the existing legislation where the new legislation has changed that particular issue but it has not been an identified change. That would assist taxpayers in those circumstances. It would not give taxpayers a certainty in relation to where the new legislation appears to be far more beneficial than the previous legislation and they seek to rely on the new legislation and then find out that, oh, hang on, that was a—

Senator GIBSON—Yes.

Mr Spence—So, yes, I think it can be done by way of a ruling. But I think it is preferable that, if the government wants it to proceed on that basis, it takes that issue on itself and it makes the legislative amendment, rather than putting it back in the hands of the commissioner, who may or may not decide to issue the ruling.

Mr Kirkwood—Also, Mr Chairman, in the example that Ken was giving, if that particular asset was then rolled into another vehicle and there became a matter of dispute later on where other matters were arising before the courts, the tax ruling would be of no use whatsoever to a taxpayer in that situation.

Mr Nolan—Mr Chairman, I understand very well where John Morgan is coming from. He is seeking to give the professional community a degree of comfort that there will not be unintended consequences. We understand and support that attitude. But, to my mind, the most effective thing for us to do if there are unintended consequences that emerge detrimental to taxpayers or even, in the reverse case, detrimental to the revenue is to ensure that they be corrected by legislation. There is adequate capacity to do that.

We have debated this particular proposition of John's many times. The situation is that we have not reached agreement over it. That does not mean that there is not goodwill on both sides. The ATO—and by that I mean the tax rulings area of the tax office—advised that they do not believe that this proposition can be dealt with by a tax ruling. The reason for that is essentially that, even though we are dealing in a realm of hypotheticals here, if you really did have a situation where the new law says something quite clearly different from the old law, it is really not possible for the commissioner, by a tax

ruling, to say, 'I'm going to ignore what is in fact the law.' There are a lot more subpoints to be made, but that is the nub of it. We think the best thing here is for the commitment of the project—and of the minister, for that matter—to sponsor any corrections that are required. We think that is the way to proceed.

Senator GIBSON—The problem, isn't it, is that legislation takes at least a year, even for minor amendments, to process?

Mr Nolan—That is the case. I stress again that we are in a hypothetical world; but even if legislation was proposed to correct one of these hypotheticals, that could be the subject of a clear policy announcement by the government. I am sure people would, in this context, rely on that.

Mr Back—Just to support that, last year—1997—our first two bills came into operation by the middle of the year and before the year was out those technical corrections and other improvements that were in response to suggestions made after that time were in the parliament.

Mr BEDDALL—You are assuming that parliament will be sitting.

Mr Back—No, they were in the parliament before the end of 1997.

Mr BEDDALL—But you probably will not have a parliament sitting at the end of 1998.

Mr Morgan—I do not want to go over all the old ground that Brian and I have spent so much time on, but if I could make four or perhaps five brief comments—

CHAIR—Yes, be brief.

Mr Morgan—The first is that such a ruling would not prevent legislative correction, and in the draft I proposed that that was made express. Second, the ruling deals with the difference between favourable and unfavourable unannounced changes, in that taxpayers do not have to follow the commissioner's ruling if it is favourable to them. In other words, they can ignore a ruling when there is an unannounced change that is favourable to them. Third, on the question of the commissioner's competency to issue this ruling a lot could be said but the briefest comment I can make is that a ruling to similar effect has already been made—TR97/16.

The fourth point is that, because I believe Tom Magney is right that probably so little is different, it seems to me that this is not a very costly assurance in revenue terms or really a very wide ranging or radical ruling. And, last, the technical corrections bill does not include all unannounced changes that have been subsequently identified.

CHAIR—I have got a question for TLIP. Could TLIP please put together for this committee some documentation: a list of small 'p' and larger changes reflected in this legislation and, if possible, without distracting you from the time necessary to answer all the private sector questions that you are loaded with at the moment, revenue implications.

Mr Nolan—Yes, Mr Chairman. That is largely a question of extracting that information from explanatory memorandums, and we can do that.

CHAIR—The committee would appreciate that very much.

Mr Nolan—We can add to that whatever additional changes result from these proceedings.

CHAIR—Fine. And other requests that we have made yesterday in the course of events, we assume that you will respond to directly.

Mr Nolan—We will. I am sure the secretariat will remind us.

CHAIR—Our time line is very tight. May I say to everyone here that, while you call for the bill to be delayed—and the committee will deliberate on that and the committee will make its view known in its report—I have to say to you that there are not many sitting weeks between now and the second day of July, when parliament rises, the day after the proposed operation of this bill. There are some people who think this may be an election year, although it might not come until early 1999, and that would pose for you, I would think, its own difficulties in terms of commencing a bill on 1 July 1999. So you have to think about practicalities too.

I am neither an accountant nor a tax lawyer, I am an engineer, so they trained me to be very practical. May I suggest to you that you ought to think about those practical issues. Several people keep saying, 'At the end of the day.' Well, at the end of the year it is going to make a big difference to you. So think about that. If you want this bill to be law because it proposes advantages for taxpayers and for the professions, then you had better think about whether you want it to come in some time next century or not.

Having said all that, may I thank all the participants, both those that are paid to be here and those that are not. May I thank the observers. I want to thank Hansard, thank my secretariat staff and thank my colleagues. Ladies and gentlemen, I think it has been a good two days. It has been most useful the committee. We will attempt to faithfully respond to the issues that you have raised and produce a good report for the parliament and for the minister. Thank you very much.

Is it the wish of the committee that additional submission No. 15 from TLIP dated 29 January 1998 be accepted as evidence and authorised for publication? There being no objection, it is so ordered.

Resolved (on motion by Mr Beddall):

That the committee authorise publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at the public hearing today.

CHAIR—I declare this public hearing closed.

Committee adjourned at 2.53 p.m.