Submission No: 51.3

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Sent: Monday, 30 April 2007 6:06 PM

To: Committee, JCPAA (REPS)

Cc: RG TSRD Executive; Wilson, Michael; Savage, James; LoPilato, Virginia

Subject: FW: legislative intervention (JCPAA) [SEC=UNCLASSIFIED]

The Secretary,

Re: Inquiry reviewing a range of taxation issues within Australia

At the Canberra hearing of 9 November 2006, Senator Humphries canvassed the question of whether certainty could be increased for taxpayers by legislative intervention where a tax case has not been resolved within a certain period:

'Would there be value—and Treasury might want to comment on this—in setting some kind of

time limit on the period of a dispute between the commissioner and the courts? If an issue has

not been resolved within a certain time, it ought to be referred to the parliament so that it can

legislate on that matter and, if the parliament wants to, determine to resolve the matter, whether

or not it is in favour of the position the commissioner has taken.' (Transcript page PA 34)

At page PA 57 Treasury was asked to provide a detailed answer on notice addressing this proposal.

Attached is Treasury's response, along with a case in point supplied by the ATO.

Regards,

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Tax System Review Division
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Question on Notice: Whether certainty could be increased for taxpayers by legislative intervention where a tax case has not been resolved within a certain period.

Treasury Response

In limited circumstances, such as where it is particularly important to promptly clarify the application of the law for revenue or anti-avoidance purposes, an appropriate legislative amendment could successfully solve the issue raised by an affected taxpayer, and also for future taxpayers. Attached is an example provided by the ATO of where the Government has done so.

However, as a general rule, legislating rather than allowing cases to run their course through the Courts may create more problems than it solves. In particular:

- There is no guarantee that a legislative amendment that is prepared before the point of law has been determined will actually address the issue on which the court ultimately decides that the taxpayer's case turns. Amending the tax law before the Court has the opportunity to clarify the meaning of the law can lead to unintended consequences, or open up new and unanticipated issues.

- In order to provide the taxpayer involved in the litigation (and those in similar circumstances) with any certainty, legislation would need to be retrospective. However, retrospective legislation will bind, and may disadvantage, other taxpayers who have complied with the Commissioner's interpretation of the law. If retrospective change supports the ultimate 'winner' of the case little is achieved by intervention. In test case scenarios, retrospective change in support of the 'loser' of the test case would risk undermining public confidence in the test case system. In short, retrospective legislation often creates more uncertainty, rather than less. It is only of practical use to resolve litigation arising out of a change of interpretation by the Commissioner, to preserve the status quo.

- Similarly, prospective legislation is of no benefit to the affected taxpayer (or others in similar situations), because it will not resolve existing taxpayer disputes. In order for certainty to be achieved for the period before prospective legislation comes into effect, court cases will need to run their course.

Any legislative response to lengthy court cases, however desirable, would, in any event, have to compete for scarce Parliamentary time with potentially more significant matters. As some time will necessarily have elapsed before the need for legislative intervention is identified, in many instances a test case could be resolved through the court process before any amendment to the law could be drafted, consulted on, introduced and passed. Passing an amendment after the court had resolved the issue would simply create more uncertainty.

Off-shore non-complying super

On 19 May 1999 the Commissioner issued a media release which indicated various employee benefit trusts (EBT), employee share plan (ESP) schemes, controlling interest superannuation (CIS) and off-shore superannuation (OSS) schemes were not effective under the law.[1]

On 30 June 2000, the Assistant Treasurer, Senator the Hon. Rod Kemp, announced legislative changes relating to superannuation and Fringe Benefits Tax. This was designed to stop tax planners exploiting existing tax structures to maximise their clients' tax deductions through aggressively marketed employee benefit arrangements.[2]

When announcing the amendments contained in the Bill, the Assistant Treasurer explained that the legislative change was necessary following Tax Office advice that these arrangements were still being actively promoted.

The Commissioner advised that a legislative change was appropriate because although the Tax Office remained of the view that these schemes were not effective under the existing law, it would be some time before action taken by the Commissioner in the Courts would be resolved and it appeared as though some taxpayers would continue to enter into the arrangements until a court confirmed our view of the law.

The Commissioner also advised that although an argument could be made for retrospective application of the proposed changes, on balance they should apply from the date of the Government's announcement. The changes were designed to clarify the law for taxpayers as the Tax Office was already of the opinion that the schemes were not effective under the existing law.

On 8 December 2003, the Federal Court handed down its judgment in which it considered the deductibility of 'contributions' made to an off-shore non-complying superannuation fund (*Walstern)*. The Court denied deductions for contributions made by a company to a New Zealand based superannuation fund on behalf of its owners who were also its sole employees. The Court agreed with the Tax Office that the sole purpose of the contribution was not to provide superannuation benefits to persons who were employees. It also held that the fringe benefits tax (FBT) applied in respect of the contributions at the time the amounts contributed were allocated by the fund to the employee owners.

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1 ATO Minute to AT No. 287 of 2000

2 Senate Select Committee on Superannuation and Financial Services Report on Taxation Laws Amendment (Superannuation Contributions) Bill 2000.