

CHAPTER 7

CONCLUSION

7.1 The Committee welcomes the recent decisions of the ATO towards participants in mass marketed schemes. Although the Committee believes these initiatives are overdue and should have been part of a coherent strategy towards scheme participants from the outset, they should nonetheless be recognised as a step in the right direction. In particular, the Committee is pleased to see that the ATO is adopting an approach more consistent with its obligations to take into account individual circumstances, especially for the many participants caught unwittingly in these arrangements.

7.2 The Committee also wishes to note for the record that several of these initiatives, particularly those in relation to expediting test cases, halting recovery action and sending dedicated teams to regional locations, are in line with some of the conclusions and recommendations that the Committee had arrived at during the inquiry to date.

7.3 That said, the Committee has a number of concerns that warrant consideration by the Government and ATO. The ATO's most recent announcement on reducing the interest applying to some scheme debts will require careful handling, particularly the drafting of guidelines for determining eligibility. The Committee sees this announcement as a sign that the individual circumstances of participants is coming more into focus in the ATO's approach. It is important that the criteria adopted in the guidelines continue to focus on individual circumstances and do not establish arbitrary limits.

7.4 On the face of the evidence to the inquiry, the Committee considers a large number of participants fit the ATO's general criteria for entitlement to an interest cut – ie, they have generally good tax records and are not representative of those who use aggressively-driven schemes to exploit the tax system. The guidelines should be drawn up to reflect this point.

7.5 The Committee acknowledges the recent decision of the ATO to fund a number of test cases, even if it is overdue and limited in nature. This should not only help break the impasse between the ATO and the various groups running test cases but should also settle the ATO's position at law, an outcome that is in the interests of all parties as well as the functioning of the tax system.

7.6 Further, the Committee considers that there is a case to be considered for suspending the accrual of interest on the tax debts of participants selected as test cases. The reason for this is to prevent financial pressure stemming from compounding interest on tax debts forcing participants to withdraw from test cases. Any further delays to the test case program at this stage would be, in the Committee's view, unacceptable. It is critical for the overall resolution of the MMS matter that the

Courts get to decide on the ATO's position at law. A suspension of interest, insofar as it removes one source of pressure for representative participants, might therefore be in the public interest.

7.7 Notwithstanding the statements above on the interest concession and suspending interest for test case participants, the Committee considers that there may be scope for a further remission in the interest charge and/or penalty tax in view of the ATO's role during the growth of the MMS market. On the evidence before the inquiry, the Committee believes that the ATO cannot be absolved entirely for the emergence of the risk to the revenue that mass marketed schemes posed in the period 1996-97, particularly so far as it is responsible for providing certainty to taxpayers under the self assessment system. The ATO's own evidence indicates that it had at the least questions about the application of Part IVA to mass marketed-like schemes for over a decade before it eventually addressed the issue. The ATO points to its disallowance of deductions in some 20-odd cases during the late-1980s and early 1990s as evidence that it was active in addressing the matter. The ATO suggests that the market and tax professionals should have heeded this action.

7.8 In the Committee's view, the ATO itself should have heeded the warning signs that these cases provided and the Commissioner should have turned his mind to settling the issue of Part IVA's application to schemes through issuing a tax ruling. This would have sent a clear signal to the market, resolved a grey area in the law and provided certainty to taxpayers. In addition, if a ruling had been reinforced by a series of high profile statements – similar to the Commissioner's 1998 'Beware the Magic Pudding' speech and those that followed – putting abusive scheme promoters on notice, then the MMS crisis in the mid-1990s may have been averted. That it took a rapidly escalating risk to the revenue to galvanise the ATO into action in 1996-97 is not an adequate defence of the ATO's administration when the overall timeframe is considered.

7.9 Consequently, the Committee is not convinced that the ATO is on firm ground in imposing interest and high penalty charges retrospectively on taxpayers in order to compensate the revenue, when its failure to provide adequate certainty was partly the cause of the tax shortfall stemming from mass marketed arrangements. The Committee intends to explore this issue further in its final report.

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Chairman