COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, EDUCATION AND WORKPLACE RELATIONS

Reference: Employee share ownership in Australian enterprises

THURSDAY, 11 MAY 2000

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, EDUCATION AND WORKPLACE RELATIONS

Thursday, 11 May 2000

Members: Dr Nelson *(Chair)*, Mr Barresi, Mr Bartlett, Dr Emerson, Ms Gambaro, Mrs Gash, Ms Gillard, Mr Katter, Mr Sawford and Mr Wilkie

Members in attendance: Mr Barresi, Mr Bartlett, Dr Emerson, Ms Gambaro, Mrs Gash, Ms Gillard, Dr Nelson, Mr Sawford and Mr Wilkie

Terms of reference for the inquiry:

The extent to which employee share ownership schemes have been established in Australian enterprises and the resultant effects on:

(a) workplace relations and productivity in enterprises; and

(b) the economy.

WITNESSES

Committee met at 9.04 a.m.

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

LEE, Ms Eva, Executive Officer, Banking and Finance, Australian Taxation Office

O'NEILL, Mr Michael, Assistant Commissioner, Australian Taxation Office

CHAIR—I declare open this public hearing of the inquiry into employee share ownership and welcome representatives from the Australian Taxation Office. This morning we are going to focus on the issue of private binding rulings relating to employee share ownership plans.

I remind you that the proceedings here today are legal proceedings of the parliament and warrant the same respect as proceedings in the House. The deliberate misleading of the committee may be regarded as a contempt of parliament. The committee prefers that all evidence be given in public, but if at any stage you wish to give any evidence in private, please ask to do so and the committee will consider your request. I mention that particularly in the context of any questioning which raises matters which may currently be the subject of legal proceedings.

I propose to the committee that we set a finishing time for this meeting. I would propose, if one of my colleagues is prepared to so move, that the public hearing with the officers from the Australian Taxation Office finish no later than 10.30. That is moved by Teresa Gambaro.

Mr SAWFORD—Can I put an amendment to that? Why don't we just say that the meeting be for 90 minutes? These hearings are always being interrupted.

CHAIR—Okay. The proposal is that the public hearing with the officers from the Australian Taxation Office shall not extend beyond a period of 90 minutes. That is accepted. I now ask the officers: is there anything you would like to say by way of an opening statement?

Mr D'Ascenzo—I asked Mr O'Neill to prepare some dot points summarising some of the positions associated with employee share plans. Perhaps Mr O'Neill could run through that very briefly.

Mr O'Neill—There are a few things we have spoken to your committee or secretariat about, Mr Chairman. One of them is in respect of division 13A share plans, which mainly touch on larger companies. The tax office does not have any cause to be particularly concerned about those arrangements in larger companies which are subject to large amounts of scrutiny from all sorts of sources, not just the ATO. We did raise with you in our first submission in April and in seeing you in June, and later in discussions with Mr McMahon, our concerns about some aggression in different areas of the market. In those cases promoters were seeking to get more generous concessions than those provided in the legislation under division 13A. Some of those

aggressive schemes were share schemes, some of them were trust schemes and a third type were superannuation schemes, but all of them seemed to have the same sorts of features.

The considerable revenue at risk caused the commissioner to start acting in 1998. He issued a draft ruling. There was an embargo, as you are aware, on issuing private rulings. Some advance opinions were withdrawn. Eventually we issued a public ruling and announced our view of the law in May 1999. Because there were large numbers of taxpayers involved in these arrangements we instituted a safe harbour arrangement. It seemed to us that, contrary to the views of many of the promoters of these schemes that these were efficacious for tax reasons, these schemes were actually drawing people into a scheme where there could be multiple taxing points and there could be the application of the antiavoidance provisions and very high penalties. The safe harbour essentially said to people, 'If you come forward and disclose your facts, there will be one taxing point and concessional penalties.' Large numbers of people took up that offer.

We are continuing our compliance efforts around those arrangements. There are ongoing investigations in respect of participants and promoters of those arrangements, and there will be some critical court cases to test our views on the law. I can go into the details of those particular types of share plans or trust plans if the committee is interested in that. We attended in June last year, when we gave some evidence around some sharp operators seeking to convert the good policy of division13A. Some of those sharp operators were seeking to base their promotional aspects on rulings or advance opinions that they had obtained from the ATO. Mr D'Ascenzo might say a few words about the private ruling system, if that would be helpful.

CHAIR—Yes, if you could. Without being disrespectful, would you keep it reasonably succinct, because we have got a lot of questions we want to get through.

Mr D'Ascenzo—Basically, private rulings were introduced in 1992. They were about providing a degree of certainty for taxpayers who were uncertain about their position. They are private and they are only relevant to the particular person who applies. So it is only relevant to the particular taxpayer. On their face, they would state whether the ruling relates to one ruling request, which is for one year—each ruling request is for one tax year, although you can, in the same request, ask for more rulings, which are given in the same response but each covering a specified period of time.

One of the problems in the early days of the ruling system was a question of ensuring that people did not go about ruling shopping—in other words, going to different offices and perhaps getting slightly different responses. We tried to ameliorate that position by, first, creating the Tax Counsel Network in 1994, which virtually had a look at the more significant issues, and therefore, through that network, created some degree of cohesion in our technical processes. In 1998 we introduced a case reporting system, which is perhaps one of the key ways of ensuring consistency. Basically, before you give a private ruling, you have to input the ruling request into the system and then you have to ask the system two things. The first is whether or not anybody is dealing with a similar issue. If there is, you are mandated to go and talk to those people and make sure there is some consistency in resolution. Or, if there is a precedent in relation to the same issue, then you have to look at the precedent and, if you agree with it, follow it; if you do not agree with it, escalate it so that we can make sure that the answer is correct into the future.

So we have escalation processes and case review systems, plus we have tightened up and perhaps consolidated a lot of our advising functions. Therefore, there is a whole range of checks and balances within the business lines as well, so that systemically there really is not that much chance of too much inconsistency or ruling shopping today. Some of the claims that people would have read in the newspapers related back to, certainly, an earlier period, and then I think not to the extent to which it may appear in the newspapers.

We have reviewed the system a number of times. We are in the course of another major review of the system. We have had previous fraud plans about the system; we have released a second fraud plan just recently. Systemically, I believe, we have got the best ruling system in the world.

CHAIR—Thank you. Does the problem you have had relate to the system or to some individuals within it?

Mr D'Ascenzo—No, it does not relate to the system at all. Anyone who works outside the system is going to be difficult to catch.

CHAIR—You are referring to people who are putting forward plans?

Mr D'Ascenzo—To the extent to which people use escalation processes as is mandated, to the extent to which people use the processes within the sort of networked arrangements that we have for technical advice, and to the extent to which people input data into the CRS and access that data as is prescribed, then the alleged abuses just do not occur.

CHAIR—We have had some people talking about letters of comfort. How does a private ruling differ from a letter of comfort?

Mr D'Ascenzo—There is no such thing as a letter of comfort per se. A private ruling is a specific advice from the tax office to a person who asks for it in relation to their arrangement, and not anybody else's arrangement, that they are entering into or in serious contemplation of entering into themselves. It is about providing them with certainty about whether or not, if they enter into this arrangement, it produces that tax effect.

CHAIR—So there is no such thing as a letter of comfort?

Mr D'Ascenzo—No.

Mr O'Neill—There are advance opinions which are the procedural processes prior to the statutory format of private binding rulings. They might be generically described loosely as letters of comfort.

CHAIR—Is there a fee imposed for providing a private binding ruling?

Mr D'Ascenzo—No, there are no fees. Subsequent to our system, New Zealand introduced their system, where they do have a fee structure. There are some proposals in the Review of

Business Taxation report that ask for consideration of the charging for rulings, but at this point in time there are no fees for private rulings.

CHAIR—Are private rulings provided in other countries?

Mr D'Ascenzo—They are. As I said, New Zealand introduced a system based on the Australian system but without reviewability subsequent to our system being introduced. There is a system in Sweden which is one that actually goes through a tribunal process. The number of rulings that issue out of that process are very small. The US and Canada do provide advice but they do not provide the degree of protection or the reviewability that the Australian system does.

CHAIR—In terms of the pattern of the number of private binding rulings that have been issued, I presume you have looked at how many have been issued since 1992. Has there been an increase, a decline or is it a fairly constant thing? Does it simply reflect the number of share plan arrangements?

Mr D'Ascenzo—I was speaking more generally. I am not sure about the share planning arrangements. I could speak more generally first and then perhaps Mr O'Neill can cover the share plans.

CHAIR—We specifically are interested in share plans. In other words, did you have so many in 1995 and so many in 1996 and all of a sudden there was a huge increase?

Mr D'Ascenzo—I suspect that we had very few from 1992 to 1998 and then I do not think we had that many subsequently either.

Mr O'Neill—In the questions we took on notice, we gave some feedback. In 1997 we issued approximately 22 private rulings in respect of share plans and in 1998 we issued 49 private rulings. Those figures may be a little higher for the 1999 tax year. At that time there were only eight mentioned, but it would have been less than 100 in any case.

Mr SAWFORD—In terms of the private rulings that are given, in the tax department's view, who are the beneficiaries? Are they mainly executives or are they mainly employees?

Mr O'Neill—The private rulings usually apply to the nominated taxpayer. It is often in the name of the company that is seeking to establish an employee share plan. The beneficiaries will be the people who are employees of a first company. Perhaps if I can go back—

Mr SAWFORD—I am not interested in publicly listed companies, by the way. I am more interested in the other ones.

Mr O'Neill—At the smaller end. Generally we will have Michael O'Neill Pty Ltd that establishes the Michael O'Neill special purpose entity. This company will be in the employee share company. In respect of these arrangements, there is generally not a wide offer to employees to join the employee share plan—although sometimes there is. But those that are down at the aggressive end of the tax market, as we say, are focusing on the key executives. So

Michael O'Neill is invited to subscribe for shares in this special purpose subsidiary. If the private ruling is addressed to this company, Michael O'Neill—the controlling mind and will, if you like, of the original company—is probably a key beneficiary of that ruling.

Mr SAWFORD—So it is executives?

Mr O'Neill—Very often, yes—the managers or the directors, the key shareholders.

Mr D'Ascenzo—And the key point for them would be whether or not the amounts would be deductible?

Mr O'Neill—That is right.

Mr SAWFORD—So in some ways the language of employee share ownership, which has an egalitarian sort of feel to it, does not mean a thing, does it? This is an executive share plan, and perhaps it ought to be called that.

Mr O'Neill—In policy terms I would agree. Many of these aggressive schemes have got nothing to do with the good policy intent of division 13A.

Mr SAWFORD—I agree with your comments that in terms of publicly listed companies the tax department does not really have a problem with this. We are really talking about unlisted companies, small and medium, and we are talking about executive share plans under a misnomer. It just seems to me that there is no intrinsic merit in any of these schemes other than tax avoidance. In terms of all the submissions that have been put forward, I cannot find any intrinsic evidence to support those schemes. That being the case, should the tax department be far more aggressive?

Mr D'Ascenzo—I think we have made our position fairly clear to the extent to which we will tax some of these on three bases. Not that it doubles up, but one is under FBT, one is under income tax and the other one is under—I cannot remember the other one now. Oh, yes, under two provisions in the income tax law: one is part IVA and one is section 8.1.

Mr SAWFORD—How much revenue do you think has been lost in these?

Mr D'Ascenzo—We do not believe anything has been lost because we are pursuing these cases.

Mr O'Neill—We do not think any of these cases will withstand scrutiny by the courts.

Mr SAWFORD—I really find that hard to believe.

Mr D'Ascenzo—They have claimed deductions. Now we have to go back and disallow those deductions and seek to recover the amount that we do not believe should have been deducted. In other words, we are still taking action to pursue these cases. Basically, people make a claim which we do not believe is appropriate at law. We would then amend their returns and seek to recover the amount of the balance plus penalty and interest.

CHAIR—Professor Yuri Grbich said in the *Financial Review* that the tax office—and I quote:

... had given away too many private rulings due to a desperate and misguided desire to please those they are supposed to be regulating.

Mr D'Ascenzo—I was at the meeting and Professor Yuri likes to engender discussion.

Mr EMERSON—That comes out of public policy school!

CHAIR—Mr D'Ascenzo, for the record, could that be applied to the employee share ownership area with private binding rulings?

Mr D'Ascenzo—If you move outside the rulings which have some alleged taintness to them, then I am not sure. There would be many others outside that category.

CHAIR—Okay. That is an important point. Have the problems that we have had with private binding rulings in relation to employee share ownership plans just reflected the problems right across the private binding ruling area or has there been something special happening there?

Mr D'Ascenzo—There has been something special in that area.

CHAIR—In employee share ownership plans?

Mr D'Ascenzo—That is right.

CHAIR—Okay.

Mr D'Ascenzo—That is basically the process of the alleged impropriety that has occurred in relation to the ruling system, and it has all been focused on these arrangements.

Mr EMERSON—The reason we thought it was important to recall the tax office was that a draft report on employee share ownership schemes is being prepared by this committee, and the balance of discussion by promoters of these schemes is that they are good things and there should be further tax concessions. So I think it would be pretty obvious why we wanted you back: in the light of recent revelations, it may well be that further tax concessions greatly compound what seems to be already a large problem, highlighted most particularly by the so-called Petroulias affair. That is the context of it. I want to, effectively, take you through the submission of 30 April 1999 and ask some questions based on that submission. At page 4, you say:

The increasing popularity of 'new generation' share schemes and 1c option plans, and the threat they posed to the PAYE system and overall revenue, influenced the Commissioner to raise the matter with the Treasurer.

That was back in 1994 or so. It seems that the Taxation Laws Amendment Bill (No. 2) 1995 was introduced, basically, to address some of these problems. Is that a fair assessment?

Mr D'Ascenzo—That is right.

Mr EMERSON—Then promoters began using trusts—in other words, you had headed them off at one pass but they went galloping down another. Division 13A was introduced to deal with that sort of problem. Is that a fair assessment?

Mr D'Ascenzo—That is right.

Mr EMERSON—Then the submission says:

The schemes have been too numerous to individually outline their mechanics. However, they evolved to the point where promoters were claiming 'total tax wipeouts'.

So this seems to be a real problem. You go on to say that fringe benefits tax could apply to the benefits under these trust structures. Isn't that one of the main issues here, that fringe benefits tax has not been applied? Therefore, through these schemes people have been able, effectively, to avoid fringe benefits tax when what seems to be going on is a fringe benefit is being paid. Does that really go to the heart of the problem?

Mr D'Ascenzo—That is certainly a key. In fact, our ruling addressed whether or not fringe benefits tax did apply. Our ruling said that, in the arrangements that we have seen, it did. So, to the extent to which taxpayers were self-assessing on the basis that it did not, our compliance activity now is to try to change that position, adjust assessments and seek to recover the amount at stake.

Mr EMERSON—And you had a draft taxation ruling in November 1998 to address this problem?

Mr D'Ascenzo—That was finalised in early 1999.

Mr EMERSON—Over the page, on page 5, you say—this is my paraphrase—'Although this application of fringe benefits tax is yet to be tested in the courts, the anecdotal evidence suggests that promoters have dramatically slowed the roll-out of such employee benefit arrangements.' Back in April 1999, you seemed to be saying that this problem was easing or disappearing. Do you still stand by those statements, that the problem is more or less under control?

Mr D'Ascenzo—Employee benefit share schemes and employee benefit trusts are no longer being marketed widely in the community; that is quite right.

Mr EMERSON—You go on to say that you believe that many of them have gone beyond the policy and operation of the law. So would it be fair to characterise the tax office's attitude to it as that they are shams, basically—avoidance mechanisms?

Mr D'Ascenzo—They are avoidance mechanisms. We do not believe they are effective, either.

Mr EMERSON—You have not tested them in the courts, but you are confident that, when tested—

Mr D'Ascenzo—You can never guarantee the way the courts will jump, but from the information that we have—as I think we explained last time when we were here—they are characterised by a whole range of artificial, round robin arrangements. The money gets back to the owner and controller of that small company, is never used for the benefit of any employees and is actually, sometimes, funded by loans that are paid back at the same time.

Mr EMERSON—You say further on that in some circumstances the arrangements appear to be no more than shams. That reinforces the point that you are making there, I would think. Is that right?

Mr D'Ascenzo—Yes. Sham is a difficult argument to win in the Australian court system. But, in a colloquial sense, we think they are ineffective as blatant tax avoidance schemes.

Mr EMERSON—You said earlier that a lot of the difficulties seemed to be associated with problems within the tax office in relation to private binding rulings, that a lot of rulings were being made and there was not cross-checking of the consistency of those rulings.

Mr D'Ascenzo—No, this was in 1992. I was just talking about the system generally in 1992, not just in relation to this area.

Mr EMERSON—Okay.

Mr D'Ascenzo—One of the criticisms of the system was that there was the potential for some inconsistency to the extent to which we have a range of officers spread around the country, experienced people trying to provide the right outcome. But even in those circumstances with slightly changed factual situations, you might have some slightly changed answers. We have been trying to address that, certainly since then, but I think some of the breakthroughs have been the case reporting system and the escalation processes that we have introduced, both of which, in my mind, really make it systemically difficult to shop around for different answers. As we move into the future, for instance, in relation to the business tax reform areas, we are setting up our centres of expertise on topics. So that is another way of virtually centralising expertise in one topic area and giving you another layer of comfort where you will not have different or inconsistent advices.

We have also said that we have started that review of rulings. Mr Tom Sherman is going to lead that to make sure that there is an independence to the process. Our forward plans are looking at things like centralising the lodgment of the ruling requests so that it cannot be siphoned outside our normal system processes. We have not put this in practice but one of the criticisms has been that someone could improperly channel the ruling request to someone working outside the system. So a ruling request could go outside the system to someone who had perhaps improper and inappropriate motives. By centralising that, it makes it more difficult for someone to do that. They are some fraud checks and balances that we want to build on in the future.

Mr BARRESI—We will be hit by a number of divisions, Mr Chairman, in the next couple of minutes.

CHAIR—Yes. Time is ticking by while we are here. Kerry, do you want to ask any questions?

Mr BARTLETT—Not at the moment.

CHAIR—One of the things I wanted to ask relates to your May 1999 submission. You mentioned the aggressive employee. It looks like we are having a division. We will return.

Proceedings suspended from 9.33 a.m. to 9.54 a.m.

CHAIR—I invite my colleague Craig Emerson to continue his questioning.

Mr EMERSON—I asked whether you were satisfied with the issuing of private binding rulings from within the tax office. I was referring to a period around March to May of 1999. I think you referred to 1992, when the private binding rulings were first issued. Isn't it true that you announced an embargo on the issuing of private binding rulings on 26 March 1999; you had an internal review of that and became satisfied as a result of that review with the process, as a result of some changes that you made; and then you lifted the embargo on 19 May 1999?

Mr O'Neill—That is right.

Mr EMERSON—So you are now happy with the process of issuing private binding rulings. Is that what you are saying?

CHAIR—This is in relation to employee share ownership?

Mr O'Neill—That is right. Mr D'Ascenzo mentioned that there is currently a review of the private rulings process, so that is the broader issue. In respect of the employee share plans, if I give some numbers, perhaps that will give the parameters of the numbers of rulings we are talking about. Every year the tax office would issue thousands of rulings on a myriad of subjects, over 3,000 private rulings. In respect of the whole range of employee benefit arrangements—shares, trusts, super plans—it is a number less than 100 with respect to the private rulings issued. In respect of those share plans that are caught up in recent allegations, we are looking at a number that is less than 10.

CHAIR—Less than 10 employee share ownership plans?

Mr O'Neill—That is right.

CHAIR—So you have got a concern about 10 per cent of all the rulings?

Mr O'Neill—Employee share plans, less than 10.

Mr D'Ascenzo—The ones that we have got concerns about, we have said, are in the tens rather than the hundreds.

Mr O'Neill—That is right.

Mr EMERSON—Yet the submission that you provided last year to this inquiry, at page 16, says:

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

Are you saying that there are 10 private binding rulings associated with the $1.5 billion? I do not really understand that. I think $1.5 billion is a big problem, not a small problem.

Mr D'Ascenzo—Yes, but I am not sure that the $1.5 billion is covered by the private rulings.

Mr EMERSON—Are you saying that you do not know?

Mr D'Ascenzo—We do know that all the participants in those sorts of arrangements, other than the under 10 and the under 100, are not in the possession of any binding private ruling.

Mr EMERSON—So are you saying that the aggressive promoters of these schemes are doing so without the benefit of any private rulings?

Mr D'Ascenzo—Mostly that is the case.

Mr EMERSON—Are they just flying by the seat of their pants?

Mr D'Ascenzo—They take their own advice, often from counsel or other sources. Some promoters take advice from the ATO, but that is a very small number.

Mr EMERSON—Mr O'Neill, at the beginning you said, 'There is considerable revenue at risk.' Yet Mr D'Ascenzo said there is not, it seems to me because you are going to get it all back, because they are operating outside the law. There seems to be an inconsistency.

Mr D'Ascenzo—That is what is at risk if ultimately we do not succeed in the courts.

Mr EMERSON—I am sure you said that you will succeed and therefore there is no risk to the revenue.

Mr D'Ascenzo—My judgment is that the good sense of the courts in applying the law will be that the arrangements that we have seen are not successful. But I cannot guarantee how the courts will jump. That is my view.

Mr O'Neill—If I may clarify my comment, Mr Emerson: I was talking about the reason we took action back in 1999, including an embargo on the finalisation of the public ruling, a compliance program and the safe harbour. It was that we did perceive significant risk in not acting. But, in acting, we are very confident that we will recover the tax that is exposed through these schemes.

Mr EMERSON—But you did say, in your opening remarks, not that there 'was' considerable risk to the revenue but that there 'is' considerable revenue at risk, to use your words.

Mr O'Neill—Yes. In that context that is what I was saying. I am not sure if I said 'was' or 'is', but I will certainly accept your version of that.

Mr EMERSON—Mr D'Ascenzo said that there is not much chance of inconsistency in the rulings. That seems to be a very optimistic view. Would it not be true to say that?

Mr D'Ascenzo—No, it is not optimistic. How would there be much chance if you input your issue into a national system and the national system says to you, 'This issue has been dealt with before,' then you download the answer and you also have the contact of the person that was involved in the issue? You look at that answer and at the facts and circumstances of the case before you and say, 'These look the same. I think the answer is right,' in which case I then proceed to follow consistently the same approach, or I think the matter is not right, in which case I then escalate the matter ultimately to the Tax Counsel Network.

Mr EMERSON—I would have two responses to that. One is that, in terms of inconsistency, that surely was a problem in 1999 that led to an embargo being placed on the issuing of private binding rulings—an embargo which was lifted a couple of months later. If there was not a problem of inconsistency in rulings, why did you impose the embargo?

Mr D'Ascenzo—Basically, Mr O'Neill had taken over the area and his first task was to see what had been given. He wanted to make sure that if something had been given incorrectly, it was not repeated.

Mr EMERSON—Doesn't that raise the prospect of inconsistency? It might be a good and very sensible thing to do—

Mr D'Ascenzo—No, the answer might be the other way. It might have led to consistently giving rulings that were wrong.

CHAIR—Why did Mr O'Neill take over that area?

Mr D'Ascenzo—We moved the previous occupant out of the area.

CHAIR—Why?

Mr D'Ascenzo—That is part of the allegations that are now before the courts.

CHAIR—I think we are clear on that.

Mr EMERSON—I understand. The second part of my response as to whether there would be inconsistency in the rulings is that my understanding, as a result of the business tax review process, is that it is now proposed to issue oral rulings. Wouldn't that create an enormous prospect and scope for inconsistency in rulings?

Mr D'Ascenzo—I do not believe it is a question of optimism. When we look at the written requests for rulings, where you have the case reporting systems, where you have escalation processes and a culture that has a range of supervisors working with the people involved in resolving these issues, and also when we have developments like centres of expertise, where we try to bring together all of that, you are working on what I call a virtually centralised advice process. It is very hard to put everybody in one town, so to speak, and have throughput of experienced people into that area. You take the benefit of people around the country but you clump them up in a way that gives them a critical mass and you also clump them up in such a way that they have a national virtual process. There are a whole lot of checks and balances through their supervisors, through the managers of the advisings areas and, ultimately, through to people at senior levels like myself.

I know this is a long answer to the question, but when you say 'optimism', I think that people are harking back to the opportunities for inconsistency that arose even before 1992, when we had what was called section 169A, which allowed people, in their tax return, when we moved to self-assessment, to ask us a question. I remember when we introduced the rulings system in 1992, we estimated that the amount of 169A requests to be in the order of 50,000. We did not have a national system and they were given by experienced, well-supervised people, but in a decentralised way. The scope of inconsistency under that system was greater than it is under our current system. That is why I hark back and say that it has not always been perfect. It has always been managed, but it has not always been perfect. Now we have a situation where, I think, systemically, if the rules are followed, the chances of inconsistency are non-existent.

Mr EMERSON—I can imagine that with documented rulings you could cross-check them, but with oral rulings it could be off to lunch and—

Mr D'Ascenzo—You are absolutely right. There is a risk if that process is not supported by a range of work practices. It is up to the organisation to manage those work processes and balance the priority of making sure they are in place against the other needs of the organisation.

Let me give you an idea of how I see it operating. Basically, when you look at oral advice it is aimed only at ordinary taxpayers. The whole thrust of the proposal is limited to ordinary taxpayers. It is just that sort of philosophy that we have been trying to pursue through Tax Pack and other processes so that ordinary taxpayers, if they really want to, can have a great degree of comfort and certainty about their tax affairs. We want to try to take the fear of the tax system away from ordinary salary and wage earners, most of whose instalments come to the tax office through PAYE and other withholding arrangements. If they have problems, people with simple affairs, they can ring up. In fact, in 1993 the JCPA report was about saying that people should get just as good protection through an oral system as they should through a written system because the reality is that some people do not like to write. Some people just like to ring up or—

Mr EMERSON—It is very convenient.

CHAIR—You are talking about ordinary taxpayers—

Mr D'Ascenzo—That is right.

CHAIR—but it is also going to apply to people proposing employee share ownership plans, is it not?

Mr D'Ascenzo—No, it is not, it is just taxpayers with ordinary, simple affairs.

CHAIR—And is it less binding than written advice, such as a private ruling?

Mr D'Ascenzo—No. The proposal is that it would be binding, but even that is not sufficient because, okay, so we limit the range of questions that are likely to be asked, being questions that are applicable to ordinary people with simple affairs. Our experience has shown that in relation to that category there is a high level of repetition in terms of the questions that are asked. In fact, 90 per cent of them are not really tax issues at all. You can virtually have a range of system supports. You can have scripted answers on the system. If someone rings in and says, 'I want to ask this question,' which is a normal, common question, they can press a button and there is a script there—

Mr EMERSON—I think we can save some time here. If you are providing an assurance that oral rulings will not be provided in relation to employee share ownership schemes, then that addresses my concern. Can you provide that assurance?

Mr O'Neill—Yes.

Mr D'Ascenzo—It might depend on how it ultimately goes through parliament, but if there is any difference from what I have said here I would certainly get back to this committee straight away.

CHAIR—We may deal with that issue in our report. Of those 10 that you are now looking at closely, how many of those involve shares or options, or are they all one or the other?

Mr O'Neill—There are fewer than 10, but all of them are share plans.

CHAIR—Are they all 13A?

Mr D'Ascenzo—Mr O'Neill mentioned that there were five or six that had to do with share plans?

Mr O'Neill—Yes.

Mr D'Ascenzo—In relation to other employee benefit arrangements, it was certainly under 100. So there is a wider range than just those five or—

CHAIR—Are they all 13As, or are they—

Mr O'Neill—None of them are 13As. They all seek to be outside division 13A.

Mr EMERSON—Mr D'Ascenzo, in your opening remarks you said, 'The problem does not relate to the system. Anyone who works outside the system will be difficult to catch.' It seems to me that there are quite a few people working outside the system. Are you conceding that they would be difficult to catch?

Mr D'Ascenzo—I put that in a general sense in view of the sensitivities here. If you want more particularity then I might have to do it in camera. But the recent Senate report on the ATO in this area—and the Senate was briefed in relation to this matter—said that if people work outside the system, no matter how hard and how good your checks and balances are—just like if you were to have taken some copies of ATO letterhead and gone home and used them off your own system—it is hard for someone within the tax office to pick those sorts of things up. That is the context in which I meant that. As you know, charges have been laid in relation to one former employee.

CHAIR—In relation to that earlier reference you are not talking about any specific individual; you are just saying that hypothetically someone could do that.

Mr D'Ascenzo—That was my proposition. We have always had a fraud plan in this area. We have recently released a second fraud plan. It is one that is validated by external experts in this area, but if people were representing themselves as tax officers, police officers or doctors, it is hard for the organisation to have knowledge of that.

Mr EMERSON—In the 1994-95 budget, the Treasurer announced that fringe benefits tax would apply to conventional employee share ownership plans, but everyone would get an equal exemption of $500, and that would apply to all the schemes. It is in Budget Paper No. 1, at page 4.8. For clarification, I ask again: are the current problem schemes based on no fringe benefits tax applying? That is one of the major incentives available. Is that right?

Mr O'Neill—The proposition that the promoters of these schemes put to participants at the relevant time was that these schemes would gain you a deduction for the amount that is contributed to the share plan. You will not have an amount for a quarter's income under division 13A, and there will not be any fringe benefits tax.

Mr EMERSON—Yet there was an announcement and, as I understand it, a bill, which addressed this specific issue—that it would be subject to fringe benefits tax. Did that bill ever proceed?

Mr O'Neill—I am not sure of the particular paper or bill that you are referring to, Mr Emerson. It is certainly our belief that these amounts would be caught by fringe benefits tax if they are not taxed under another head—for example, division 13A.

Mr EMERSON—To address your concerns, wouldn't it have been sensible for that bill to proceed? It seems to me that back in 1994 an announcement in that budget addressed the very concerns that you are expressing here in the year 2000.

Mr O'Neill—Our sense is that the fringe benefits tax provisions cover the mischief that is sought to be promoted in these schemes.

Mr EMERSON—Isn't it likely that the tax office provided advice to the Treasurer of the day in order for the Treasurer to make this announcement in the budget and therefore to draw up legislation, yet I think I can reliably inform you that that legislation was never enacted.

Mr O'Neill—We are now getting into advices to government on policy issues. The ultimate outcome there is that we certainly would be providing advice to governments of the day on tax issues. That remains confidential between ourselves and governments.

CHAIR—Just by way of clarification, Craig, you are referring to the budget released on Tuesday of this week?

Mr EMERSON—No, I am referring to the 1994-95 budget, in which it was announced that there would be legislation dealing with precisely this problem, and that legislation was never enacted. The point I am making is that, if it had been enacted, maybe we would have avoided all these difficulties with employee share ownership schemes. I am asserting as a matter of logic that the Treasurer of the day would not have talked to his office and drafted this legislation. It seems certain that it was based on advice from the tax office that ultimately was acted upon but then, subsequently, at the change of government, that action was withdrawn; in other words, the legislation was not passed.

Mr D'Ascenzo—That is not a question for us to comment on, but one of the things I should comment on is that Mr O'Neill made the point about how these arrangements have changed over time, from your 1c options that were addressed legislatively to your trust arrangements, the introduction of division 13A and then, more recently, schemes which claim that they avoid FBT, which we dispute. It is interesting in the area of concessions that people artificially construct arrangements to try to provide people with more benefits than the policy intent provides. In these situations we think that they are not effective, but that seems to be what happens when concessions are put through a tax act.

Mr EMERSON—It just seems to me surprising that there was legislation to deal with this that was not enacted upon the change of government, and as a result, you have had to rely on the issuing of draft rulings and other non-legislative processes to try to address it.

Mr D'Ascenzo—It may have fixed the FBT depending on the wording of the provision. It certainly is FBT. There has been a claim that these arrangements circumvent it. We do not believe they are effective.

Mr EMERSON—I understand that, but it goes therefore to where I am now heading which is towards the end of my set of questions and that is that, in response to questions that were—

Mr SAWFORD—Can I just follow up that previous question of yours?

Mr EMERSON—Sure.

Mr SAWFORD—If recommendations were made by government to the tax department in terms of giving a much harder edge when talking about the EBAs, it just seems to be mathematical. The more variables you add, the harder everything becomes—your

interpretations go, as do everybody's. It just seems to me that what Craig is getting at is: if you remove the variables by legislation, isn't that the thrust of what the rationale ought to be? You used the word 'concession' just a moment ago, but that is what it means.

Mr D'Ascenzo—To the extent to which the legislation provides the policy intent that government and parliament intend, that is the best way of providing a sound platform for people to operate under. The processes under the business tax review talk about trying to address avoidance through some systemic legislative measures, and I support that fully. It is a very good leverage opportunity to do that. But even with good policies—and well written policies and the law—the point I was trying to make is that the opportunity for some of these advisers, or so-called advisers, to construct artificially contrived and blatant arrangements still exists, and some of these arrangements we would put in that category.

Mr EMERSON—It goes to this requirement. You provided a response in a document of 25 February this year to a number of questions that were put on notice by this committee. One of the questions was a part of question 4:

Does the Commissioner have sufficient power to deal with schemes like this?

It is a long answer but it basically says yes. Then we go over to an answer—

Mr D'Ascenzo—That is one of those questions: do you have sufficient power? At the moment we think that we can challenge these under the current law. We are taking these cases to court. We hope we will win in court. We will institute adjustment action to the returns. We will institute recovery action.

Mr SAWFORD—Isn't that wasteful? If there was a legislative change that gave you a harder edge and you removed the variables, we would not be in that ballgame. That seems to me very wasteful of taxpayers' money.

Mr D'Ascenzo—That is right. As I say, if the policy is systemic, then we are supportive of it. But to the extent to which the policy is there to provide support for these measures, that is a role for governments and parliaments to decide.

Mr EMERSON—Is there a recommendation in the business tax review about legislation? You said that, in the integrity measures, it does actually propose legislative change. Is part of that legislative change to deal with this problem of fringe benefits tax not being paid under these schemes and other tax concessions being availed of under these schemes?

Mr D'Ascenzo—I do not think specifically there is any legislation directed there.

Mr EMERSON—That is right. In question 9, again in the same document of 25 February 2000, in a much shorter answer, a question was asked:

Do you have any specific suggestions that could further reduce the potential and actual abuse of share schemes beyond their intended legislative purpose?

The response from the tax office was:

As indicated in the ATO's submission we are of the view that aggressive tax planning in this area can be regulated under existing laws, including the anti-avoidance provisions, and the proposed integrity measures under the Business Tax Reform.

In other words, there is no need for further legislation, yet I heard you just say that there are no provisions in the business tax review to legislate against this activity.

Mr O'Neill—Not in respect of employee share plans specifically. There are integrity measures that we referred to. For instance, the government has announced a review of the general antiavoidance provision. That would obviously give the ATO extra strength in dealing with these schemes.

One of the issues in our addressing these employee share plans is that we are not dealing with a static beast, we are dealing with an evolutionary creature that at one stage looks like this, then the legislation comes in and it changes its face. So, whilst the legislation may provide a hard edge, it is only a hard edge for a short period of time because, as Mr D'Ascenzo said, there is a thirst by promoters to develop something new in the marketplace.

Mr D'Ascenzo—This is a difficult situation here. Where there are arrangements which we think are blatant, artificial and contrived, we think the antiavoidance provisions should and do apply, quite apart from technical arguments based on associateship for FBT purposes.

Mr EMERSON—I understand that.

Mr D'Ascenzo—The problem with mass marketed arrangements is that if you are not in there early in the piece, the application of an antiavoidance provision requires you to go through the facts of each individual investor, and it does become resource intensive in doing that. On the other hand, if the arrangement is blatant, artificial and contrived, and designed to give a purpose other than the purpose intended by parliament, it is hard for parliament to have anticipated that when they legislate.

Mr EMERSON—It still seems to me that there was a legislative option that was not availed of and not proceeded with. It seems also that you are saying, 'We don't need any more legislation on this.' As custodians of the revenue, I find that very surprising.

Mr D'Ascenzo—But I do not think that legislative option was designed to counter the arrangements, it was designed to provide a policy platform of what range of benefits should be allowed under these sorts of arrangements.

Mr EMERSON—What it was designed to do was make people pay fringe benefits tax and not avoid it. That is what the legislation was designed to do, and you are saying we do not need that sort of legislation.

Mr D'Ascenzo—We believe that under the arrangements that we are countering that FBT is payable, and we have issued a public ruling to that effect.

Mr EMERSON—But you are officially saying, 'We don't want any more legislation.' Is that the advice that you would be giving in the future? I am not asking for confidential advice to government, but is that the advice that you would be giving to this committee, not to government, that there should be no further legislation?

Mr D'Ascenzo—Let us hypothetically think of advice that perhaps we could give to government. One would be, 'We think we will counter these arrangements under the existing law,' and to the extent to which they are able to be countered that way, the revenue will be protected, ultimately. But if the courts were to find against us on any of these issues, then the amount at risk, to use the words we used beforehand, is very substantial and you might have to think about legislation—indeed, retrospective legislation—at that point. The alternative is to do something legislative now. I have not thought through the various options that are going to be available.

Mr EMERSON—That is what I am getting at. We are now up to Taxation Laws Amendment Bill (No. 12) 1999, so there is a disposition on the part of the government to make amendments to the taxation act, which is generally fine. I think we supported the majority of those amendment bills. It seems to me that it would be sensible to bring Taxation Laws Amendment Bill (No. 13) 1999 into the parliament to implement what was not implemented upon the change of government in 1996.

CHAIR—Are you saying that you are happy with the current integrity measures as defined in legislation, and those that have been foreshadowed?

Mr O'Neill—That is right, Dr Nelson. Perhaps if I can shine some light on a particular arrangement, because the blatant nature of the arrangement is clear for anyone walking by to see: it is the Michael O'Neill special purpose entity where I, as the controlling mind and will, have bought a $1 share, but I, as the employer, then contribute a premium of $5,000. The promoters say that if anything is caught by division 13A it is only the mere $1, even though I will get the benefit of $5,001 at the end of the day. That proposition is fairly hard for anyone to accept, I would imagine—perhaps I am a little biased as a tax officer. But the second proposition is that, at the time of the contribution, Michael O'Neill as the shareholder of the special purpose entity is disassociated from the contributing entity for fringe benefits tax purposes.

Association is very broadly defined in the tax act just to catch this sort of mischief, and our public ruling 99/5 deals with that very point, so it seems to me very difficult to sustain that fringe benefits tax would not apply. But they piggyback on that, saying that if an amount is caught by division 13A—that is, the $1—it should not be caught by FBT. Surely, if division 13A only catches the $1, then fringe benefits tax will catch the $5,000. The third proposition that we talk about around the general antiavoidance provision takes on those features of round robin funding: I present to you a cheque, you present it back to me. The deal is done in a matter of seconds. There is no real economic contribution to this special purpose entity.

Mr EMERSON—Mr D'Ascenzo, you said in answer to a previous question that if you happened to fail in the courts on this, then legislation might be, or probably would be, I think, necessary. There is potentially a lot of revenue bound up here—we have seen figures of $1.5

billion. You said that it may be necessary to introduce retrospective legislation. Would that be a recommendation that you would make?

Mr D'Ascenzo—I certainly think that would be the sort of advice we would be providing government, that there is $1.5 billion and to claw that back for the Commonwealth, if we are ineffective in the courts, would require some legislative change.

CHAIR—If you are ineffective in the courts.

Mr D'Ascenzo—That is right.

Mr EMERSON—To my knowledge, this government has not ever implemented retrospective legislation, except perhaps in the case of Lamesa Holdings.

Mr D'Ascenzo—No, that is not true. In fact, both the opposition and the current government have at times introduced retrospective legislation.

Mr EMERSON—Since March 1996?

Mr D'Ascenzo—I am not sure—

Mr EMERSON—I know the previous government did, and before 1983 in relation to bottom of the harbour.

Mr D'Ascenzo—There was a recent announcement in relation to the Mercantile Mutual case, where the government has announced retrospective legislation in that matter. That is a different case, a different issue.

CHAIR—That is a policy decision.

Mr EMERSON—I am just testing a matter of fact here, as to whether this government has actually implemented retrospective legislation.

Mr BARRESI—Can I just clarify the $1.5 billion that has been bandied around a couple of times. The $1.5 billion is the amount of contributions from the 40 promoters involved in employee benefit arrangements, according to the submission. It is not necessarily $1.5 billion that is under investigation through bogus schemes.

Mr O'Neill—That figure refers to employee benefit arrangements which are at the aggressive end of the market.

Mr BARRESI—Yes, but they have not been proven yet.

Mr O'Neill—No, that is right.

Mr BARRESI—They are bogus, which means they may not even go to court at all.

Mr D'Ascenzo—No, all those arrangements we believe are blatant, artificial and contrived. The only question—

Mr BARRESI—Okay. I thought you said you had to prove it.

Mr EMERSON—So you stand by the $1.5 billion figure as the revenue that is at risk?

Mr O'Neill—That is our estimate.

Mr D'Ascenzo—At risk if ultimately—

Mr EMERSON—If the court cases were to fail. I refer to the *Financial Review* of 1 April this year where—this is in relation to the so-called Petroulias affair—it says:

> But it is understood that rulings on four types of tax scheme are primarily affected: employee benefit trusts; employee share schemes; offshore superannuation schemes and controlling interest superannuation arrangements.

Would that be a fair statement by the *Financial Review*?

CHAIR—It may not necessarily be appropriate to comment in relation to this individual.

Mr D'Ascenzo—That is right. Basically, in the advices that we have given we have talked about rulings in the order of tens rather than hundreds and they would cover those four sorts of arrangements. But quite apart from those covered, the particular taxpayer who alleges to have some benefit of those tainted rulings, in relation to other participants who have entered into these arrangements without any ruling benefit, we are certainly going to challenge their arrangements as well.

Mr EMERSON—My final point is really more of a question. I am concerned that we have a reference and a draft report under way on the employee share ownership schemes which, as my colleague and deputy chair has said, were meant to increase incentives for genuine employees, and so on. In practice they appear to have been a significant, if not major, vehicle for tax avoidance. We have to bring down a report, and the tilting seems to be—and I will be interested in the chairman's response here—to let us make those schemes a little bit more generous. It seems to me that there are real concerns about making a scheme more generous when it is already being abused to the tune of $1.5 billion. My further concern is that the tax office seems to be saying, 'At present we can handle it through rulings and not legislation.'

Mr D'Ascenzo—At present, we are challenging the arrangements.

CHAIR—It needs to be made perfectly clear—and I have said as the chairman of the committee on numerous occasions, which also reflects the government's position—that we are not interested in doing anything to liberalise access to employee share ownership plans at the executive end of the market. That is not what this inquiry is about. This inquiry is about looking at what we can reasonably do to see that we have broader employee share ownership which comes down to middle management and especially on to the workshop floor. That is what the inquiry is about. The committee's work and the inquiry's work, and certainly the government's

perspective in terms of the reference, is not in any way about liberalising it other than if there is to be any liberalisation it is about making sure that employee share ownership is more accessible to everyday workers. And I think, amongst other things, that that was the ACTU's view of them as long as they were not at the expense of other—

Mr EMERSON—The ACTU does not support them at all. But I understand what you are saying there.

CHAIR—Craig, the ACTU said to us, 'Handle with care,' and it is in the document as well. They do support them providing they are not at the expense of other employees' salaries and benefits.

Mr EMERSON—I, for one, and I think my colleagues, too, would be very concerned—this is just directed to you—that if we were inadvertently heading in a direction that provided more complexity, there would be scope for further avoidance here. I accept that you would not wantonly do that. I would also ask us to consider the possibility of maybe making recommendations in this area. If we are going to employee share ownership schemes and we are looking at whether they should be changed, maybe they should be changed in the sense of tightening them up so that we do not get this sort of abuse. That is basically all I need to say.

CHAIR—In light of this morning's discussion and the concerns that you already have which you are investigating in relation to avoidance and those schemes that we have gone so far as to describe as shams, one thing perhaps that you might consider is: what further integrity measures could be considered by this committee to recommend to government as a range of options to make it easier for the Australian Taxation Office to ensure compliance? That would be helpful to our committee in light of the experiences that you have had particularly in the last couple of years.

Mr D'Ascenzo—Okay. I understand. We will certainly take up the opportunity and provide whatever advice we can in that area. As I said, if it is good systemic policy then that is the best way of dealing with things. I also hope that in these arrangements which we think are blatant, artificial and contrived, that ultimately when it gets to the courts the courts will see it that way and people will look at the substance of the arrangements and not be overly narrow in focus in terms of formalism or other features of judicial interpretation that have perhaps been a blight on our system in the late 1970s.

CHAIR—Again, is your preference that we have a case-by-case judicial examination or is it that there be—

Mr D'Ascenzo—There is no doubt the systemic solutions are the best.

Mr EMERSON—By which you mean legislation?

Mr D'Ascenzo—Good legislation which provides the policy intent is always the best vehicle to have a good tax system. The problem is that you may have a very good policy platform and yet people will make these contrived, artificial arrangements. You do not want to get to a provision in the law which starts to have some good policy and 15,000 specific anti-general

avoidance provisions. Once you start to get to the specific end, people will find ways of saying, 'Ha, they missed this point.' What I am suggesting is that a good platform of policies is the best option. We argued, in terms of the business tax reform, that we needed to maintain a general antiavoidance provision to cover things that are built on to that policy in a way that was never intended.

CHAIR—Yes. Are there any other questions?

Ms GILLARD—Yes, I have three areas. With these 40 promoters and $1.5 billion that you have referred to, and we have been referring to this morning, are you able to tell us what percentage of the clients who are involved in the $1.5 billion made use of the safe harbour arrangement?

Mr O'Neill—I can give you some rough figures on that. The broad range of employee benefit arrangements have three categories—trusts, super and shares. About 25 per cent of those schemes are around share schemes. We think the take-up rate for people involved in share schemes in the safe harbour would be about one-third.

Ms GILLARD—So in broad terms we have 40 aggressive promoters of what you have termed to be schemes that are contrived or blatant, $1.5 billion in those schemes, and you think that about one quarter—

Mr O'Neill—One quarter are share schemes.

Ms GILLARD—I am talking specifically, not generally. Specifically, your statement was that there are 40 promoters involved in employee benefit arrangements.

Mr O'Neill—Yes.

Ms GILLARD—You then went on to say that, conservatively, clients had invested in those schemes $1.5 billion.

Mr O'Neill—Yes.

Ms GILLARD—You have told us this morning that that is obviously an enormous problem. You told us this morning that one of the strategies you used to address that problem was the safe harbour arrangement where people could self-select and come forward and say, 'Yes, I got involved. What do you want to do now?', and you would take a more charitable view of that than if you had to pursue people in the courts yourself. What percentage of people came forward who were involved in these scams?

Mr O'Neill—Roughly about one-third.

Ms GILLARD—Then there is litigation on foot in respect of the schemes generally which, subject to it going the way you want it to go, will enable you to seek tax recovery from the other two-thirds. Is that correct?

Mr O'Neill—That is right.

Ms GILLARD—Where is that litigation up to?

Mr O'Neill—I probably should say that there is an intermediate step. Investigations—audits, if you like—are being conducted in respect of a large number of that outstanding population. We would be surprised if the number that are settled does not increase fairly dramatically, or are not resolved through other means. The numbers that go on to litigation would be obviously not two-thirds because one promoter, for example, might have 100 clients, but it is one generic scheme. We would only need to litigate one case. We are seeking, sometimes with the help of the promoter, to find that right test case. The difficulty, in many cases, has been that not many people are keen to be the test case, for obvious reasons.

Ms GILLARD—I can understand that.

Mr D'Ascenzo—I must say that over time in this area of aggressive tax planning, while we have tried to work with the promoters in some of these areas, we are not sure that that has been a satisfactory strategy. We are certainly reviewing that strategy. One of the consequences of that is that we think it has taken too long to get some cases into the courts and it may be time now to raise assessments on all the participants to the extent to which we have information that allows us to do that and then let the normal processes operate. We have briefed Bloom QC to lead our team in these areas. As I said, we are very confident of winning. My frustration is not getting these cases to the court fast enough.

CHAIR—To come back to that other point in another way: if you are successful, how much money do you expect will be recovered? Let us say you were successful in all of the cases you think justifiably warrant your concern.

Mr D'Ascenzo—I think there may be problems of people not having money and being in a situation that they have got to action bankruptcy.

CHAIR—What is the overall figure? Is it the $1.5—

Mr D'Ascenzo—We expect to recover the lot.

CHAIR—You expect to recover that $1.5 billion?

Mr D'Ascenzo—Subject to people having the capacity to pay.

CHAIR—But that is the amount of money that is involved.

Ms GILLARD—I want to focus on this question of time frame. If I could paraphrase your answers to a series of questions from Dr Emerson, you have basically said you are going down the track of resolving this through the safe harbour, people coming forward voluntarily. Failing that, you then use a court based process to follow these people up and it is only really if that process goes against your expectations that there might be a need to provide advice to government on legislating for other solutions.

Mr D'Ascenzo—We would have kept government informed all the way through the process.

Ms GILLARD—I accept that. What I am trying to focus on is how far away we are in time from knowing whether the court based approach that you are currently engaged in is going to be successful. I accept that you do not set court dates, but are we talking months, years, a number of years?

Mr D'Ascenzo—I do not know.

Mr O'Neill—I would expect that the first cases will be in the Federal Court in a matter of months. Then there is the question of how long it takes for the Federal Court to determine the matter. But given that there is a large population involved in these cases we would be seeking, with the help of promoters, to expedite the critical case—the test case, if you like—and very often—

Mr D'Ascenzo—As I said, I think that fairly soon in the piece we will be moving to raise the assessments in relation to taxpayers where we have sufficient information to raise those assessments.

Ms GILLARD—To clarify that, your current anticipation is that the first case would be in hearing in, say, three or four months and then resolved—

Mr O'Neill—I could not be exactly sure of that but certainly within months. It is not a question of years. The Federal Court, as courts go, is fairly expeditious in coming to a point, and then there is a question of appeals, of course, if it goes on.

Mr D'Ascenzo—I have been personally trying to push the processes as quickly as we can to get them to litigation. To my mind the best way administratively to deal with this issue is to bring it out into the open, to get the courts to indicate to others that these are blatant and artificially contrived arrangements. I think that would then send a very salutary warning in terms of the way the courts will approach not just these schemes but other arrangements of this type into the future. I think there was an article by Peter Roach who used to be a member of the board of review—and you were saying people seemed to have very short memories—and some of the arrangements that have emerged over recent years smack very much of the ingredients that were the tax avoidance paper scheme rorts of the 1970s and early 1980s. We have certainly put in an organisational effort over the last two or three years in focusing on those issues. We want to get that out into the courts and be vindicated in terms of our challenge of those arrangements.

Ms GILLARD—So you are pursuing the process but it is at least a number of months away before the courts first speak, if you like, about this question—some several months away by the sound of it.

Mr D'Ascenzo—That is right. And I have got to say that the reason I hesitated was that I have been frustrated about a range of other tax avoidance schemes on which I would have wanted to go to the court a lot earlier than I have.

Ms GILLARD—And in the interests of expediting litigation you are reviewing the approach of agreeing a test case with the promoter?

Mr D'Ascenzo—That is right. I think what has happened has been that we have actually brought a number of these test cases to the courts, not just in this area but in other areas, only to find the taxpayer pulling out at the last minute.

Ms GILLARD—Then that delays the resolution?

Mr D'Ascenzo—Exactly right.

Ms GILLARD—In the time period that it is in the works, if I can use that phrase, I think you said right at the outset that it is your view that these schemes are not continuing to be aggressively marketed at this stage of the game. Is that right? Is that your view?

Mr D'Ascenzo—I think that Mr O'Neill will know better. In terms of 'aggressively marketed' we do not seem to see the mass marketing of these arrangements, but I would be cautious in saying that some categories or variants might not still be in the marketplace. Hopefully our audit activity will be there to pick them up and ultimately if we prove to be successful we will be challenging those arrangements. Mr O'Neill might have some better details. I just worry that there are still snake oil salesmen around and people gullible enough to buy from them.

CHAIR—There always will be. It does not matter what system you have got.

Mr D'Ascenzo—I had had many people writing back to me saying, 'We did not know anything.' I almost sound incredulous sometimes.

Mr O'Neill—At this time of year there is always a particular focus on mass marketed schemes. We have not seen any evidence of share schemes or trust schemes being marketed this year but there are other types of schemes.

Ms GILLARD—I asked you that question because I have. Someone has brought to my attention a scheme, an employee participation plan, being marketed by the Kenneths Group and referring to advice from the Remuneration Planning Corporation that is still out there and being marketed now. Have you got any comment about that?

Mr O'Neill—I could not comment on a particular case. We are aware of some schemes that are being marketed now, certainly.

Mr D'Ascenzo—In this area of the marketing of the schemes often people forget the middle player in this arrangement. Not only the promoter but also the tax agent, if there is a tax agent, is involved. One would have thought, with the ATO view on these arrangements clearly in the marketplace, and if these schemes prove to be blatant, artificial and contrived, then investors in all these arrangements would have rights of redress against their agent if that agent were negligent.

CHAIR—I suspect that after today we will have some publicity for schemes that are blatant, confected and contrived, so I think a message will be sent out there.

Ms GILLARD—The issue, I suppose, is not only the legal jeopardy people are putting themselves in by involving themselves in these arrangements now, but also the fact that by the time you get to the end of the process, the revenue that could be in the balance is going to have escalated beyond the $1.5 billion. That was your estimate at an earlier point in time if people are still out there marketing.

Mr D'Ascenzo—That is right and, indeed, that is good feedback for us because we are very keen to try to make sure that people are not duped into arrangements that are going to be challenged.

Mr EMERSON—Of course. Legislation sounds like a better and better idea.

Mr SAWFORD—The taxation department seems to come across as having great organisational strengths and there is no question about that. But when it comes to strategic strengths—and maybe that is not a purpose of the department; it is more of a government policy—it does not seem to have a great deal of strength. When you use the term you are dealing with an evolutionary beast—I agree with you totally. But if we remove the variables of the existing evolutionary beast then you are dealing often with single variables in the future and they are much easier to deal with. So from a strategic point of view that is a point that I will certainly be making in the report.

Mr D'Ascenzo—We accept that point. The point I was trying to make is that the concepts of integrated tax design that flow out of the business tax review which the tax office has been party to is all about trying to look at a strategic focus to do more development. So I am not sure I agree with the fact that strategic skills are lacking. There are other variables in the environment itself.

Mr SAWFORD—By its very nature people in organisations that are very strong organisationally use a whole different set of skills. I have never seen anybody on this earth who has both organisational and strategic skills. They are different sorts of people and they come from different areas and you do not often see a great deal of evidence from tax departments. I do not want to labour the point.

I have to go to the Main Committee; that is why I am in a hurry. When you talk about rationale, in terms of dealing with shams, I get a great deal of confidence out of what you are saying. When you then start talking about the processes of using the courts, I go to water. I do not share the confidence that you do, because you have not got a determined result and really the history of some of the results has not been too flash. Again, to me, that seems to be a strategic failing in terms of having to deal with this. I am perhaps going back to what Craig was saying—that we need legislative change in order to deal with this effectively, and also to allow a great organisation like yours to do your job better than you do. I am sorry, I have to go.

CHAIR—We will be finished soon. Are there any more questions?

Mr BARRESI—Of those 40 promoters that are at that extreme end—this question might have been asked and, if so, I apologise—how many of those are actually dealing with schemes at the blue-collar and middle employee level? It just seems to me that the entire discussion this morning has been about executive schemes. The chairman rightly pointed out that this inquiry is all about employee share schemes at that middle to lower level. I am interested to know how many of those 40 are, or are not, involved.

Mr O'Neill—In most of the schemes that we are looking at, every one of the schemes that I personally have reviewed is about the controller of the company getting a benefit under a share plan.

Mr BARRESI—So it is really about schemes which are not part of this inquiry?

Mr O'Neill—They are schemes which seek to hide under the cover of division 13A but have a different rationale absolutely.

CHAIR—This is all part of our inquiry. The report is actually making recommendations about these kinds of things.

Mr BARRESI—I am referring more to the employee—

Mr D'Ascenzo—In form these are dressed up to be employee share benefit arrangements. In substance, the controller is the only one who benefits.

CHAIR—We have been told they are shams.

Mr EMERSON—My colleague the member for Lalor referred to this scheme that appears to be marketed aggressively by the Kenneths Group. At page 28, it says:

The Plan Management of the Company Management Employee Incentive Plan will be operated by the TRINITY MANAGEMENT GROUP (TMG).

TMG is jointly owned by The Kenneths Group and Remuneration Planning Corporation Pty Ltd.

In the Remuneration Planning Corporation submission of May 1999, it says, in a chronology:

1999 Shadow of uncertainty placed over ESOP's by ATO's embargo on ESOP rulings in April, 1999. RPC lobby for lifting of embargo.

Would RPC be one of the companies that is involved in this aggressive tax planning?

CHAIR—I think it would be inappropriate to answer that question. I appreciate why Craig is asking it.

Mr D'Ascenzo—We cannot give you that answer but Mr O'Neill is heavily involved in the investigation of these issues. Anyone promoting arrangements of this type will be looked at as part of ATO operations.

Mr EMERSON—My point is that we have a document here.

CHAIR—Perhaps I could ask the member for Lalor to table that document and provide a copy directly to you. I am sure you will deal with it as you think most appropriate.

Ms GILLARD—Yes, I will table the document.

CHAIR—Thank you very much. We will finish the public hearing at this point.

Resolved (on motion by **Ms Gillard**):

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

Committee adjourned at 10.54 a.m.