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SENATE ECONOMICS REFERENCES COMMITTEE

INQUIRY INTO MASS MARKETED TAX EFFECTIVE SCHEMES AND INVESTOR PROTECTION

INTERIM REPORT

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TERMS OF REFERENCE

On 29 June 2000 the Senate referred to the Senate Economics Reference Committee the matter of mass marketed tax effective schemes and investor protection for inquiry and report with particular attention to:

i. The adequacy of measures to promote investor understanding of the financial and taxation implications of tax effective schemes;

ii. The conduct of, and the adequacy of measures for controlling, tax effective scheme designers, promoters and financial advisers; and

iii. The ATO's approach towards and role in relation to mass marketed tax effective schemes.

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DEFINITIONS

Amended Assessment

An amended assessment is when the ATO re-assesses a taxpayer's tax liability. Amended assessments involve a more detailed review than is the case with assessments which mainly involve the ATO accepting a taxpayer's return at face value.

Deductions

Money you spend to enable you to earn income. Allowable deductions include, among other things, stationery, equipment, rent, electricity, telephone and tools. The value of the deduction is subtracted from assessable income to calculate your taxable income.

Non- and Limited- Recourse Loans

In the ATO's view, a non-recourse loan (NRL) is an arrangement where the lender has no recourse or right to reclaim the loan beyond a specified security of the borrower. Usually the 'specified security' is tied to the scheme's earnings (eg, the sale of timber in afforestation schemes). In other words, with an NRL the borrower is not personally at risk to repay the loan, apart from the specified security.

A limited recourse loan (LRL) exposes the borrower to slightly more risk than an NRL. Under an LRL the lender may have recourse to other assets of the borrower's, beyond the specified security. For instance, the borrower may be required to repay the investment loan in full, even if the income from the scheme is less than the outstanding balance on the loan.

Round Robin Financing

A round robin arrangement involves a circular 'paper flow' where little real capital is at stake. It often involves, according to the ATO, the passing of documents such as cheques, promissory notes and so on among connected parties, usually on the same day, with no change to the overall level of cash. While it creates the appearance of a financial transaction, there is little or no cash generated that can go into the underlying business of the investment.

Private Binding Rulings

Private Binding Rulings (PBRs) provide certainty on the tax benefits or consequences of an investment to *individual* investors. These rulings only apply to the individual taxpayer who requested the ruling (compare with Product Rulings below). As with Product Rulings, PBRs provide no protection in circumstances where the investment arrangement is not carried out in accordance with the information provided to the ATO.

Product Rulings

The ATO issues Product Rulings for individual investment schemes. Product Rulings are intended to provide certainty for potential investors by confirming the tax benefits of the investment. Unlike Private Binding Rulings which apply only to individuals, Product Rulings apply to all participants in the investment. Product Rulings relate only to the tax consequences of the investment. They do not involve any ATO assurance as to the investment's commercial viability, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based. A Product Ruling only applies if the arrangement is carried out in accordance with the information provided to the ATO.

Promoters

'Promoters' is a general term which can include investment scheme designers, the principals behind schemes and their managers, and those involved in the marketing and promotion of schemes.

Tax Rulings

Tax rulings provide the ATO's view on general matters of tax law (such as the deductibility of expenditure in relation to investment schemes, for instance). These have wider application than Product Rulings which relate to single investments.

CHAPTER 1

INTRODUCTION

1.1 The Committee originally decided to issue an interim report as a matter of urgency due to mounting concerns about the economic, social and personal impact of current ATO recovery action on taxpayers caught up in mass marketed tax effective schemes. At the time, the Committee believed that the evidence received raised serious questions of the appropriateness and fairness of the ATO's approach to the tax affairs of mass marketed scheme (MMS) participants, who number close to 65,000.[1]

1.2 Although recent ATO initiatives have addressed to a certain extent several of those concerns, the Committee still believes there are grounds for issuing an interim report.

1.3 The crux of the matter before the Committee at this point is whether the level of the tax burden imposed on scheme participants, many of whom were caught unwittingly in what are said to be tax avoidance arrangements, is justified. In approaching this question, the Committee has taken into account the following key issues:

- The time delay between the growth of the MMS market and the ATO's decision to disallow deductions associated with mass marketed arrangements;
- The circumstances in which participants made their investment and tax claim decisions; and
- The ATO's handling of the individual circumstances of scheme participants since making the decision to disallow deductions.

1.4 In issuing this interim report, the Committee wishes to be clear that it is not reaching any conclusions at this stage on the soundness of the ATO's position at law. This is a matter that must be tested in the courts and is for the courts to decide. Nor is the Committee deflecting attention from other underlying issues (such as the generally weak understanding of self assessment by taxpayers and sections of the tax industry) or other actors implicated in the MMS problem (namely, scheme architects and promoters, as well as financial and legal advisers). These factors are also important and the Committee intends to continue to explore them in future hearings and the final report.

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[1] While some estimates indicate participants in mass marketed schemes at over 100,000, ATO data show that it has taken action involving over 57,000 participants with more than 8000 participants also expected to be subject to ATO measures. ATO Submission No. 845, p.1.

1.5 Therefore this report concentrates mainly on the ATO's handling of MMS – both its historical approach to the market and its current handling of deductions that it has disallowed – and the impact that is having on taxpayers.

1.6 At the outset, the Committee acknowledges the complexity of the issues involved and the difficulty faced by the ATO in distinguishing the levels of tax mischief and risk posed by different investors and different schemes. Profiles of participants range from unsophisticated investors who seem to have been captured unawares by aggressive marketing and bad advice, to high wealth individuals with a history of tax evasion and an interest in reducing their taxable incomes to very low levels.

1.7 Furthermore, it should be clear at the outset that the Committee is not in a position to, and can in no way endorse any of the schemes involved in the dispute with the ATO. Indeed, it is the view of the Committee that a large number of these schemes appeared to be designed specifically to defraud the tax system and to use ordinary taxpayers in that process. Not only have they left many taxpayers with large tax bills, but many of these schemes have ceased to exist. The Committee is of the view that few schemes represented 'a good investment' in the ordinary meaning of the term, and that without the 'tax deductibility' factor, very few would have got off the ground.

1.8 For these reasons, the Committee emphasises that, while there have been attempts to paint a picture that attributes sole blame to the ATO for the difficult circumstances in which many people now find themselves, the Committee does not accept such a blanket explanation. While the Committee believes that the ATO contributed to the problem (and will explore that issue in the body of this report), promoters and advisers bear a significant share of the blame. It is clear to the Committee that elements of the tax, legal and financial planning professions, and at least some of the taxpayers involved, have sought to exploit loopholes in the taxation law in a way never intended by Parliament.

1.9 In its final report, the Committee intends to more closely examine whether legislative change is required to prevent the tax system from being exploited in this way in the future and what sanctions should be developed against persons who seek to promote such tax avoidance schemes. The Committee will also examine more closely what it believes may be serious flaws in the self assessment system.

1.10 However, the main issue before the Committee at this stage of the inquiry is the effects of ATO actions on investors who entered into mass marketed schemes, unaware of their exposure to the risk of later charges of tax avoidance.

CHAPTER 2

NATURE AND SCALE OF THE PROBLEM

Risk to the tax system

2.1 The MMS matter is of major significance in terms of number of schemes, participants and the risk to the integrity of the tax system. In its November 2000 submission to the inquiry, the ATO reported that it had taken action on 231 schemes involving 57,667 participants and claimed deductions totalling $4.3 billion. An additional 45 schemes involving 8425 participants and totalling $555 million were also under examination.[1] The potential risk to the revenue is about 40 per cent of the overall claimed deductions of approximately $4.8 billion.

2.2 The ATO groups 'mass marketed tax effective schemes' into the following three categories:

- round-robin schemes, including non-recourse financing, often in agriculture, afforestation and franchises;
- certain film schemes, with guaranteed returns that are, in effect, a return of part of the invested funds; and
- employee benefit arrangements (EBAs).[2]

2.3 In this report the Committee's focus is on the first two categories. The evidence to the Committee concentrates overwhelmingly on the first category of schemes, namely the agribusiness sector (eg, vineyards, olives and tea tree and timber plantations) and franchise arrangements, although some participants are involved in a mix of schemes which include film projects. The Committee intends to address EBAs in its final report.

2.4 In the ATO's view, the fundamental compliance problem or 'tax mischief' common to these schemes relates to their *financing* as distinct from their commercial nature or business activity. The ATO contends that in many cases participants' investments were largely or wholly funded through tax deductions. Relatively little private capital is said to have been at risk. As the Commissioner of Taxation stated:

> The underlying [business] activity is not itself the issue of concern here. What is of concern to us [the ATO] in a range of cases are the financial arrangements associated with the investments. These often have the effect

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1 ATO Submission No. 845, p.1.

2 ATO Submission No. 845, p.1.

> that the financing of the activity is significantly funded by taxpayers generally from the tax system.[3]

2.5 In some cases, the tax deductions claimed by scheme participants often exceeded the amount of money invested; that is, the schemes were geared in such a way as to generate a 'tax profit' for participants.[4]

2.6 In disallowing participants' deductions, the ATO cites a number of defining characteristics found in mass marketed arrangements, including:

- apart from subscribing to the scheme, participants have no hands-on involvement and therefore are not carrying on a business;
- financial arrangements involve limited- or non-recourse loans, often based on round robin arrangements;
- high up-front management fees geared to create inflated tax deductions;
- participants have little or no practical control over the scheme's management;
- limited exposure to risk; and
- in some cases, a guarantee from promoters to reverse the transaction if claimed tax deductions are not allowed.

2.7 Owing to a combination or all of these factors, the ATO maintains that the participants invested in mass marketed schemes for the 'dominant purpose' of obtaining a tax benefit, and because of that the anti-avoidance provisions of Part IVA of the Tax Act apply. By applying Part IVA the ATO has imposed penalty tax, in addition to disallowing participants' deductions and levying interest charges dating back to when the participant claimed their deduction.

2.8 It should be noted that, while the ATO has applied Part IVA to all the schemes under consideration, the level of penalties imposed is not uniform but ranges from 50 per cent to 5 per cent, depending on the level of tax mischief involved. According to the ATO:

> Because Part IVA does apply, the penalty provision imposes a statutory penalty of 50 per cent. We recognise that in most cases that statutory penalty of 50 per cent would not be appropriate for these taxpayers and we looked at opportunities of being able to reduce that. The way we did that was to give

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3 Michael Carmody, 'Beware the Magic Pudding', Commissioner's address to the Australian Society of CPAs, 12 June 1998, p.3.

4 See in particular the examples in Attachment D to ATO Submission No. 845. See also the example cited in Senate Economics References Committee, *Inquiry into the Operation of the Australian Taxation Office*, March 2000, p.31. According to the ATO, the example indicates a 'typical' arrangement in which a participant on the top marginal tax rate received a tax refund of $14,000 for an initial $10,000 investment, generating a profit or 'bonus' of $4000.

> them the opportunity to make voluntary disclosures and in some cases we also exercised the statutory discretion to reduce the penalty to five per cent. We also invited taxpayers to present their individual circumstances. That may be relevant in some cases.[5]

2.9 The application of Part IVA is one of the most contentious issues in the inquiry for several reasons. The first is due to the penalty charges included in the tax debt many taxpayers face. The second reason from the participants' view is the inference under Part IVA that they are 'tax cheats'. The Committee examines the ATO's application of Part IVA in later sections of the report.

The human and social cost of the problem

2.10 Based on the revenue and number of participants involved in mass marketed arrangements, the average tax debt per participant is over $75,000. While the amount of debt is obviously spread unevenly across participants, this average figure in its own right indicates the high individual burden for large numbers of those affected.

2.11 In terms of the magnitude of the human cost at stake, the Committee heard disturbing evidence of the wider ramifications that this large-scale debt represents. In brief, on a personal scale the evidence to the inquiry points to the:

- wipe out of personal and family savings and retirement funds;
- selling off of major assets, particularly homes and in some cases private vehicles and furniture;
- in some cases, selling of businesses;
- increasing likelihood of widespread bankruptcy among participants, which in some cases may disqualify people from certain jobs, eg, the police force;
- growing incidence of stress, depression and related illness;
- workplace risks due to the impact on concentration and stress;
- relationship/marriage breakdown and;
- threats of suicide, including anecdotal evidence of some suicide.

2.12 The Committee considers that the above side-effects are not random and isolated but are endemic and widespread amongst the affected population. A witness from an accounting firm with 800 clients caught up in mass marketed arrangements, stated:

> These clients … have now received amended notices of assessment going back up to six years, leaving them with often massive tax debts, which they dispute, and a full recourse loan in some cases. So far we are aware of four

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5 Evidence, p.486.

> suicides directly caused by this situation—thankfully not our clients. Two of our clients have gone bankrupt and another into part 10 administration.[6]

2.13 Reports of wider social and community repercussions would tend to support the conclusion that the personal toll of this problem is commonplace. For instance, the Committee notes the following report based on survey findings from the Goldfields Community Legal Centre in Kalgoorlie:

> Now I would like to tell you a few stories of the devastation. In general terms, they refer to financial ruin, failed retirement plans, insufficient time to recover, given the percentage of people who are over 50 or even over 45, and the fear they have of having to live on a benefit. They speak of the loss of esteem, confidence and their friends. They speak of broken relationships and they speak of the cost of these to them and their families in human health terms and in monetary terms. They fear the loss of their homes—more than anything they fear this. Many of them are unable to borrow from banks because they have insufficient equity. They speak of selling assets to repay the debt, and within that there are shares, savings, superannuation, jewellery, family heirlooms, antiques and cars. Often they have downgraded their homes and their vehicles in order to be able to fulfil the ATO obligations.[7]

2.14 The scale of the tax debt behind the financial, human and social costs cited above is symptomatic of several factors. The debt comprises primary tax (ie, the tax related to the original deductions) and additional penalty tax and interest charges (as detailed in paragraph 2.7). The interest component is obviously a function of the time that has passed since the deduction was claimed and the disallowance notice issued by the ATO.

2.15 The Committee believes that two points are relevant in this matter. The first is the size of the tax debt, particularly the high compounding interest component, and the lengthy time lag from when participants invested in schemes and claimed deductions to when the ATO eventually moved to disallow those deductions. Although the ATO advised that it acted within 12 to 18 months to deny deductions claimed in up to 90 per cent of cases, in some instances the time lag was approximately two to three years, and in others the delay reached up to six years. The factors behind those delays are discussed in chapter 4. It should be noted that under the self assessment tax system the ATO does have the legal right to conduct such reassessments (as is discussed in the next chapter).

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6 Evidence, Perth, p.69.

7 Evidence, p.211.

CHAPTER 3

THE ATO'S POSITION AT LAW

3.1 This chapter provides an overview of the legal basis for the ATO's position on a number of points at issue with mass marketed schemes. The general points covered include:

- The general provisions for deductibility;
- Part IVA;
- Section 221D taxation instalment variations; and
- Scheme promoters.

3.2 Reference to the legal underpinning of the ATO's position is important for clarifying questions about the ATO's ability or powers to take certain actions, such as amending tax assessments several years after a tax return or deduction was lodged and paid, for instance. Misunderstanding about the ATO's right to issue amended assessments, apparently retrospectively, is common place in the debate surrounding MMS.

3.3 The Committee emphasises that the chapter reflects the ATO's interpretation of the law. While both taxpayers and their legal advisers contest the ATO's legal position, the chapter does not examine those contending points of view. As stated in several places in this report, the Committee considers that the ATO's position at law is a central matter that the courts must decide upon: that is, the courts are the appropriate fora to resolve the matter. (Chapter 6 addresses the issue of test cases and the importance of the courts ruling upon the issues at law.)

3.4 These points notwithstanding, the Committee notes that the Ombudsman has concluded in relation to two schemes, Budplan and Maincamp, that the Commissioner's interpretation of the law is reasonably open to him.[1] That said, the Ombudsman is also of the view that the ATO's position is ultimately a matter for the courts to rule upon.

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1 Commonwealth Ombudsman, *The ATO and Budplan: Report of the Investigation into the Australian Taxation Office's handling of claims for tax deductions by investors in a tax-effective financing scheme known as Budplan*, June 1999, p.1. Commonwealth Ombudsman, *The ATO and Maincamp: Report of the Investigation into the Australian Taxation Office's handling of claims for tax deductions by investors in a tax-effective financing scheme known as Maincamp*, January 2001, p.27.

Deductibility: general provisions

3.5 Section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997) deals with deductible business losses or outgoings. Prior to ITAA 1997, subsection 51 (1) of ITAA 1936 (general provisions) addressed this matter. According to the ATO:

> …a loss or outgoing of a revenue nature is deductible to the extent that it is incurred in gaining or producing assessable income or is necessarily incurred in carrying on a business for that purpose. Critically, a loss or outgoing will not be deductible to the extent that it is of a capital nature.[2]

3.6 In addition, the ATO referred to the High Court case, *Sun Newspaper versus Federal Commissioner of Taxation (FC of T)*, which established three matters for consideration when determining whether an expenditure is revenue or capital in nature:

- The character of the advantage sought;
- The manner in which it is to be used or enjoyed; and
- The means adopted to obtain it.[3]

Taxation Ruling TR 2000/8

3.7 Taxation Ruling TR 2000/8 (Investment Schemes) elaborates upon these general points. Issued on 14 June 2000, TR 2000/8 outlines the ATO's views on investment schemes and 'tax shelters' including primary production, film and franchise schemes.[4] In particular, the ATO indicated with reference to TR 2000/8 the sort of features that would incline it to view an investor as carrying on a business:

- The investor has an identifiable interest in specific growing trees and the right to harvest and sell the timber from those trees. Otherwise the ATO may view the investment as being in someone else's business and therefore on capital account. But the ATO accepts the practice of the manager harvesting the investor's produce and aggregating it with other investors' produce for the purposes of sale. This point is also relevant to other tax effective investments; and
- The activities of the investor have a significant commercial purpose in view of matters such as their nature, size, scale, repetition and regularity and the manner in which those activities are conducted. This factor looks at the manner in which the investor carries on the activity; specifically, whether

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2 ATO Submission No. 845, p.5.

3 Ibid.

4 ATO Media Release Nat00/63, 'Tax Office ruling on investment schemes TR 2000/8'. See Attachment A3, ATO Submission No. 845.

> the investor has a profit making purpose, the activity is carried on in a systematic, business-like manner, and on a consistent and repetitive basis.[5]

3.8 On the other hand, TR 2000/8 also details the features or characteristics that would 'detract from a finding that an investor is carrying on a business':

- The investor's return is guaranteed;
- There are mechanisms to reduce the risks of participating in the scheme, eg, ongoing maintenance costs are being met by the manager;
- The method of sale of the produce ignores the investor's interest in that produce;
- The use of non - or limited recourse financing and the existence of non-commercial rates, fees or charges. Under a non-recourse arrangement, the promoter lends the investor a significant proportion of the 'cost' of the investment. However, the effective liability to repay the loan is limited to the investor's interest in the investment (which may be of limited value). Nevertheless, the investor still claims a tax deduction for the cost of participating in the investment which may significantly exceed the investor's own cash outlay; and
- The promoters undertake to reverse transactions if tax deductions are disallowed.[6]

3.9 Another factor counting against a participant carrying on a business is if their initial investment amounts to no more than completing application forms and providing funds which are held in trust until the minimum subscription is achieved. TR 2000/8 indicates that under this scenario a participant's outgoing would not have been incurred in carrying on a business.[7]

Part IVA

3.10 Part IVA of the ITAA 1936 empowers the ATO to deny or 'cancel' an investor's tax benefit where a 'reasonable person' would conclude that the sole or dominant purpose for entering a scheme was to obtain that tax benefit. According to the ATO:

> The High Court in *FC of T v. Spotless Services Ltd* observed that where a transaction is influenced by tax considerations this will not of itself result in Part IVA being applied. However, the High Court also found that where the shape of a transaction, or means adopted to achieve a transaction, is so

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5 Overview of Taxation Ruling TR 2000/8 (Investment Schemes), Attachment C in ATO Submission No. 845, pp.1-2.

6 Ibid, p.2.

7 Ibid.

> governed or driven by the tax consequences, the commerciality of the transaction may be so overshadowed that Part IVA can be applied.[8]

3.11 Particular features of schemes that might lead the ATO to apply Part IVA include:

- Transactions which do not occur at market rates/values. For example, grossly excessive fees;[9]
- The inflation or artificial creation of deductions. For example, where only a small proportion of the amount of the deduction claimed is actually used on the underlying activity;
- Round robin arrangements. For example, a bank lends moneys to a promoter's finance company, which in turn loans the moneys to the investor; the investor uses the loan funds to discharge the lease and management fee liabilities and the lessor and manager place the funds received on deposit with the promoter's finance company; the finance company then uses the funds to repay the original loan from the bank. The investor has discharged the lease and management fee liabilities but there are no real cash funds available to the lessor or manager to fund the underlying activity. There is no change in the overall level of cash;
- Non-recourse or limited recourse loans which limit the investor's real commercial risk in relation to any debts. For example, the investor is only liable to repay the loan from and to the extent of any sale proceeds;
- Arrangements where the investor is not subject to significant risks when the tax benefit is taken into account. For example, the existence of a put option which gives the investor the right to sell the underlying asset back to the promoter for a pre-agreed price;
- Prepayments shortly before the end of the year of income;
- Arrangements representing a roundabout way of conducting an activity;
- Transactions between related or unrelated parties not at arm's length;
- Arrangements where the transactions or series of transactions produce no economic gain or loss. For example, the whole scheme is self-cancelling; and
- Arrangements which lack economic substance and are not rationally related to any useful non-tax purpose. For example, related party dealings that merely produce a tax result.[10]

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8 ATO Submission No. 845, p.6.

9 For more on this issue, see 'Fee Levels in Projects' and 'Fee Levels and Deductibility' in ATO Supplementary Submission No. 845A.

3.12 Two further points should be noted in the context of Part IVA's application to mass marketed arrangements. First, the ATO states that no single feature necessarily determines whether Part IVA applies. Consideration must be had for all of the eight so-called 'objective factors' listed above (and outlined in paragraph 177D(b) of the 1936 Act).[11] This helps explain the citing of all eight factors in many of the ATO position papers sent to taxpayers, rather than the ATO singling out one or two factors as the reason for its decision to apply Part IVA.

3.13 The second point goes to the issue of Part IVA's application and the individual circumstances of investors/taxpayers. The ATO claims that because Part IVA is an 'objective' test, the individual circumstances – or the 'subjective motives'[12] – behind a taxpayer's decision to invest will not affect whether Part IVA applies.[13] This reflects a key distinction between the initial consideration of whether Part IVA applies, and the next step of the process, the Commissioner's consideration of whether to apply his discretionary powers to reduce the level of tax penalty.

3.14 Individual circumstances come into play when the Commissioner turns his mind to applying the discretion (under subsection 227(3) of the Act).[14] But individual factors do not figure in the initial consideration whether a scheme has features that attract Part IVA.

3.15 The Committee further examines the issue of individual circumstances and Part IVA in Chapter 5.

Penalty tax rate

3.16 As noted in Chapter 2 (paragraph 2.8), Part IVA applies an automatic statutory penalty of 50 per cent. However, in recognition that in 'most cases' the 50 per cent penalty would not be appropriate, the ATO has reduced it by one of two means:

- In many cases, taxpayers who take up the ATO's invitation to make a voluntary disclosure have had the penalty tax reduced to ten per cent; or
- In some cases, the Commissioner has exercised his discretion to reduce the penalty to five per cent.[15]

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10 Overview of Taxation Ruling TR 2000/8 (Investment Schemes), Attachment C in ATO Submission No. 845, pp.5-6.

11 Ibid.

12 Evidence, p.497.

13 Evidence, p.493.

14 In addition to the Commissioner's discretion, the statutory penalty of 50 per cent can be reduced to 25 per cent if the taxpayer has a reasonably arguable position, or under section 226Z can be reduced by 80 per cent if a taxpayer notifies the Commissioner of a tax shortfall prior to an ATO audit.

15 Evidence, pp.18-20 and 486.

221D Tax Instalment Variations

3.17 Under section 221D of the ITAA 1936, the ATO has the discretion to vary the prescribed rate of tax instalment deductions, ie, the tax taken out of taxpayers' salaries and wages. Many participants in mass marketed schemes had tax deductions paid to them using 221D variations, and many assumed that the processing and payment of refunds under 221D (or end of the year tax refunds for that matter) meant that the ATO had investigated the schemes and approved deductions.

3.18 However, under the law this assumption is mistaken. The approval to vary the tax rate for a taxpayer does not amount to the ATO approving the reason or basis (ie, the scheme) for the variation. Tax Determination TD 93/19, issued on 4 February 1993, makes it plain that ATO approval is limited to the variation, not the investment plan or scheme in which the taxpayer has entered. As stated in TD 93/19:

> An approval to vary a taxpayer's instalment deductions does not mean the ATO has expressed an opinion on the taxation treatment of the negatively geared investment plan or any tax deductions that might flow from that plan.[16]

3.19 Furthermore, the ATO indicated that it is not required under the law to express an opinion or grant approval for the investment arrangement or associated tax deduction.[17] This reflects a basic point of Australia's self assessment tax system, that returns are accepted at face value and generally not scrutinised in detail. Under the law the ATO has up to four years to review returns and amend assessments where necessary. The time period is six years in instances involving anti-avoidance provisions.

Promoters

3.20 One of the peculiar features of the MMS issue is that the promoters of schemes the ATO deems to be aggressive or abusive appear, by and large, to have escaped the penalties or 'downside' that scheme participants have experienced. As the Commissioner has stated, 'Presently it is the participants placed in schemes by promoters who suffer administrative penalties. There is no direct penalty to chasten prospective promoters and marketers'.[18]

3.21 According to the ATO, this anomaly reflects the absence of any sanctions in the law for promoters involved in the design or marketing of tax aggressive arrangements. While promoters who make fraudulent, untrue or false or misleading statements may face criminal prosecution under the Trade Practices Act, the Corporations Law and consumer protection laws, no comparable penalties exist under

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16 TD 93/19, 4 February 1993, p.1.

17 ATO Submission No. 845, p.2.

18 Michael Carmody, Commissioner of Taxation, 'Ethics and Taxation', Speech to the Edmund Rice Business Ethics Forum, Sydney, 28 October 1999, p.3.

tax law. In discussing the imbalance in penalties borne by participants and promoters, the Commissioner recently indicated:

> Our experience with these schemes has highlighted that the structure of the income tax law is such that the focus of the downside for participation in schemes is with the participant. We believe this is a position that needs to be rebalanced. We are therefore developing for government options for consideration that would introduce financial penalties for those who profit from promoting and marketing these types of schemes.[19]

3.22 The ATO told the Committee that the Commissioner had foreshadowed providing advice to the Government on options for dealing with promoters by the middle of May 2001.[20] While the Committee discusses this in brief at paragraphs 4.83-84, it reiterates here that it intends to deal with this key issue in detail in its final report.

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19 Michael Carmody, Commissioner of Taxation, 'Taxation…Current Issues and Future Directions', Speech to the Australian Institute of Company Directors, Perth, 1 May 2001, p.6.

20 Evidence, p.503. On the type of options under consideration, see Evidence, pp.35-36, 503-504 and ATO Submission No. 845, p.12.

CHAPTER 4

THE ATO, THE MARKET AND INVESTORS

4.1 Two central considerations in the inquiry are, first, the circumstances in which scheme participants made their decision to invest in schemes and claim tax deductions and, second, the ATO's role in influencing those circumstances. Both points go to two key questions: was it reasonable for participants to believe scheme deductions complied with the law? And, what part did the ATO play in influencing the market conditions in which participants made their investment and tax deduction decisions? This chapter examines these questions.

4.2 Before so doing, the chapter traces the history of the rise of the MMS market and the ATO's response to it. This is necessary for understanding the gap in timing from when participants invested in schemes, to when the ATO decided subsequently to disallow deductions already refunded to participants.

The growth of the MMS Market and the ATO response

4.3 One of the critical factors in the debate over MMS is the apparent time delay between the growth of the MMS market and the ATO's decision to crackdown on the schemes.

4.4 The ATO's account suggests that this delay stemmed primarily from the slow build-up of the market during the early 1990s until 1995-97 when the situation changed with a 'surge' in market growth.[1] The figures in table 3.1 show the rise in claimed deductions from 1994 to 1997.[2] Table 3.2 (page 22) provides a longer range view of the ebb and flow of deductions from 1987 to 1998.

4.5 In its submission to the Committee, the ATO pointed out that its field work included investigations of individual schemes during the early 1990s. The indication from the ATO is that these investigations neither identified any significant degree of risk to cause the ATO alarm, nor did they forewarn the ATO of any impending market expansion.

4.6 However, further investigation by the Committee and information provided by the ATO show that the ATO had investigated at least 14 schemes from 1987 to 1994 and a further 14 from 1995 to 1997. The ATO used Part IVA to disallow deductions in nine of the first 14 schemes investigated with the primary reason for disallowing those deductions being limited and non-recourse financing.

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1 ATO Submission No. 845, p.2. See also Evidence, pp.470-476.

2 Figures from ATO Supplementary Submission No. 845A, p.17.

Table 3.1: Growth in Claimed Deductions 1994 to 1997

SCHEME TYPE	CLAIM DEDUCTIONS ($) for the year ended:			
	30/6/94	**30/6/95**	**30/6/96**	**30/6/97**
Agricultural	53,766,455	91,187,651	102,018,371	274,843,122
Employee benefit	17,275,953	58,854,507	115,722,987	287,189,606
Films	63,281,555	90,437,623	117,485,838	222,425,834
Scientific research	25,000	-	188,514,640	296,030.995
Book publications	4,591,397	4,999,196	21,364,795	7,402,667
Franchise	13,082,722	24,124,044	76,653,443	243,223,709
Investment	7,086,767	7,672,520	6,851,609	13,014,937
Live theatre	11,148,999	4,669,112	23,675,713	-
Videos	-	-	-	20,023,034
TOTALS	170,258,848	281,944,653	652,287,396	1,364,153,904

4.7 The ATO also admitted that it was 'inconsistent', both in its approach to disallowing abusive features and in the level of penalties imposed. For example, the ATO conceded that '[p]enalties ranged from 50% to nil in relation to schemes that involved similar levels of mischief'.[3]

4.8 The ATO submission suggests that it was not until early 1996 that the ATO recognised, on the basis of growing numbers of tax instalment variations, that a potential compliance issue existed. In 1997 research coordinated by a national project team within the ATO arrived at the view that 'mass marketed schemes were a significant and growing risk to the revenue with deductions identified at that time growing from $182 million in the 1993-94 income year to $842 million in the 1996-97 income year'.[4] The ATO indicated that the leap in deductions reflected both a rise in the numbers of investors involved in schemes[5] and more aggressive tax gearing.[6]

4.9 However, the Committee notes, as is set out in Tables 3.1 and 3.2, that in percentage terms growth in these schemes was also significant at stages in the late 1980s and early 1990s, and that the ATO took action on some occasions but not on others.

4.10 The ATO also asserts that the market changed dramatically not only in *scale* but also in the *nature* of the schemes being promoted, a change which appears to have alarmed the ATO due to the potential for exponential growth in such arrangements:

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3 ATO Supplementary Submission No. 845B, Response to Hansard Page Question on Notice: E 472-3.

4 ATO Submission No. 845, p.2. As table 3.1 shows, the deductions for the 1996-97 income year were later revised at over $1.3 billion.

5 Evidence, p.484.

6 Evidence, p.470.

> What we saw happening in around 1995 and 1996 was a move away from types of activities that were more or less restricted by access to some sort of property to grow the tea-tree or whatever primary produce they were growing. What we saw in 1995-96 was a move away from those tangible activities to more intangible activities.
>
> We saw that with the Budplan scheme, which emerged out of a tea-tree plantation to be a supposed business carrying out research into the use of tea-tree oil. At about the same time that emerged, the franchise schemes that were prevalent in Western Australia also emerged. Those particular schemes were also not constrained by the need to have some form of agricultural property behind them. That combination of factors resulted in a surge in these activities in 1996 and 1997.[7]

4.11 As the ATO chronology of its actions at Appendix 3 shows, it was not until 1998 that the ATO moved decisively on a large scale to disallow deductions related to mass marketed arrangements. While it took steps in this direction in the latter half of 1997, 1998 saw major ATO initiatives to address the risk to the revenue these schemes posed and to recover deductions from scheme participants. Chief amongst the measures taken were the:

- withdrawal of previous tax instalment deduction variations (ie, 221D variations)
- issuing of position papers to a range of promoters
- over 10,000 letters sent to participants in over ten schemes
- several hundred refunds stopped in one scheme
- four major speeches (including the Commissioner's 'Beware the Magic Pudding' speech in June 1998 that is widely seen as signalling the start of the ATO campaign on mass marketed schemes)
- introduction of the Product Ruling System
- draft ruling on FBT and employee benefit arrangements issued.

4.12 Since 1998, the ATO has introduced two further significant measures. One is a set of guidelines for settlements related specifically to aggressive tax planning arrangements. The second is the key Taxation Ruling TR2000/08 which sets out the ATO's view on investment schemes.[8]

4.13 The time that elapsed from when mass marketed arrangements began and when the ATO moved against them had several important consequences. It appears that the MMS industry, despite some early ATO action in the late 80s and early 90s, operated and expanded largely unchecked for several years. During this period,

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7 Evidence, p.470.

8 TR2000/08 superseded the ATO's draft afforestation ruling TR97/D17 issued in October 1997.

investors entered into mass marketed arrangements, it seems to the Committee, without any clear warnings or signs from the ATO that these arrangements may not have been legitimate. For many investors, the refund of their initial deductions encouraged them to invest in subsequent schemes, a decision that ultimately served to increase their tax debt.[9] The time lag has also had the effect of magnifying the interest charge levied on the tax debts of participants.

4.14 The question the Committee examines here is whether ATO actions and inaction during the pre-1998 era contributed directly or indirectly to the proliferation of mass marketed arrangements and potentially misled or at least influenced 'the market' – scheme promoters, tax professionals and investors – into believing scheme deductions were legitimate. The Committee addresses these points in the next sections of this chapter.

Participant/taxpayer culpability – 'tax cheats' or 'unwitting victims'?

4.15 The Committee considers that, in this report, a key issue facing it is the question of the extent to which it is fair and reasonable for scheme participants to be bearing the tax burden currently imposed upon them. This question goes beyond the ATO's position at law and application of Part IVA measures and relates to what can be reasonably expected of a taxpayer under the self assessment system.

4.16 In addressing this point, the Committee focuses on first, the ATO's role during the rise of the MMS market and second, the conduct of scheme participants when they invested in the schemes.

4.17 In approaching both matters, the Committee notes that under the self assessment tax system the onus lies entirely with the taxpayer to ensure that their tax returns comply with the law. But it also notes the Commissioner's recent statement on the importance of the ATO providing taxpayers with the necessary information to ensure they can fulfil their obligations. He said:

> We cannot expect taxpayers to pay their taxes in a self assessment system if we do not provide them with the information to understand their obligations. We can maximise the opportunity for voluntary compliance by narrowing uncertainty. For taxpayers seeking advice from the Tax Office is often about certainty, confidence or comfort – removing the fear of getting it wrong.[10]

4.18 In the Committee' view, the ATO should be judged against, among other things, its own declared standards. Accordingly, the following section approaches the ATO's conduct from the point of whether it managed to provide certainty and adequate information for taxpayers involved in mass marketed arrangements.

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9 See, for example, Evidence, Perth, p.78.

10 Michael Carmody, 'The Integrity of the Private Binding Rulings System', Melbourne 15 November 2000, p.3.

The role of the ATO pre-1998

4.19 Based on the evidence to date, the ATO's approach towards mass marketed arrangements before it cracked down on the market appears to be one characterised mainly by limited action and sending mixed signals. In arriving at this view, the Committee notes five points in particular.

No clear ATO warning

4.20 First, there is little evidence that the ATO issued explicit advice to the community or market on whether mass marketed arrangements, with features such as limited and non-recourse financing, were acceptable or not. Although the ATO has pointed to some warning signals in the market, these were marked by their vagueness and ambiguity.

4.21 For example, the ATO referred to a public ruling (IT2195) issued in 1986 that indicated that the ATO 'did not rule out' the possibility of applying Part IVA anti-avoidance provisions in relation to non-recourse loans and round robin financing.[11] According to the ATO's Senior Tax Counsel, Mr Oliver:

> we were saying in relation to afforestation schemes that, *if part IVA does apply*—and we have said that consistently since 1986—then your deductions will be disallowed.[12] [emphasis added]

4.22 The Committee considers that a conditional statement of this nature appears at best vague, if not weak and confusing. It falls short of providing the sort of certainty required in the administration of a self assessment tax system – a point that the ATO's Mr Oliver appeared to concede before the Committee. In referring to IT2195, Mr Oliver stated:

> That was the public position that the commissioner had. You might have said—and we would undoubtedly agree—it would have been far nicer if the commissioner had said at that time in 1986, 'Just when do you think part IVA does apply? It is no good saying if it does; you have to tell us a bit more than that.'[13]

4.23 Recent information provided by the ATO indicates that it sent two further signals to the market place in the early 1990s. First, in June 1991 the Commissioner issued a press statement warning taxpayers about investing in tax shelters in primary production arrangements.[14] Apart from providing a general warning to taxpayers to check the full tax implications of such schemes, the statement did not mention the particular abusive features that taxpayers should steer clear of – namely round robin

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11 Evidence, p.479.

12 Evidence, p.481.

13 Evidence, p.481.

14 ATO Media Release, 'Tax Shelters – Why Some Umbrellas Sometimes Have Holes', 91/26, 2 June 1991.

funds flows and non-recourse and limited-recourse financing arrangements. It is debatable whether a statement of such generality would have adequately forewarned taxpayers in the years ahead of the tax risks associated with mass marketed schemes, particularly in relation to their financing methods.

4.24 A further problem with this 1991 press statement concerns the advice it provides to taxpayers. The Commissioner is quoted in the statement as saying:

> I would strongly recommend that in order to be assured of their tax position, investors obtain detailed and comprehensive advice on the full tax implications from promoters or their own advisers prior to committing funds.[15]

4.25 In hindsight, this advice seems rather misplaced. If the ATO's assessment is accepted, that scheme promoters are the driving force behind aggressive tax planning,[16] then the recommendation above could be seen as delivering investors into the arms of the very elements that perpetrated the mass marketed schemes tax crisis. As is discussed later in this chapter, several witnesses claim to have done due diligence tests on schemes before investing but did not discover anything untoward about them.

4.26 The second warning signal the ATO mentions was 'Pre-Ruling Consultative Document 9' (PCD 9) in relation to afforestation schemes issued in December 1995. This document was the forerunner of draft Ruling TR 97/D17 issued in October 1997. While the ATO is correct in saying PCD 9 flagged its concerns on the deductibility of fees in afforestation arrangements, the document does not appear as quite the clear cut warning that the ATO suggests. For one, it is questionable whether circulating what was little more than a discussion paper constitutes sending a strong 'signal', let alone a clear statement to the market of the ATO's position on schemes. Indeed, the document itself stated:

> The only purpose of Pre-Ruling Consultative Documents (PCDs) is to initiate discussion and consultation, and to obtain comments. PCDs are not statements of the views of the Australian Taxation Office…[17]

4.27 As with the Commissioner's 1991 press statement discussed above, PCD 9 also omitted any mention of round robin arrangements and only skirted around the issue of non- or limited-recourse financing arrangements. The circumscribed treatment of these financing techniques seems at odds with the ATO's later view of non/limited

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15 Ibid.

16 ATO Submission No. 845, p.13.

17 PCD 9, 'Afforestation Schemes – Deductibility of Fees and Capital Gains Tax Issues', 20 December 1995.

recourse financing as potentially abusive *per se*.[18] An internal ATO report noted this shortcoming in early 1996. This report stated:

> The PCD does not significantly address the limited recourse financing issue other than with respect to early termination of the loan and the application of section 82KL.[19]

4.28 In sum, the Committee is not convinced that any of these signals provided sufficient warning to taxpayers of the particular risks associated with mass marketed arrangements. IT2195 left the question of Part IVA's application hanging. Neither of the two 'signals' in the early 1990s made explicit mention of the ATO's concerns about non/limited-recourse finance and round robin funds arrangements. In view of the ATO's current emphasis on these financing arrangements as major abusive features of schemes, it seems odd that the ATO is now trying to point to these two statements as fair warning of its concerns. Although it may have been reasonable at the time for the ATO to omit mentioning these features while it was still determining its view on them, it cannot now claim that the market in general and taxpayers in particular should have been aware of its concerns about the technicalities of scheme financing.

4.29 The absence of any explicit warning on the financing arrangements of schemes is not a trivial factor. If the Commissioner's statement above is to be accepted, then there is a question about the legitimacy of holding taxpayers to account for decisions made in an environment where the ATO had not clearly indicated its view.

Action relative to risk

4.30 The adequacy of the signals discussed above is further thrown into doubt when the level of scheme deductions during the late 1980s and early 1990s is taken into account. As ATO figures in Table 3.2 reveal, deductions leaped from $13 million in 1987 to $113 million in 1988 – a 'surge'[20] in deductions that would seem to have warranted stronger ATO attention given its apparent misgivings about Part IVA at the time and the fact that it had taken audit action on some schemes.

4.31 As stated earlier, the ATO recently provided the Committee with information showing that as a result of investigations in the late 1980s it disallowed deductions for about 14 schemes.[21] While this shows that it was not inactive on the issue, it does raise the question why the ATO did not issue a tax ruling clarifying the relationship between Part IVA and these arrangements. Furthermore, while this evidence also

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18 For example, see TR2000/8, especially paragraphs 64-67.

19 See Attachment A, ATO Additional Information of 22 May 2001, p.7.

20 While the overall level of deductions in 1988 is overshadowed by the level in 1998, the relative rate of growth in deductions in 1987-88 (an almost ninefold increase) exceeds that in 1996-97 (less than double).

21 ATO Supplementary Submission No. 845B, Attachment 4.

raises questions about the response of promoters and tax practitioners to this ATO activity, the degree of inconsistency towards deductions and culpability penalties[22] would also have sent mixed signals to the market about the ATO's position.

4.32 Alternately, if the ATO was only reserving its position with IT2195, then the same question applies as to why it did not act sooner to clarify the issue in order to both provide certainty and close off a possible loop hole.

4.33 Even in 1994 – before the market 'surge' of 1996-97 – both the growth and level of deductions would appear to have demanded stronger ATO action: deductions *tripled* in 1993-94, from $54 million to $176 million, a rate of growth greater than that in 1996-97 (which was less than double). If the Commissioner saw reason to issue a press statement about schemes in 1991 when deductions were $7 million, why did he not make a similar public announcement in the face of this much greater threat to the revenue in 1994?

4.34 In the Committee's view, the ATO's muted response to the growing risk posed by mass marketed schemes casts doubt over its internal coordination of the information from field audits and taxpayer returns. The limited action taken and the absence of any warning on financing arrangements in response to dramatic increases in deductions in 1987-88 and 1993-94 in particular point to possible failings with ATO systems for risk identification and risk management.

Table 3.2: Increasing Scheme Deductions 1987-1998

YEAR	SCHEME DEDUCTIONS $M
1987	13
1988	113
1989	73
1990	2
1991	7
1992	54
1993	54
1994	176
1995	288
1996	666
1997	1095
1998	960

Source: ATO Supplementary Submission No. 845B, Attachment 1[23]

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22 ATO Supplementary Submission No. 845B, Response to Hansard Page Question on Notice: E 472-3.

Ambiguity over non-recourse financing

4.35 Third, adding to the air of uncertainty over Part IVA is evidence that the ATO had *ruled out* its application in some instances involving non-recourse financing. It is possible that promoters and participants interpreted the ATO's position on those cases as setting a general precedent. As Mr Leibler of Arnold Bloch Leibler stated:

> Notwithstanding the Commissioner's current stance in relation to non-recourse lending arrangements and Part IVA, the Tax Office has, in the past, given positive rulings where such arrangements, or similar arrangements, have existed. I refer to up front payments in relation to infrastructure bonds, film schemes and research and development syndicates. In other words, it could not be automatically assumed that the Commissioner would, at the relevant times, have determined that Part IVA was applicable merely because non-recourse arrangements were in place.[24]

4.36 A relevant case of the ambiguity surrounding Part IVA and non- or limited-recourse financing is provided by the Private Binding Rulings (PBRs) issued to a scheme known as Maincamp. The ATO issued favourable rulings on the scheme to four taxpayers in the knowledge that it involved limited-recourse financing.[25] Although the ATO subsequently claimed that the full details of the financing (mainly the scheme's round robin funds flow) were not disclosed when it made the rulings (which therefore invalidates the rulings), this example does suggest that the position on limited- or non-recourse financing was not straight forward.

ATO issuing of Private Binding Rulings

4.37 Although only a small number of PBRs were issued, it appears that promoters and designers exploited them to market schemes *en masse*. Common practice included using a PBR to market later versions of a scheme or schemes with comparable features. While promoters misused PBRs in this fashion,[26] it seems that many scheme participants relied upon them as a seal of ATO approval or saw them as representing the ATO line on schemes in general.

4.38 The ATO has attempted to counter this view by pointing out that only a handful PBRs were issued, four of which related solely to one scheme and, more importantly, two of those did not rule out the application of Part IVA.[27] The ATO asserts that investors and the market should have taken heed of the 'heavily qualified'

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23 It should be noted that the annual scheme deductions in Table 3.2 do not include deductions for EBAs. This accounts for the difference in yearly figures between tables 3.2 and 3.1 (the latter includes EBA deductions).

24 Supplementary Submission No. 22A, p.3.

25 ATO Supplementary Submission No. 845B, Answer to Hansard Page Question on Notice E478.

26 A PBR only covers the individual who applied for it from the ATO; that is, PBRs cannot be relied upon or interpreted by others as indicating ATO approval for a particular scheme's tax benefits. For an explanation of PBRs, see 'The Integrity of the Private Binding Rulings System'.

27 Evidence, pp.478-479.

nature of the latter two PBRs, particularly when it is recognised that some of the tax opinions included in scheme prospectuses also cautioned investors in regard to Part IVA.[28]

4.39 However, the Committee is unconvinced that the matter is as straightforward as the ATO suggests. For one thing, the four PBRs issued to the one scheme were inconsistent, suggesting that the ATO itself was experiencing administrative problems in coming to grips with mass marketed arrangements. The Committee notes the Ombudsman's criticism that the inconsistencies and other defects evident in the case of these PBRs 'can undermine public confidence in the tax system'.[29] In particular, the Committee finds it hard to reconcile the ATO's responsibility for promoting certainty under self assessment and the failure to address adequately the applicability of Part IVA in the PBRs issued.

4.40 The Committee also notes that the ATO experienced similar problems during the late 1980s with defective advance opinions issued for Financing Unit Trusts,[30] a point that suggests the ATO had failed to learn from its earlier mistakes in this instance.

4.41 More importantly, the Committee questions whether it is reasonable or realistic to expect that the bulk of investors would have been sufficiently versed in the complex nature and arcane language of PBRs and tax opinions to pick up these purported warnings, especially when many advisers were endorsing the schemes to their clients.

4.42 If the ATO expected the market and investors in particular to see the warning signals in these PBRs, then it also seems reasonable to ask why the ATO did not see requests for these PBRs as a warning sign of a looming aggressive tax planning threat. Rather than leaving the question of the applicability of Part IVA in relation to schemes and non-recourse finance in limbo, the request for PBRs should have provided an opportunity for the ATO to test and resolve the matter.

4.43 However, according to the Ombudsman, the ATO staff responsible for these PBRs addressed neither the application of the anti-avoidance provisions to the scheme's financing arrangements, nor the scheme's 'broader significance because of the potential number of participants in the arrangement'.[31] These omissions may have been partly symptomatic of administrative weaknesses in PBR system at the time.[32]

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28 Evidence, pp.485-486.

29 Commonwealth Ombudsman, *The ATO and Maincamp*, January 2001, p.14.

30 See the discussion of Financing Unit Trusts in the later section in this chapter on 'Prospective versus Retrospective Action'.

31 Commonwealth Ombudsman, *The ATO and Maincamp*, January 2001, p.14.

32 See the report by Mr Tom Sherman AO, *Report of an Internal Review of the Systems and Procedures relating to Private Binding Rulings and Advance Opinions in the Australian Taxation Office*, 16 November 2000. As the report notes, the Commissioner of Taxation authorised the review following 'media criticism of aspects of the system' (p.1).

But it could also indicate that the prolonged ambivalence surrounding Part IVA and scheme arrangements meant that there was no internal ATO view that might have guided those officers dealing with the PBR applications in this case.

Continued refunding of deductions after the 1996 alert

4.44 The Committee also finds it puzzling that the ATO continued to process and pay deductions *after* the alert was raised in 1996 about the dramatic rise in deductions and while an ATO taskforce was simultaneously investigating the potential risk the schemes posed. On the face of it, this approach appears somewhat contradictory.

4.45 A more prudent approach to a potential risk of this magnitude (claimed deductions had already at this point more than *doubled* between 1995 and 1996)[33] might have been to put on hold the refunding of scheme-related deductions until the taskforce had completed its work and reported its findings. Such an approach would have avoided the risk of acting too late or too precipitately (ie, sending signals that might potentially distort the market before the ATO has reached a concluded view on a matter).[34]

ASIC warnings

4.46 The ATO has also claimed that the Australian Securities and Investments Commission (ASIC) issued public cautions to investors on the risks associated with mass marketed schemes. Mr Peter Smith, Assistant Commissioner (Small Business) of the ATO stated:

> There were messages out there at the time being put out by ASIC—the 'too good to be true' type message, when you look at these things where you are getting a $30,000 or $40,000 tax deduction for a $10,000 cash outlay.[35]

4.47 However, ASIC's[36] warnings to the market pre-1998 did *not* convey *tax* cautions as Mr Smith suggested. While ASIC did issue notices during 1996 and 1997 concerning 'shonky tax-driven schemes', these focused on the unsound *commercial* nature of the investment rather than their tax features.[37] In other words, ASIC's focus was the reverse of that of the ATO. As noted in chapter 2, the ATO's concern addresses the taxation effect of the financing structure of mass marketed

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33 Claimed deductions went from $281,944,653 for the 1995-96 financial year to $652,287,396 for the 1996-97 financial year. See ATO Supplementary Submission No. 845A, p.17.

34 See the statement by ATO Assistant Commissioner, Peter Smith, on constraints the ATO faces in issuing early warnings to the market place: '[I]f we make our call too early we can leave ourselves subject to commercial damages if we get it wrong', Evidence, p.485.

35 Evidence, p.485.

36 ASIC was called the Australian Securities Commission (ASC) at that time.

37 See, for example, 'ASC puts shonky tax scheme promoters on notice', 21 April 1997 (Media Release ASC 97/00); and 'ASC declares war against shonky tax-driven schemes', 20 May 1996 (Media Release ASC 96/85).

arrangements, whereas ASIC's concerns addressed the business or commercial structure of such arrangements.

4.48 The Committee considers that the ATO is overstating the extent to which ASIC's public statements could have warned investors about the *tax risks* associated with schemes. As the next section about scheme participants shows, many investors were cautious about investing in various schemes and did take steps to verify the business merits and commercial viability of what was on offer. But it is mistaken to claim that participants had been cautioned about the tax side of these investments, particularly insofar as ASIC's role is concerned.

Conclusion

4.49 The Committee considers that the key points to emerge from the above discussion are not whether the ATO was inactive in relation to mass marketed schemes in the late 1980s, early 1990s and pre-1998 period. It is clear that the ATO was active to a degree. The point is, however, whether the actions taken by the ATO were appropriate and adequate relative to the level of risk emerging at the time, and whether the steps taken were sufficient to provide certainty for taxpayers.

4.50 The Committee is not convinced, at this stage, that the measures adopted by the ATO went far enough in addressing its own growing concerns about the abusive features appearing in some schemes. For instance, it is not apparent to the Committee that the ATO's public statements made clear its misgivings about the financing arrangements used in schemes for which it had, on the basis of field audits, disallowed deductions. The combination of the findings from these audits and the rapid growth in deductions at several points prior to the 1997 'surge' suggests that firmer steps should have been taken.

4.51 The Committee intends to explore these questions in detail in its final report.

Did investors act reasonably?

4.52 In examining the evidence it strikes the Committee that several factors worked together to create a climate in which many participants had apparently sound reasons for believing that the deductions were permissible. As can be seen from the previous section, the market environment pre-1998 did not have the benefit of a clear ATO position on mass marketed arrangements. To the extent that the ATO had issued advice to the market, this was in the form of PBRs that at the very least conveyed a sense of approval for the schemes (qualifications and omissions on Part IVA notwithstanding), albeit for only a handful of investors in relation to two schemes.[38]

4.53 Many participants invested on the basis of advice from financial advisers, including certified financial planners, accountants and lawyers. Understandably, many placed great store on the fact that leading accounting and legal firms, including QCs,

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38 A point also noted by Mr Leibler, Supplementary Submission No. 22A, p.4.

had provided tax opinions supporting the benefits advertised as within the law. As the Commissioner himself has stated: 'Many investors relied on the existence of glossy prospectuses and on the advice of financial and other investors'.[39]

4.54 Many participants, nonetheless, also claim that they took precautionary steps to check the bona fides of the schemes in which they invested. In so doing, most believed that they had done all that was reasonably possible and could be expected of them under the self assessment system – in other words, they believed that they had acted with *due diligence* before investing in the schemes. In the view of one witness:

> Let us say that I go to a registered tax agent and he introduces me to a scheme which has a tax opinion from Robert O'Connor QC and endorsement from Norton and Smailes, who are solicitors. I then also ring the franchise company and speak to them. A friend of mine rings the Australian Securities and Investments Commission. She also rings the ATO. Is that due diligence? I believe it is. In fact, I believe that is over and above due diligence. I think that shows I have been extremely careful with my investment.[40]

4.55 As this evidence indicates, in some instances participants sought advice from ATO offices on the legitimacy of particular schemes before they committed to investing in them.[41] While it does not appear that ATO offices issued advice approving the tax benefits of schemes, some participants were reassured that if they performed due diligence tests they would not face penalties if deductions were later disallowed. In the case of one witness:

> Initially, when I invested in Satcom, I rang the ATO to discuss what the implications were. I discussed the scheme at length with a tax officer. The ATO told me that they were not in the business of saying whether something was a legitimate deduction or not and it was up to me to seek a legal opinion. They explained the self-assessment and suggested that I check the viability of the scheme, legal opinions, accountants' opinions, and the legal qualifications of the person giving the opinion. They also explained that if I did these things and went through a CPA, this would be due diligence and if, at a later date, it was not found to be a legitimate deduction, there would be no penalty, but the deduction would be disallowed.
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> Subsequently, I checked the qualifications of the legal opinion from Robert O'Connor, which was supplied to me from Satcom. I called the Law Society shopfront lawyer for advice. I called the University of Western Australia legal lecturing department, and they said that Robert O'Connor QC was an eminent QC and his opinion was one of the highest you could obtain. There was no such thing as product rulings at this time. I asked my accountant for

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39 ATO Supplementary Submission No. 845B, p.1.

40 Evidence, p.120.

41 Evidence, p.211.

> his opinion—he is a highly respected accountant in South Perth—and he told me that it was a good investment.[42]

4.56 In the event, despite following the ATO's original advice, this witness had both his deductions disallowed and penalty tax and interest charges imposed as well. In this particular case, the Committee considers that prima facie it is unfair for tax office staff to say one thing and then for the ATO to renege on that original advice. As the witness concerned stated:

> I thought that by ringing the ATO and asking for their opinion I was fairly safe, and I took their advice on face value.[43]

4.57 In considering the circumstances in which taxpayers invested in mass marketed schemes, the Committee believes that the influence on investor perceptions of PBRs used to market schemes needs to be recognised. Insofar as PBRs were used as marketing tools to encourage participants to believe they represented a general ATO position, participants were poorly served by both promoters and advisers, particularly tax practitioners who would have known that this was an improper use of PBRs and that no certainty existed for anyone except the PBR applicant. This matter will be canvassed further in the Committee's main report.

4.58 However, the Committee considers that a reasonable person unaware of the PBR restrictions or their qualified nature could be forgiven for thinking that they amounted to ATO acceptance of the deductions or that they represented a general ATO view, particularly when the tide of legal and accounting opinion supporting the schemes is also taken into account (see below). The fact that the ATO did not take prompt action to review and withdraw these PBRs also lulled participants into investing in later schemes. Would it not have been reasonable for investors to believe that if the ATO had concerns about an earlier scheme then it would have indicated so already and moved to disallow deductions or withdraw the PBRs? In this regard, it is salutary to note the ATO's admission to the Committee that in its own view many of the schemes appeared acceptable on the surface:

> It would be the case in not just one but in very many arrangements that, if we have a look at the arrangement on paper, in the glossy prospectus that is used to sell the scheme it may at face value look reasonable.[44]

4.59 The Committee considers that it is untenable for the ATO to claim, in self-defence of its inaction and delays, that in its eyes schemes appeared 'reasonable' on the surface, but to insist that scheme participants failed to take due care in investing in schemes and claiming what in many cases appeared to be 'reasonable' tax deductions. To put it another way, the ATO cannot seek to use one standard to justify its own

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42 Evidence, Perth, p.119.

43 Evidence, Perth, p.121.

44 Evidence, p.485.

behaviour and then disregard that standard when making assessments of taxpayer behaviour.

Conclusions

4.60 The Committee considers that the ATO needs to give more consideration to the significant evidence that participants entered schemes on the basis that the arrangements and associated deductions were allowable and that the ATO would not later move to disallow them. Most appear to have had reasonable grounds for believing the schemes to be above board. Many took extra steps to reassure themselves of the soundness of their investment – in the Commissioner's words, to 'remove the fear of getting it wrong'.

4.61 The Committee also considers that the absence of any clear warning or sign of disapproval – as has been the ATO's recent practice – of the schemes would have also been significant for participants. Combined with the existence of Private Binding Rulings for some participants and endorsement from legal and accounting practitioners, this would have led many to believe that their investments were inside the law.

4.62 A taxpayer who took all responsible steps to act within the law, who took advice on which they were entitled to rely, who did normal due diligence, who took professional advice from professional accountants or lawyers, who relied on tax rulings (even if draft), who relied on professional tax and financial planners, and who has a previously good tax record, can be justified in arguing that they acted in good faith.

4.63 In light of the above, the Committee believes it may be unreasonable for the ATO to maintain that the dominant purpose of all participants was to seek a tax advantage. Such a view simplifies the motives of many participants and overlooks the mitigating circumstances affecting many of them. As such, the imposition of tax penalties under Part IVA on those scheme participants who largely appear to have been caught unwittingly in mass marketed arrangements, and who exercised reasonable care or due diligence, raises serious questions about the equitable application of the tax law.

Prospective versus retrospective action

4.64 The Committee raised the matter of whether the ATO's actions over mass marketed arrangements amounted to a divergence from the general ATO principle of not applying policy changes retrospectively, when such changes represent a departure from a previous ATO view or practice. In previous cases where the ATO has had a well established view or position on the law's application, any change to its position has been introduced on a prospective as opposed to retrospective basis. For instance, the Committee notes three examples where the ATO adopted prospectively new positions on matters at variance to its earlier treatment of them:

- Utilisation of prior year company losses where shares are held by trustees or discretionary trusts;
- Taxation of retirement village owner; and
- Financing unit trusts.[45]

4.65 In considering these examples, the Committee makes particular note of the ATO's explanation for applying a new treatment of financing unit trusts prospectively from the date that new treatment came into effect. The relevant Taxation Ruling, IT2512, states:

> The view contained in this ruling as to how the law operates in relation to financing unit trusts is at variance with advance opinions that this office gave in a small number of particular cases. …it appears that the advance opinions given in those cases were disseminated in the financial/building industries and among their taxation advisers as evidencing a general Taxation Office approach. *Although not authorised to be used in that way the result was that some parties entered into these arrangements believing that they generally had a form of official clearance*. [emphasis added][46]

4.66 On the face of it, it seems to the Committee that the circumstances cited in IT2512 are similar to those that faced many scheme participants, particularly in cases where PBRs were used in the marketing of particular schemes.

4.67 When the Committee raised the matter of the ATO ruling prospectively, the ATO confirmed that its policy is that a change in its view will only have prospective effect. According to Mr O'Neill:

> … in circumstances in which the ATO has led the community, or a particular section of the community involved in financing unit trusts, into the error that they thought that they were safe in respect of those investments, our policy has always been that a change of ATO view on the tax implications of that arrangements should be prospective.[47]

4.68 However, the ATO disagreed that it had changed its view on mass marketed schemes and thus disagreed that its current rulings should only be applied prospectively.[48] It rejected the analogy between mass marketed arrangements and the three cases cited above, arguing that there were two important differences between them.

4.69 First, the ATO stated that whereas in relation to afforestation schemes its public position was that deductions would not be allowable if Part IVA applied, it had

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45 See the attachment to Supplementary Submission No. 22A, pp.5-6.

46 Supplementary Submission No. 22A, p.6.

47 Evidence, p.482.

48 Evidence, pp.477-483.

made no comparable statement on financing unit trusts (FUT).[49] Thus, according to the ATO, a clear signal of its position was present in the case of afforestation schemes which was lacking in the case of FUTs.

4.70 Second, the ATO noted that the prospective effect of the ruling for FUT was conditional on the arrangements being implemented in line with the information provided to the ATO on which it based its advance opinions.[50] In contrast, the ATO claimed that in the case of PBRs for mass marketed arrangements, the promoters neither provided all the facts to the ATO nor did they implement the arrangements according to the facts presented.[51] For that reason, the ATO asserted that even the schemes that had been approved in principle by the PBRs were not allowable in fact.

4.71 As has already been discussed, the claim that public ruling IT2195 which stated that 'if Part IVA does apply' then deductions claimed in relation to afforestation schemes would be disallowed hardly sends an unambiguous signal to the market about afforestation schemes, let alone about any other kind of investment.[52] Further, the implication that the market was not misled by PBRs which were issued on the basis of inadequate information and hence which were not legitimate seems nonsensical. How were individual investors in a position to know whether a particular PBR had been obtained from the ATO, as it were, under false pretences? Aside from the fact that it was the existence of the PBR itself which misled investors, it also raises questions about checks and balances in the system.

4.72 The Committee considers that the question of whether the ATO should be acting retrospectively or prospectively in the case of mass marketed schemes is a complex matter, warranting closer examination. At this stage, however, the Committee has grave concerns about the ATO's justification for the retrospective application of its current view. This matter is at the heart of taxpayer complaints about how the ATO is treating them. It is therefore vital that the ATO and the Courts (if it is a question that they are addressing), and as far as possible the Committee, try to determine the extent to which retrospective action is warranted and in what circumstances.

Drawing A Line in the Sand

4.73 A common view put to the Committee is that the ATO should, in the interests of both fairness and good administration, declare an amnesty on participants who invested in schemes before the ATO signalled its intentions to disallow deductions. Based on the large numbers of taxpayers caught unwittingly in mass marketed

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49 Evidence, p.481.

50 IT2512 states: 'this Ruling will not disturb any prior advice given by this office as to the tax implications of a particular case where the arrangement is carried into effect on the factual basis on which the advice was formulated'. Supplementary Submission No. 22A, p.7.

51 Evidence, p.478.

52 See Evidence, p.481.

arrangements and the questions surrounding the ATO's administration of the matter, it is suggested that the ATO consider foregoing and remitting penalty tax and interest charges and only seek to recoup the primary tax involved with the original claimed deductions. In short, the recommendation is that the ATO 'draw a line in the sand' and move forward.

4.74 The ATO, however, told the Committee that it rejected that proposition on the grounds that: 'That sort of approach creates an expectation that we will do that again next time, and I think that is itself a driver of tax avoidance'.[53] The point was elaborated by Mr Michael O'Neill, Acting First Assistant Commissioner, ATO, who said:

> It seems to me a balancing question between the interests of those who have done the right thing throughout the period of time and those who may have taken advantage of a glitch in the law, a misunderstanding by the tax office about how the law applies. If we said that any new announcement of policy would have only prospective effect, that would have a very deleterious effect on the confidence in the system because any taxpayer who had always been doing the right thing would thereby suffer disadvantage and it would, in fact, encourage people to always be seeking the lowest common denominator.[54]

4.75 The Committee considers that there are some legitimate criticisms of this kind of argument. The first relates to the question of equity between taxpayers who were involved in the schemes and those who were not. The Committee acknowledges that were a 'line in the sand' to be drawn, taxpayers who have had no involvement in mass marketed schemes would bear a cost that they otherwise would not, just in virtue of the fact that the prospective application of the ATO's ruling would involve a cost to the revenue.

4.76 However, the Committee is not convinced that the cost borne by non-involved taxpayers is sufficient to offset the very great costs that must be borne by those involved unwittingly in allegedly abusive schemes if the ruling applies retrospectively. Moreover, the sheer number of those involved in these schemes and the evidence of their general unwittingness of any wrongdoing indicates that, to some extent, all taxpayers are potentially vulnerable to making serious mistakes under the self-assessment system. In that sense, it is at least arguable that all taxpayers are served by a taxation office that is prepared to exercise its discretionary powers to the full extent possible in such situations.

4.77 The second criticism relates to the issue of the integrity of the self-assessment system itself. The ATO's concern is that if those who market and engage in aggressive tax planning are allowed simply to 'get away with it' whenever there is no definitive ATO ruling on the legitimacy of individual schemes, then it is likely that more and

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53 Evidence, pp.505-506.

54 Evidence, p.480.

more inventive tax avoidance schemes will be devised and flourish. The long term risk to the revenue is then very great.

4.78 While noting the force of this argument, the Committee considers that it overlooks several important factors that would combine to contain the risk posed by future attempts to engage in aggressive tax planning, particularly on a scale comparable to the case of mass marketed arrangements. First, the introduction of the Product Ruling system is widely considered to have been a positive development in that it provides both the ATO and the market with a mechanism for enhancing certainty about the tax implications of arrangements.[55] The view put to the Committee in the evidence is that the presence of Product Rulings has made it extremely difficult for promoters to market schemes unless the scheme has such a ruling. As the ATO stated:

> The introduction of the Product Rulings system … has forced most promoters of mass marketed investments to come to the ATO before marketing investments.[56]

4.79 With appropriate levels of investor education and vigilant field audits of issued rulings, the Committee considers that investors are less likely to be misled into aggressive schemes *on a large scale* as they were in the past. This is not to say that the Product Ruling system cannot be improved. While it has clearly helped clean up the market, the Committee considers that more can be done to strengthen the role of Product Rulings. The Committee intends to discuss this matter in its final report.

4.80 The second factor constraining the potential outbreak of large scale aggressive tax planning is the expected sanctions being developed for aggressive promoters. Currently the absence of effective sanctions on aggressive promoters is a major loophole in the system. The ATO considers that 'more immediate prospects for financial detriment to promoters and marketers is the single most important lever in putting a check on aggressive tax planning'.[57]

4.81 The Commissioner indicated that the ATO expected to have advice to the government about promoter sanctions by the middle of May this year.[58] The range of measures under consideration include measures adopted or being developed in the United States and Canada to penalise promoters and others developing and marketing schemes; splitting penalties between promoters and participants; and penalising promoters for implementing schemes in a manner not according to the facts disclosed to the ATO.[59]

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55 ATO Submission No. 845, p.4.

56 ATO Submission No. 845, p.13.

57 ATO Submission No. 845, p.13.

58 Evidence, p.503.

59 Evidence, pp.503-504 and ATO Submission No. 845, p.12.

4.82 The Committee notes that this matter was discussed in its previous inquiry into the operations of the ATO. At that time also the ATO indicated that it was developing measures to deal with promoters. The Committee is concerned that, despite its recommendations on this matter in its March 2000 report, no concrete measures have yet been announced.[60]

4.83 Third, the ATO claims that as a result of its recent experience with aggressive tax planning the ATO has moved to a more proactive footing in monitoring the market and detecting compliance risks. In particular, the ATO has enhanced its strategic intelligence capabilities, both internally and with the market. This drive to develop the ability to respond in 'real time'[61] to market trends is crucial if the ATO is to be in a position to pre-empt risks to the revenue before they get out of hand.

4.84 The Committee also considers that the experience of the mass marketed arrangements affair should provide lessons not only to the ATO but also the market, the tax industry and taxpayers. It considers that the personal trauma many scheme participants have experienced as a result of the ATO's actions will have provided more than enough 'downside' to ensure that they will exercise the utmost caution in approaching investment schemes in the future. Similarly, the ATO's actions will have concentrated the minds of tax practitioners and financial advisers on the importance, when advising clients, of seeking certainty about the ATO's view on the application of the law. While stronger measures and penalties for promoters are still in the wings, the Commissioner's frequent public statements signalling the ATO's intention to attack aggressive tax planning has put the more extreme promoters on notice that they can no longer take the ATO and investors for granted. There are some reports that aggressive tax planning has declined as a result.[62]

4.85 In sum, the Committee considers that, given the combination of checks now present and envisaged, schemes on the scale witnessed with mass marketed arrangements prior to 1998 could not arise again. For that reason, the Committee considers that a partial or full amnesty on penalties and interest for appropriate cases does not set a precedent which will be able to be exploited by aggressive tax planners in the future. Taxpayers who can be shown to have acted in good faith – as outlined above in paragraph 4.62 – would be likely candidates for a partial or full amnesty. That is to say, the Committee is not proposing a blanket amnesty but rather one which takes into account the many taxpayers who believed they were acting on sound advice and within the law. An amnesty would obviously not extend to those participants who have knowingly invested in blatantly abusive schemes or who have a history of persistent tax avoidance. As difficult as it always is, there is a need to ensure that outcomes are as fair and just as possible.

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60 See Senate Economics References Committee, *Inquiry into the Operation of the Australian Taxation Office*, March 2000, p.xii.

61 Evidence, p.485.

62 Evidence, p.139.

4.86 The Committee will monitor the ATO's approach to this issue and may consider making recommendations in its final report.

CHAPTER 5

CURRENT ATO HANDLING OF MMS: PART IVA, SETTLEMENTS AND DEBT COLLECTION

5.1 When the Committee reported on mass marketed schemes in March 2000 it believed that the ATO had moderated its original hardline stance on participant culpability and was moving to take individual circumstances, among other things, more into account. The Commissioner had indicated that the ATO had reviewed its approach to handling the MMS issue and learnt a number of lessons.[1]

5.2 The Committee's view at the time was strongly influenced by the ATO's development of a draft code of settlement guidelines specifically for mass marketed schemes. The Committee saw these guidelines as an important sign that the ATO was willing to address participants according to their circumstances and to make concessions.[2]

5.3 During this inquiry, the Committee has received considerable evidence to cause it to reconsider its earlier impression of a shift in the ATO's handling of the matter. While the Committee acknowledges that the ATO has shown flexibility in some cases by way of entering into settlement negotiations,[3] it remains concerned about the ATO's approach towards individual circumstances and advising taxpayers of the settlement provisions, debt recovery policy and hardship relief measures.

5.4 These are operational matters which will be discussed in more detail in the following sections. Before turning to these issues, however, the Committee addresses the question of the relationship between consideration of individual circumstances and the application of the Part IVA provisions. There is evidence of considerable confusion among scheme participants about this relationship.

Individual circumstances and application of Part IVA

5.5 The Taxpayers' Charter commits the ATO to treating taxpayers fairly and reasonably under the law, a commitment that implies that individual circumstances are recognised and taken into account. Likewise, Part IVA of the Income Tax Act requires the Commissioner to make determinations on an individual basis. While the requirement to address taxpayers' circumstances appears unambiguous, its implementation in practice is not straightforward. In particular, the question of what kind of individual circumstances are relevant to the determination of the application of Part IVA provisions needs to be clarified.

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1 Senate Economics References Committee, *Inquiry into the Operation of the Australian Taxation Office*, pp.37-38.

2 *Inquiry into the Operation of the Australian Taxation Office*, pp.39-40.

3 ATO Supplementary Submission No. 845A, p.19.

5.6 As outlined earlier, whether or not Part IVA provisions apply to particular mass marketed schemes depends upon features of the schemes themselves. These features include matters such as the financing arrangements, the involvement of participants in the business, the size of up-front management fees relative to the scale of investment in the proposed activity, and so on.[4] The ATO advised the Committee that determining whether Part IVA provisions apply is 'an objective test'[5] and involves a judgement about the extent to which the presence and combination of various features of a particular arrangement work such that the 'objective dominant purpose'[6] of the scheme is deemed to be that of tax avoidance. What that means is that whether or not individuals who participated in certain schemes were *subjectively* motivated by the desire to avoid paying tax is basically irrelevant to the application of Part IVA provisions to them.

5.7 In other words, the circumstances of individual motivation are not the kind of individual circumstance to which the ATO must attend in its treatment of taxpayers. Rather, the individual circumstances that would make a difference to the application of Part IVA provisions would be things such as financial arrangements in which the investor really did bear the risk of the investment.

5.8 Mr Michael O'Neill, Acting First Assistant Commissioner, ATO, explained:

> The way Part IVA works is that it sets out these eight factors … and it calls for the determination of an objective dominant purpose. In a sense, the person's subjective intention is not the key trigger for the application of Part IVA. So while individual facts are important … there is very little in these standardised mass marketed schemes. It is very rarely the case that there is any exception to the scheme – very rare indeed.[7]

5.9 In a similar vein, Mr Peter Smith, Assistant Commissioner, Small Business, ATO, said:

> Generally, the individual circumstances of the taxpayers will not affect the conclusions that Part IVA applies. There might be some instances, as I mentioned before, of where taxpayers put their own money in rather than use the round robin non-recourse or whatever financing technique was used to inflate the deductions. But having come to a view that Part IVA does apply, the statute imposes the penalty at 50 per cent.[8]

5.10 In the light of this explanation of the rules governing the application of Part IVA provisions to individuals, two kinds of question arise. The first concerns the

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4 See Chapters 2 and 3.

5 Evidence, p.493.

6 Evidence, p.497.

7 Evidence, p.497.

8 Evidence, p.493.

policy issue of whether the subjective motivations of individuals *should* be deemed irrelevant to a Part IVA determination.

5.11 This is a matter which the Committee intends to take up in its final report, and which cannot be fully canvassed here. The basic issue, however, turns on the question of the point at which a taxpayer's due diligence should enter as a consideration that mitigates liability under Part IVA. At present, a taxpayer can seek advice in good faith from financial professionals, tax experts, and so on about the tax propriety of an investment scheme. If the advice leads that individual into actions which are subsequently deemed by the ATO to fall foul of the Part IVA provisions, the taxpayer's 'due diligence' has no effect upon the application of those provisions. It may affect the amount of the penalty imposed, but it cannot protect the taxpayer from the initial determination. In this, the taxpayer's situation contrasts unfavourably with that of a company director under Corporations Law, whose liability for 'failure' is wholly waived by considerations of due diligence. The question arises as to whether this feature of the current arrangements imposes an undue burden of risk upon the individual taxpayer.

5.12 The second kind of question that arises concerns the ATO's application of the Part IVA provisions to particular cases. The following two matters have been raised under this heading:

- the ATO's failure to communicate the distinction between individual circumstances that are relevant and those that are irrelevant; and
- the ATO's apparent failure to take full account of *relevant* individual circumstances.

Failure to communicate the distinction

5.13 Evidence of the ATO's failure to communicate the distinction between individual circumstances that are relevant and those that are irrelevant is discussed in the Ombudsman's report of the ATO's handling of the Maincamp scheme.

5.14 The Ombudsman noted that the ATO invited scheme participants 'to provide information about their individual circumstances which would help ensure the ATO resolved their case in a fair way'.[9] Many Maincamp participants took up this invitation, but then found themselves issued with assessments 'which did not appear to take into account the information they had provided'.[10] According to the ATO, the features of the Maincamp arrangement relevant to the Part IVA determination were common to all participants and, as such, only participants who did not use the limited recourse loan facility would have been treated differently.[11]

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9 Commonwealth Ombudsman, *The ATO and Maincamp*, January 2001, p.19.

10 Commonwealth Ombudsman, *The ATO and Maincamp*, January 2001, p.19.

11 Commonwealth Ombudsman, *The ATO and Maincamp*, January 2001, p.19.

5.15 While the Ombudsman accepted this explanation for the common treatment of participants, it criticised the ATO for its failure to inform individuals of the reasons that additional personal information was unlikely to have changed its view of the application of Part IVA. The Ombudsman also stated:

> It is the Ombudsman's opinion that, irrespective of the numbers of participants involved, the principles of fairness and accountability remain paramount. This includes requiring the ATO to explain fully the basis of its decisions. This lack of explanation to the individual participants, in the Ombudsman's opinion, amounts to a breach of the Taxpayers' Charter.[12]

Failure to take full account of relevant circumstances

5.16 Many witnesses to the inquiry, including participants and their tax advisers, have complained that their efforts to have individual circumstances addressed have been met with standardised pro forma ATO correspondence that glosses over or simply ignores personal factors. This style of treatment indicates a process-driven 'broad brush' approach to dealing with scheme participants – an approach that the ATO claims to have moved away from in recent years because of its inherent inability to take individual factors into account.

5.17 As a sign of the inconsistencies that a blanket approach to schemes and participants can introduce, the Committee notes the recent case of a vineyard scheme in which all participants received the same ATO notice to disallow deductions, despite some participants having not availed themselves of the limited recourse loan facility.[13]

5.18 The Committee also heard of a further situation where the ATO disallowed deductions for a scheme on the grounds that it involved non-recourse financing, although the scheme appears structured on the basis of full recourse financing.[14] The Committee considers that these examples of indiscriminate treatment probably stem from a tendency to tar most schemes with the same brush.

5.19 The Committee finds it hard to reconcile, on the face of it, the claim that the ATO 'always' considers individual circumstances with the evidence presented to the inquiry. It seems to the Committee that the ATO's overall handling of many scheme participants is more influenced by the view that variations are 'relatively minor' across schemes and participants than the requirement to treat taxpayers on an individual basis. This view tends towards prejudging scheme participants and appears to have introduced a bias in the ATO's approach that marginalises individual circumstances.

5.20 In view of the tax burden participants face and the mitigating circumstances in which many invested unwittingly in schemes, the Committee considers that it is

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12 Commonwealth Ombudsman, *The ATO and Maincamp*, January 2001, p.19.

13 Submission No. 864 and Evidence, pp.139-141.

14 Evidence, p.448.

incumbent upon the ATO to adapt its operating procedures to address individual circumstances in a manner consistent with the Taxpayers' Charter. This is necessary for the ATO to meet *its* obligations under the Charter and the Income Tax Assessment Act. As the last two sections of this chapter show, avoiding the tendency to broad brush taxpayers is also important to ensure the ATO adheres to its own settlement guidelines and provisions relating to debt recovery and hardship relief.

Reducing interest for 'some investors'

5.21 On 26 April 2001, the ATO announced that it intended to reduce the interest on tax debts for 'some mass marketed "tax effective" schemes debts' to assist some taxpayers caught up in these arrangements.[15] It foreshadowed reducing the level of interest to an amount that more closely approximates the 'time value of money', a reduction that could see the level go from the current 13.86 per cent to 5.86 per cent. At the time of writing this represented the most recent development in ATO treatment of scheme participants. In the Committee's view it reflects a shift in the right direction towards taking the individual circumstances of taxpayers more into account.

5.22 In announcing the measure, the ATO indicated in general terms the profile of scheme participants likely to be considered for a reduction in interest. Such participants would, in the ATO's view, 'not be categorised as typical scheme investors' but rather be seen as 'unwitting captives of aggressive marketing techniques and what we consider bad advice, often from those who stood to profit from gaining their participation'. The ATO pointed to four features distinguishing these participants:

> This approach would be appropriate for what might be called unsophisticated investors with generally good tax records who have been caught by misleading claims made in respect of these investments and suffered a real financial loss.[16]

5.23 The announcement also signalled those participants who would not receive concessional treatment, with the ATO citing as a nominal example a high wealth individual ('gross income of $170,000 to $200,000') with a track record of aggressive tax income minimisation (reducing taxable income to '$3000 in one year') via scheme participation.

5.24 The ATO also stated that eligibility for an interest reduction would be subject to participants entering into either a settlement and/or an agreed payment arrangement. Participants who have already paid their tax liability or who already have entered into

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15 ATO, 'Tax Office reduces interest applying to some mass marketed "tax effective" schemes debts', Media Release Nat 01/30. See also Michael Carmody, Commissioner of Taxation, 'Taxation…Current Issues and Future Directions', Speech to the Australian Institute of Company Directors, Perth, 1 May 2001.

16 Backgrounder to Media Release Nat 1/30, reproduced in ATO Supplementary Submission No. 845B, p.5.

a settlement would benefit from the measure, provided they fit the criteria mentioned above.

5.25 While the Committee welcomes this as potentially a significant breakthrough in the stand off between the ATO and scheme participants, it also foresees some difficulties possibly arising unless both sides take care in their approach to the measure. The potential stumbling block is the proposed guidelines for determining who should be entitled to the interest charge reduction.

5.26 The ATO's indication that it will consult community representatives and stakeholders is a positive sign in its own right. A consultative approach is not only appropriate in view of the widespread interest at the community level but should also check any tendency for the ATO to adopt a rigidly legalistic or predetermined view (as outlined above in this chapter). By the same token, scheme participants and their representatives should be open to understanding the ATO's position in relation to the integrity of the tax system. If approached in a constructive spirit, the consultative process could itself play a role in bridging the differences between the ATO and participants and their representatives.

5.27 Nonetheless, the Committee believes that deciding upon the appropriate criteria for determining entitlement will be difficult. The general criteria the ATO has already nominated – 'unsophisticated investors', 'generally good tax records', 'captives of aggressive marketing techniques' and/or 'bad advice' and facing 'real financial loss' – are not without problems. For one, it is not clear whether to be entitled to an interest reduction a participant must satisfy all four criteria. Basing entitlement on all four criteria would, in the Committee's view, be too restrictive. It would be unfair, for instance, if a participant with a sound tax record who acted in good faith on the basis of poor advice were ineligible for the reduction because he or she was deemed not to be facing a real financial loss. This would result in inconsistent treatment of participants. The Committee believes that those with good tax histories who acted in good faith should be entitled to the interest concession irrespective of their level of loss or tax debt.

5.28 How each criterion is to be defined also raises questions. What will constitute 'aggressive marketing techniques' or 'bad advice'? Would this mean that those participants, who acted in good faith on professional advice that was well intentioned but ultimately mistaken, would be excluded from the interest cut?

5.29 In determining whether scheme participants have 'good tax records' or a history of involvement in abusive arrangements, the Committee considers that it would be inappropriate if the ATO were to decide that participation in schemes over successive years during the 1993-1998 period amounted to a 'history' of scheme participation. As this period was marked by the lack of certainty coming from the ATO over its position on Part IVA and schemes, it would be unreasonable for the ATO to deem a taxpayer as a serial scheme participant on the basis of involvement during this time. Other factors might count against such a taxpayer, but involvement

in schemes over successive years during this period should not, in itself, be seen as a mark against a taxpayer's record.

5.30 Neither should participants be condemned for acting on the advice of tax professionals. Seeking and following professional advice does not categorise a scheme participant as a 'sophisticated' investor or tax 'game player'.[17] Under a self assessment tax system characterised by complex law, many taxpayers including those with relatively straight forward financial affairs feel compelled to seek the advice of tax agents and financial advisers. This is a prudent step in many cases. While there is doubtless an element among the community who seek advice in order to beat the system, many go to tax professionals because they *are* unsophisticated investors and dependent on experts. This fact of the self assessment tax system should be taken into account in defining whether investors are sophisticated or not.

5.31 The Committee also notes that the ATO's announcement is silent on the time period to which the interest reduction would apply. Is it to be based on the compromise formula adopted in the context of the Ombudsman's investigation of Maincamp or will a different basis be used? Furthermore, will the interest period be decided upon on a case by case basis as specified in the Addendum to the Code for Settlement Practice (in particular paragraph 6.3.3)? Or will a blanket approach be used based on a set time period?

5.32 How these questions are resolved will have an important bearing on the outcome of this initiative. All parties involved in the consultations on the guidelines will need to approach those discussions with the goal of seeing the measure implemented uppermost in their minds. It should not be used as a point scoring exercise by any party. A spirit of compromise will be needed to ensure the interest concessions come to fruition and to avoid the measure being derailed as the test case program has been until recently (see chapter 6).

Settlements

5.33 As mentioned above, the Committee originally interpreted the Commissioner's decision to introduce a specific code of settlements for mass marketed schemes as signalling a move towards resolving the matter with participants in a conciliatory way. As the guidelines state:

> The ATO is now at a stage where formally settling with an increasing range of promoters and scheme participants may be appropriate as a broad strategy to consolidate the gains made in the ATO's overall strategy [towards mass marketed schemes]…[18]

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17 See the Commissioner's discussion of the emergence of 'game playing' by those who 'see the ATO as someone to be beaten through smart moves and reliance on grey areas of the law' in his 1 May 2001 speech, 'Taxation…Current Issues and Future Directions'.

18 Addendum to the Code of Settlement Practice, p.5. See Attachment I in ATO Submission No. 845.

5.34 While the ATO advised the Committee that it has entered into settlement negotiations and arrangements in some cases, there is little indication of this approach in the evidence to the inquiry. This may reflect that those engaged in settling with the ATO are satisfied with the process and outcomes and therefore felt no need to approach the inquiry. On the other hand, some witnesses indicated that the ATO approach to settlements needed to be more flexible,[19] while others complained that the ATO notices to disallow deductions referred to possible settlement arrangements in 'vague and unnecessarily bureaucratic' terms.[20]

5.35 One witness recommended that '[i]f the Taxation Office is prepared to settle, then a full and open proposal should be offered uniformly to all growers'.[21] Likewise another said:

> It is extremely unfair that the ATO are trying to differentiate projects in the way they allow or disallow settlement. We have the ludicrous situation of having most clients in one or more of six projects. Of these, the tax office will not agree to settlement for three but will agree to a cash basis settlement for the other three, with a penalty of 10 per cent for one of those and five per cent for the other two. To the taxpayers, there were no differences between these projects from a tax perspective. The ATO should be required to allow consistent settlements on all projects.[22]

5.36 These remarks reflect a view broadly similar to the Ombudsman's, that the ATO should advise taxpayers upfront about the scope for settlements in relevant cases:

> The Ombudsman is of the opinion that it is vitally important that the Commissioner provide the community with a general indication of his views and his preparedness to settle cases.[23]

5.37 The Ombudsman goes further in also warning that it would be ill-advised of the ATO not to inform taxpayers in a timely manner of the potential to settle:

> Taxpayers should not be threatened with amendments and large tax bills, only to find out later the Commissioner was always prepared to consider a settlement offer for a significantly lesser amount.[24]

5.38 The ATO says that it is, however, cautious about making public offers to settle where the primary tax to be settled is for a lower amount than if there was no

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19 Submission No. 852. See the ATO's response to this point in ATO Supplementary Submission No. 845A, p.12.

20 Submission No. 864, p.1.

21 Submission No. 864, p.1.

22 Evidence, Perth, p.70.

23 Commonwealth Ombudsman, *The ATO and Maincamp,* January 2001, p.23.

24 Commonwealth Ombudsman, *The ATO and Maincamp,* January 2001, p.23.

settlement. This reflects concerns about the possible legal ramifications following a recent Federal Court decision (Young versus Commissioner of Taxation). The ATO indicated to the Ombudsman that its preferred approach is to write to taxpayers notifying them of the settlement provisions and encouraging them to approach the ATO with an offer.[25]

5.39 The Committee is strongly of the view that the ATO should seek to be proactive in promoting its code on settlements to participants. It sees the code as a key mechanism for taking individual circumstances into account, particularly for the many taxpayers that invested in good faith and whose culpability seems negligible.

Debt recovery and hardship provisions

5.40 The Committee heard evidence suggesting that there was a general lack of awareness among participants of the ATO's debt recovery measures and hardship relief provisions. In view of the heavy tax burden many participants face, the Committee would expect that a sound administrative approach would include notifying participants of ATO measures designed to assist taxpayers manage their tax bill. Such an approach would not only help taxpayers meet their tax debts and minimise the risk of financial ruin and other personal stress, but would also increase the chances for repayment and the ATO's ability to recover large-scale debt.

5.41 The Committee takes particular note of the Ombudsman's findings and perspective on the ATO's debt recovery procedures for Maincamp participants. As with the evidence to this inquiry, many of those who complained to the Ombudsman's investigation expressed concerns about their ability to repay the tax debt raised by the ATO. Although ATO correspondence to participants included information about standard ATO recovery procedures while debts remain in dispute, the Ombudsman stated that 'it provides no guidance about the possibility of considering longer-term settlement of debt'.[26] The Committee heard similar criticism which suggested that notices to disallow deductions did not reflect ATO public statements regarding repayment schemes and other debt recovery options.[27]

5.42 In response to these criticisms, the ATO informed the Committee that taxpayers are first notified of outstanding debt through a Notice of Assessment. The ATO conceded that, while this Notice includes payment details and a contact number if the taxpayer is unable to pay by the due date, it does not explicitly outline advice about alternative payment options, possible release from the debt in cases of hardship and the Taxpayers' Charter. These are provided in the Final Notice, issued when an assessment is not paid by the due date.[28]

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25 Commonwealth Ombudsman, *The ATO and Maincamp,* January 2001, p.23.

26 Commonwealth Ombudsman, *The ATO and Maincamp,* January 2001, p.24.

27 Evidence, p.216.

28 ATO Supplementary Submission No. 845B, Attachment 6, pp.5-6.

5.43 However, the ATO did advise that before it issues the first Notice of Assessment 'there will often be prior communication with the taxpayer or their representative'.[29] In the specific case of mass marketed schemes, the ATO sent more than 49, 000 investor packages to taxpayers which gave individuals the opportunity to take up voluntary disclosure provisions and which discussed the availability of payment and hardship relief options.[30]

5.44 Nevertheless, the ATO acknowledged that it:

> has recognised that the communication strategies to date may not have met the needs of all taxpayers. In response to this, additional and improved communication strategies are being introduced to help taxpayers caught up in tax effective scheme arrangements.[31]

5.45 The Ombudsman's recommendation, in the Maincamp inquiry, that the ATO adopt an 'empathetic' approach to payment arrangements was based partly on the Commissioner's assurance that such an approach would be adopted for businesses making reasonable efforts to implement the New Tax System, to ensure that tax debts did not lead to bankruptcy. The Ombudsman considered that this attitude should be extended to Maincamp participants:

> In the Ombudsman's opinion it should be an extraordinary case for the Commissioner to commence bankruptcy proceedings against a taxpayer with a tax debt from investment in this scheme. He is also of the view that an investor should not be forced to sell his or her principal place of residence to pay off such debts, where that is the only asset, except where it can be shown that there is an unacceptable risk to collection.[32]

5.46 The Committee has heard of several cases of participants in other schemes having to sell off major assets including their homes and cars in an attempt to meet scheme-related tax debts. Equally disturbing, some evidence suggested an aggressive ATO approach to chasing debt, including threats of garnisheeing wages.[33] The Committee also notes that some scheme promoters and managers are placing duress on participants to pay loan commitments, regardless of the fact that the 'loan' was financed wholly from now disallowed tax deductions (ie, the loan was contrived and contingent on participants' tax refund).

5.47 Evidence from the ATO, on the other hand, maintained that it does not take such an aggressive approach to recovering tax debts. Ms Erin Holland, Acting Deputy Commissioner, Client Account Management, ATO, said: 'We manage debt collection

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29 ATO Supplementary Submission No. 845B, Attachment 6, p.5.

30 ATO Supplementary Submission No. 845B, Attachment 6, p.5 and Attachment 3.

31 ATO Supplementary Submission No. 845B, Attachment 6, p.11.

32 Commonwealth Ombudsman, *The ATO and Maincamp*, January 2001, p.24.

33 Evidence, p.211.

on a case by case basis taking into account the individual circumstances of the client. We try to take a fair and reasonable approach'.[34] She continued:

> On the issue of bankruptcies and the issue you raised about people's homes, where the taxpayer is genuinely cooperating with us and the only tax that is outstanding is disputed, we will not take bankruptcy or liquidation action, nor will we require the sale of a person's home or assets … Where there is genuine hardship involved in relation to a taxpayer being able to make those payments, we suggest that they approach the Tax Relief Board for release of that debt. Basically, the criterion there is one of hardship. A fundamental interpretation would be where there would be some inability to pay for the necessities of life.[35]

5.48 The ATO defined 'genuinely cooperating with us' in the following terms:

> That is if the taxpayer is prepared to meet with us, talk to us about their financial situation and the difficulties they are having and come to some arrangement with us around the payment of their debt.[36]

5.49 It further categorically rejected the suggestions that it had initiated bankruptcy action against any participants in mass marketed schemes, initiated action to sell homes or other assets, or engaged private debt collectors to pursue debts.[37]

5.50 Nevertheless, the Committee received evidence indicating that some of the actions of the ATO are not so conciliatory on the ground. For example, Mr Lawrence Ryper told the Committee:

> On 1 October 1999, I had an interview with tax officer Mr Mark Beadle from the ATO's small business section in Cannington. The ATO were extremely reluctant to see me in person. My wife, me and my two children aged six and four had driven the 1¼ hours from south Mandurah to the ATO in Cannington. When we arrived at the ATO the security guards refused to let my son use the lavatories unless were were met by an ATO officer first. After some debate, my son and I were escorted to the facilities by a security guard … After this we were interviewed by Mark Beadle, who, when face to face, was far more helpful than over the telephone. He said he was concerned as well, but this was being driven from high up and he could offer no real solutions. I detailed to him all the facts that I have previously detailed. Our only option was to pay or go voluntarily bankrupt. We were offered no clemency.[38]

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34 Evidence, p.487.

35 Evidence, p.488.

36 Evidence, p.488.

37 ATO Supplementary Submission No. 845B, Policy Announcement by Commissioner, p.8. The ATO noted that it 'is aware of approximately 45 individual participants in mass marketed schemes that have filed for bankruptcy themselves'. Answer to question on notice E 489-490, p.3.

38 Evidence, Perth, p.120.

5.51 In information recently provided to the Committee, the ATO said that it had informed Mr Ryper on 10 April 2001 that the interest accrued on his debt from the due date of assessment until 10 April 2001 would be remitted 'in full due to personal hardship, stress, efforts to repay debt, working two jobs and selling personal assets'.[39] Future remission of interest is to be based on the circumstances at the time. The Committee notes that Mr Ryper's request for remission was granted after his appearance before it, and after the Committee raised his case directly with the ATO at its hearing on 3 April 2001.

5.52 Based on evidence of this kind, the Committee is of the view that, at the very least, there seems to be a significant gap between the ATO's stated policy and its implementation by regional offices.

5.53 The Committee notes the recent announcement by the Commissioner of Taxation of a new communication strategy designed to address this 'gap'. The strategy involves sending tax officers to towns where mass marketed schemes have been heavily promoted, such as Kalgoorlie, so that affected investors will be able to get appropriate advice 'face to face'.[40] It further involves:

- allocating a case manager to each taxpayer with scheme related debts;
- sending information to all investors addressing misinformation and informing investors of the ATO's processes; and
- increasing people's awareness of the ATO's helplines for investors.[41]

5.54 While the Committee welcomes this announcement, it is critical of the fact that the ATO's original letters to investors do not appear to have addressed some of these basic issues and have thus allowed confusion and fear to take root. The new communication strategy has seemingly been implemented late in the day, after a significant personal and emotional toll has already been taken of investors caught up in the ATO's actions and after the establishment of this inquiry. The Committee is concerned that this more conciliatory and helpful approach is being taken only in reaction to this inquiry rather than as part of the coherent and consistent implementation of the ATO's stated policies.

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39 ATO Supplementary Submission No. 845B, Attachment 6, p.51.

40 ATO Media Release, 5 April 2001.

41 ATO Media Release, 5 April 2001.

CHAPTER 6

TEST CASES AND OBJECTIONS

6.1 In situations where taxpayers dispute the ATO's interpretation and application of tax law and consequent assessments of their tax liability, taxpayers have a legal right to seek an independent, external review of the ATO's decisions. Avenues for review include:

- the Administrative Appeals Tribunal (AAT);
- the Federal Court;
- the Commonwealth Ombudsman; and
- the Privacy Commissioner.

6.2 Of these, decisions by the Federal Court and the AAT are binding on the ATO, although either party can appeal decisions in a higher court. The process of a court or tribunal ruling on key points of law is generally referred to as a 'test case', as this creates precedents that may be used by other courts, the legal profession and taxpayers about how the law should subsequently be interpreted and applied.

6.3 While independent review is a legal right, in reality taxpayers face substantial obstacles in challenging the ATO's decisions, largely because of the high cost of legal representation. Few individual taxpayers can afford the costs associated with protracted court action against the ATO. As Mr Mike Hutson of Hutson Duddy Solicitors noted:

> For all we know, the Tax department is wrong... But it is going to take, as I said earlier, a fair amount of courage and an awful lot of money to test it. That is the big stick that the tax department waves for which we have no defence.[1]

6.4 Further, the delay involved in seeking a review instead of settling can result in an inflated tax debt if taxpayers lose their case. Interest charges on outstanding debts compound daily. As a result, many taxpayers may face significant financial disincentives that preclude them from exercising their legal rights.

6.5 Nonetheless, it is inescapable that the ATO's disallowance of deductions sought in relation to these schemes needs to be tested in the courts for the sake of establishing the legitimacy of its actions and maintaining taxpayer confidence in the ATO's interpretation of the law. While the ATO maintains that its interpretation of the law and in particular its use of Part IVA is appropriate, a significant number of lawyers, promoters and investors are just as emphatic that the ATO is wrong. There

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1 Evidence, p.243.

appears to be widely divergent opinion between the ATO and parts of the legal and financial community about the legitimacy of the arrangements loosely referred to as tax effective investment schemes:

> After all, you have to appreciate that a large part of the tax laws is subject to interpretation, and there is nothing we can do about that. That is the nature of the beast. But still we come down to this problem of the tax department and the professionals being poles apart.[2]

6.6 The ATO and other witnesses advised the Committee that a number of test cases related to several mass marketed schemes are imminent and more are pending. In particular, cases regarding the Budplan arrangements commenced in the Federal Court on June 4.

6.7 Mr Frank Wilson, of Perth barristers and solicitors Wilson and Atkinson also advised the Committee that his firm is mounting a number of cases in both the Federal Court and the AAT, the first trial being set for August 2001.[3] The Committee understands that Wilson and Atkinson cases include five agricultural arrangements and a further two franchise arrangements.

Test case litigation program

6.8 Recognising the need for clarification of significant legal issues and the obstacles faced by taxpayers in mounting challenges, particularly in the Federal Court, the ATO operates a test case litigation program. Under this program, the ATO will undertake to fund the legal costs of individuals involved in test cases, provided they meet certain criteria. However, it appears that the ATO will only fund test cases in very limited circumstances.

6.9 Minter Ellison, a legal firm representing some Budplan participants, applied for test case funding in August and September 1998 but the ATO litigation panel recommended that funding be refused 'because of the tax avoidance implications of these cases and the potential application of Part IVA of the Income Tax Assessment Act 1936'.[4] The ATO did, however, in January 2000, offer test case funding to four Budplan participants of its own selection, although at least three of these persons had not themselves sought funding.[5] The Committee understands that only one accepted, but too late for the case to be included in the impending hearing.

6.10 Aside from the offers made to the four Budplan participants, the ATO had not, until late April 2001, made funding available for any tax effective schemes test cases. The ATO has now announced that it will be funding from 20 April onwards four Budplan test cases and 'a representative group of cases' in relation to a film

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2 Mr Mike Hutson, Evidence, p.238.

3 Evidence, Perth, p.91.

4 Letter from Deputy Chief Tax Counsel, ATO to Minter Ellison, 21 October 1998.

5 The status of the fourth is unclear.

scheme 'provided we do not experience any further delays'. The ATO has also indicated that it will consider funding further test cases if they raise materially different principles.[6] This matter may require further consideration by the Committee.

Deferring recovery action pending the outcome of legal action

6.11 The ATO's policy in respect of action to recover money assessed as being payable under amended assessments is apparently to allow tax in dispute to remain unpaid until objections are determined, providing the revenue is not at risk.

6.12 However, on 20 July 2000, the Taxation Commissioner announced that the ATO's strategy of generally holding off on determining objections and, in some cases, amending assessments while pursuing representative test cases would not be continued.[7]

6.13 The ATO explained that this decision was a consequence of the experience at that stage in a number of arrangements that an appropriate range of representative cases was not getting before the courts 'as early as the ATO would like'.

6.14 The ATO also argued that deferring debt recovery would send the wrong signals to potential participants in what it identified as aggressive arrangements:

> …any long delays are putting off the hard edge of reality of participating in aggressive schemes. This could be a factor in the continuing participation in such arrangements.[8]

6.15 The ATO advised the Committee that, accordingly, the office would continue to issue amended assessments unless matters put forward by taxpayers or their representatives, such as realistic offers of settlement were still under consideration. The ATO indicated, however, that given previous commitments and the fact that test cases are now listed for hearing before the Federal Court, it would continue to hold off on determining objections in the Budplan cases.

6.16 A number of witnesses including individual participants and representatives of the legal profession called for the ATO to cease its recovery action against people whose assessments have been amended pending the outcome of test cases.

6.17 Mr Frank Wilson of Wilson and Atkinson, was amongst those who called for the ATO to suspend the process of recovering money before test cases are concluded. Mr Wilson's argument is that the financial and personal consequences that recovery action has on taxpayers who are disputing their assessments is severe. He points out that even if the taxpayer wins the case, the ATO's recovery action may well have caused significant and irreversible harm:

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6 Backgrounder to ATO media release 01/30, dated 26 April 2001.

7 ATO, Submission No. 845, p.9.

8 ATO, Submission, No. 845, p.9.

> I think it is unconscionable and pernicious that the commissioner should be out there attempting to take recovery action and bankrupt people pending the determination of these test cases, which are likely to find that a large majority of these people do not owe the tax office anything. It is a pyrrhic victory for a taxpayer if, after being bankrupted and having his life destroyed, the commissioner finds that, 'Actually, all this time you had done nothing wrong. Sorry. Here is your money back.'[9]

6.18 Some witnesses also questioned the consistency of the ATO's approach in this regard. For example, the Committee received evidence about the Foodland case, a Part IVA case where the ATO had apparently agreed not to pursue payment 'until the matter is settled or, alternatively, FAL [Foodland Associated Limited] has exhausted all rights of appeal'. The assessments totalled $27m in tax and a further $24.7M in penalties and interest.[10] This type of agreement appears to contrast with the ATO's approach towards participants caught up in the mass marketed schemes issue.

6.19 While it must be acknowledged that the ATO's policy concerning recovery of tax debt does contain guidelines on when recovery action should proceed, the perception may be created that the ATO applies a different, harsher standard in respect of small and relatively defenceless individual taxpayers.

6.20 On 26 April 2001, the ATO announced that it was changing its approach:

> …we will agree not to take recovery action on outstanding debts in all mass marketed abusive tax effective investment scheme cases where an objection has been lodged provided there is no evidence of action such as dissipation of assets to avoid meeting their tax liability. We will review this position based on the decisions handed down. A lack of progress or continuing withdrawal of cases will also cause us to review the position.[11]

6.21 Interest will continue to accrue on outstanding debts. The Tax Commissioner has, however, announced that the ATO will reduce the interest charges from 13.86% to 5.86% for 'some investments' in schemes. It is unclear at the time of writing how widely the ATO will apply this concession. The ATO has indicated that it will consult with community representatives 'to develop reasonable guidelines for determining who should be entitled to a reduction in interest'.[12]

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9 Evidence, Perth, p. 98.

10 Foodland Associated Ltd, ASX-Signal -G, 1.2.2001.

11 Backgrounder to ATO media release 01/30, dated 26 April 2001, p.5. The ATO is continuing to issue notices of amended assessment in cases where it has disallowed scheme deductions. These are not to be confused with the final amended assessment at which point payment is required. The ATO states that those receiving notices of amended assessment may still lodge an objection with the ATO and recovery action will be suspended in accordance with the 26 April announcement.

12 ATO media release Nat 01/30. See the discussion in chapter 5 on this measure.

Test case delays

6.22 There have been very significant delays in mounting test cases for mass marketed schemes. Moves to test one particular arrangement, Budplan, commenced in 1998 but have yet to be heard. The reasons and responsibility for these delays have been subject to claim and counterclaim.

6.23 For its part, the ATO says that there have been difficulties associated with identifying representative test cases and that promoters have stalled the process. Lawyers representing the Budplan litigants paint a different picture, attributing at least part of the blame to the ATO, pointing to ATO refusal to accept certain nominated cases, a refusal to provide test case funding[13] and delays in issuing notices of decisions on objections.

6.24 In the Committee's view it appears that both parties to the litigation have contributed to the delays and that neither the ATO nor the litigants is blameless.

6.25 The controversy now surrounding test cases has led to the Ombudsman investigating the matter as an issue of taxpayer complaint in its own right. The outcome of the Ombudsman's report of his investigation is pending.

Conclusions

6.26 The Committee welcomes the ATO's apparent change of heart in relation to the funding of test cases, but notes that it is only part funding the Budplan case. Given the number of people involved in these schemes and the long running nature of the dispute, it is difficult to understand why the ATO has been so reluctant to fund test cases.

6.27 The Committee also welcomes the ATO's decision to suspend recovery action until representative cases are resolved. The Committee is of the view that the ATO's action to move to recover debts before any test cases could be determined left it open to the charge that its approach was inconsistent with that adopted in relation to large taxpayers and companies.

6.28 Notwithstanding these positive initiatives, the Committee questions whether interest charges should continue to accrue while test cases are pending. Taxpayers who have received amended assessments already face substantial and in many cases very substantial tax debts. To continue to apply interest during the test case program may increase pressure on participants to withdraw, not because they do not believe their cases are winnable but rather for financial reasons. The withdrawal of participants under such conditions could stall the test case program.

6.29 The Committee would be concerned if financial pressures on participants lead to further delays in test cases. This would be unacceptable because, in the

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[13] The first application for test case funding was lodged on 31 August 1998 and refused by the ATO.

Committee's view, this matter can only be satisfactorily resolved after the Courts decide a number of representative cases. The Committee therefore believes that there may be grounds for suspending the accrual of interest for participants involved in the test case program.

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.

Senator Shayne Murphy
Chairman

MINORITY REPORT

LIBERAL SENATORS

1.1 The Liberal Party Senators on the Committee have decided to issue a dissent to the Majority Report in order mainly to address imbalances in the analysis, assessment and recommendations contained in that report.

1.2 We wish to make it clear at the outset that we share many of the concerns and views included in the Majority Interim Report. We are concerned to see fair treatment extended to the many taxpayers caught unwittingly in mass marketed arrangements. We strongly support the introduction of appropriate counter-measures dealing with aggressive tax planners and scheme promoters.

1.3 It is common ground that the ATO should have acted sooner. This is now agreed by the Commissioner. Indeed, the Commissioner stated on 1 May 2001 that:

> Looking back the result for everyone would have been better if we could have taken the 1997 initiatives earlier and, with the benefit of full knowledge of the magnitude of the issue and techniques employed we have adopted new strategies, for example, the product ruling system introduced in 1998.

1.4 Where we part company with the Majority Report is that we believe a fair and objective assessment requires that all of the factors contributing to the mass marketed scheme phenomenon be taken into account in order to achieve a proper appreciation of the rise and handling of the mass marketed schemes problem.

1.5 The Committee decided to issue an interim report in order to establish that special concessions for investors are required. The ATO has now agreed with the requirement for special concessions, and recently announced a range of initiatives. We therefore consider that the reason for issuing an interim report has disappeared.

1.6 We consider that the greater priority for the Committee is on assessing the appropriateness of the concessions offered, and whether more needs to be done.

1.7 It is a pity that the Majority Report spends so much time establishing what is now accepted, and fails to constructively examine how this matter could be appropriately brought to finality, the impact of the concessions offered by the Commissioner, and the lessons for avoiding similar occurrences in the future.

1.8 The Majority Report fails to properly acknowledge the very significant role of designers, promoters and advisers in mass marketed schemes. The conduct of, and the adequacy of measures for controlling, tax effective scheme designers, promoters and financial advisers is one of the Committee's three terms of reference. The failure to consider this has resulted in an unbalanced Majority Report. This risks playing into the hands of those parties with a vested interest in deflecting attention away from

themselves: the aggressive scheme designers, promoters and their associates, as well as serial tax avoiders.

1.9 The Majority Report also fails to consider in detail the major concessions to participants that the ATO has announced in recent months. In our view, the Committee has a responsibility to closely consider the adequacy of these concessions. The Committee should have moved rapidly to take evidence on these concessions to ensure that the particular problems were adequately addressed before issuing a report. This did not happen. The Committee should ensure proper consideration is given to this issue in the final report.

1.10 In addition, there are some fundamental misconceptions in the majority report:

1. the Majority report does not appreciate the self-assessment system. Changes to self-assessment would be fundamental to our tax system and may ultimately work to the disadvantage of taxpayers.

2. the Majority Report carries an underlying assumption that if the ATO does not publicly state that certain arrangements are not legal before taxpayers enter into them, then the ATO cannot enforce the law when they are found to be illegal. If such a principle were generally applied, it would jeopardize the integrity of the tax system and assist blatant tax avoiders.

3. the Majority Report fails to properly recognise the role of promoters and advisers in the mass marketed scheme phenomenon. We consider that as the originators and profiteers of mass marketed schemes, the blame for the obvious pain and distress caused by these schemes can be laid with the promoters and advisers.

4. in examining the ATO's approach to the emergence of mass marketed schemes, it is necessary to maintain a sense of perspective. It needs to be remembered that the ATO is responsible for administering the overall tax system, a task that entails addressing at any one time a spectrum of risks to the revenue. Such risks differ not only in nature but also in scale. In seeking to counter these risks the ATO has adopted a risk management approach that tailors strategies and resources to the level of identified risk. The Auditor-General has approved this approach.

ATO concessions

1.11 Participants in schemes repeatedly told the Committee how they object to being classified as tax avoiders. The Committee understands the concerns that unwitting investors have in being classified in this manner.

1.12 However, regardless of investors' motives, when the ATO invokes Part IVA in respect of a scheme it has classified as a tax avoidance vehicle, the Tax Law

prescribes the penalties that apply to participants in the arrangement. The law provides that the investor must pay the tax shortfall, a penalty up to 50% of the shortfall and interest (currently at a rate of 13.86%) on the shortfall from the date the payment should have been made. Interest also applies to the penalty, from the date the penalty first becomes payable.

1.13 To assist investors who have claimed income tax deductions under mass marketed schemes which have subsequently been denied, the ATO introduced settlement guidelines, offered participants reduced penalties for coming forward (down from 50% to 10% or 5% in all but the most blatant schemes), established a project team to deal with tax planners, and where there is evidence of fraud or breaches of other laws, referred cases to other law enforcement agencies, including National Crime Authority, the Australian Federal Police and ASIC.

1.14 To combat the future development of offensive tax effective schemes, the ATO introduced a product ruling system to give investors certainty about tax benefits arising from particular schemes.

Recent ATO concessions

1.15 The ATO's approach towards the tax schemes issue has shifted significantly since it first moved to disallow deductions in late 1997. Important developments have occurred relatively recently, namely:

- on 5 April 2001, the ATO announced a new communication strategy designed better to meet the needs of taxpayers caught in schemes. This strategy included regional visits by ATO officers to provide 'face to face' contact; allocating a case manager to each taxpayer with scheme related tax debt; sending improved information to scheme participants, in part to dispel the misinformation in circulation; and promoting the ATO's helplines for investors;[1] and
- on 26 April 2001, the ATO announced three further measures:
    - ATO test case funding for four cases relating to the Budplan scheme and a representative group of cases in relation to a film scheme;
    - allied to test case funding, a halt on recovery action on outstanding scheme debts where an objection has been lodged provided there are no signs of attempts by taxpayers to reduce their assets to avoid meeting their tax liability; and
    - a reduction in the interest charge for taxpayers with generally good tax records who were caught unwittingly in schemes and suffered significant financial losses (from the statutory level of 13.86 per cent to 5.86 per cent).[2]

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1 ATO Media Release, 5 April 2001.

2 ATO Supplementary Submission No. 845B.

Fairness in taxation

1.16 It is important that members of the community pay their fair share of taxation.

1.17 This is essential to ensure that governments are able to provide public services. It is also important that the tax burden not fall disproportionately on some, which will occur if other taxpayers are able to avoid paying their share. This is essential to ensure that faith in the integrity of the tax system is maintained across the community.

1.18 It is therefore extremely important that blatant and aggressive tax avoiders be pursued.

1.19 In short, the tax system should be fair and it should be seen to be fair.

1.20 There is no dispute that those who abuse the tax system should be pursued with the utmost vigour. But the dilemma facing the Committee is how to deal with investors who have unwittingly become caught up in what the ATO considers to be tax avoidance schemes.

Special circumstances of mass marketed tax scheme participants

1.21 The evidence to the Committee has caused us to conclude that the current mass marketed scheme experience is unprecedented in that it involves a large number of taxpayers who have not set out to avoid their taxation obligations but have become involved, as a result of aggressive marketing campaigns by promoters and advisers, in what the ATO considers to be tax avoidance schemes.

1.22 The overwhelming evidence is that many of the investors in these schemes thought that they were undertaking genuine investment in worthwhile projects with a realistic expectation of receiving returns in the future. Whilst not unaware of the taxation benefits arising from the initial investment, many investors believed that these taxation benefits were acceptable to the ATO because they were more than outweighed by the potential tax on future returns. These investors were unaware that most, if not all, of their initial investment would go to cover fees and that very little, if any, would go to the underlying activity. These investors were therefore unaware that it was extremely unlikely that there would be future returns from these investments.

1.23 These schemes were often marketed with a high degree of sophistication. There were impressive looking prospectuses, often including positive opinions from apparently eminent experts.

1.24 Many investors have very limited financial expertise and so have relied solely on professional advice in entering into these schemes. Their investment in a mass marketed scheme may have been one part of a broad range of various investments undertaken over a period of years, with the other investments being entirely acceptable to the ATO. They may not have invested to such an extent as to reduce their taxable income from a very high amount to a very low amount. However, penalties and interest may have increased their debt significantly, particularly given

the length of time between the initial investment and notification by the Commissioner of disallowance of the deductions.

1.25 The ATO itself has concluded that unwitting investors should not be treated as typical tax scheme participants. We agree that unwitting investors should not be treated in the same manner as investors who have deliberately set out to evade tax.

1.26 The issue the Committee should have considered in detail is whether the ATO concessions are sufficient to deal with the problems facing unwitting investors. We are disappointed that the Committee has not moved to gather evidence of the adequacy of the recent ATO concessions. The Committee has a role to play and contribution to make in both the development of the eligibility criteria for the concessions, and in considering the adequacy of the concessions. Neither of these has been done. Again, the Committee should ensure proper consideration is given to this issue in the final report.

1.27 We have grappled with the need to assist these unwitting investors with the difficulties in which they now find themselves, and the need to ensure that members of the community who have not entered into these schemes do not bear an unfair burden of tax.

1.28 On the one hand are investors who have been unwittingly caught up in mass marketed schemes. On the other hand are taxpayers who have not invested in these schemes – some of whom will have deliberately chosen not to invest in these schemes because either they were not confident that the projected returns would be achieved, or they were not confident that the tax treatment as advised by the promoters was correct.

1.29 We recognise that there will also be a third group: those who are aggressive and blatant serial tax avoiders who will always be on the look-out to evade paying their fair share of tax and will be prepared to knowingly partake of any scheme to achieve this.

1.30 Because there is this third group, we cannot favour a general 'line in the sand' approach as we do not consider that aggressive and blatant tax avoiders should be treated concessionally. We consider that aggressive and blatant tax avoiders should be aggressively pursued by the ATO.

1.31 The question remains, however: how should investors who do not fall within this third group - the unwitting investors - be treated by the ATO?

Finalising this issue

1.32 While welcoming the decision of the Commissioner to fund test cases, we are concerned that these cases may ultimately take years to conclude and be extremely costly. There may well be appeals from court decisions and disputes on how widely a particular test case can be applied, particularly as there are many separate projects that could potentially be the subject of a court case.

1.33 In the meantime, unwitting investors in mass marketed schemes will continue to suffer from the lack of resolution.

1.34 Further, an industry seems to be growing up around providing advice to investors who have received notice from the ATO that their deductions are denied. This may cause the cost to unwitting investors of participation in these schemes to increase; we understand that some of the current advisers were previously promoters or advisers.

1.35 Even with the concessions offered by the Commissioner, interest penalties will continue to accrue where payment is not made.

Conclusions and recommendations

1.36 We consider that the mass marketed schemes phenomenon is unprecedented, and therefore that it calls for unprecedented steps by the ATO to assist investors who have been unwittingly caught up in what are considered by the ATO to be tax avoidance schemes.

1.37 We believe that every effort should be made to finalise this matter as quickly as practicable. It is in everbody's interests that a settlement be reached, to avoid the costs - both financial and human - which will continue for as long as this issue continues.

1.38 We would urge the Commissioner to investigate as a matter of urgency whether it is possible to reach settlements with individual investors where their particular circumstances are such that it would be reasonable to conclude that they are innocent of any intention to cheat the tax system.

1.39 Settlements with unwitting investors could include remission of all penalties, and application of the reduced interest rate to reflect the time value of the tax which is due and which the investors have been able to use while the tax remains unpaid. Further concessions may be required in more needy cases.

1.40 If test cases cannot be resolved within a reasonable time, we suggest the ATO consider suspending interest charges for unwitting investors.

1.41 In the meantime, we urge the ATO to make the reduced interest concession announced in April available to as wide a group of investors as possible, whilst ensuring that the tax system is protected against blatant tax avoiders.

1.42 The eligibility criteria for the reduced interest concession are currently subject to consultation. In this regard, the minority members do not consider that participation in more than one scheme over more than one year is necessarily a sign of an aggressive tax avoider, and so urges the ATO to not disqualify such investors from the concession by reason of this extended participation alone.

1.43 We consider that the primary cause of the mass marketed scheme phenomenon is scheme promoters who by a combination of aggressive marketing

techniques and incorrect advice concerning ATO clearance were able to create a culture in certain geographical areas, and within certain occupations, of investment in these schemes. We condemn such behaviour and those who have engaged in it. They have caused an immeasurable amount of damage to investors who trusted their advice. We urge investors to consider what legal action they may have against those who have engaged in these practices.

1.44 Some investors have contributed to fighting funds to support court cases against the ATO concerning the eligibility of deductions claimed. We question whether fighting funds could be established to support actions against unscrupulous promoters of these schemes. If investors have difficulties setting up fighting funds for this purpose, we urge the Committee in its future hearings to look at the possibility and practicality of organising such a fund.

1.45 We note that the Majority signals its intention to closely examine in the Committee's final report the conduct of scheme designers and promoters, as well as their networks of financial and legal advisers. We believe this is an important task before the Committee and strongly support it. Most importantly, we consider that the Committee should focus on what can be done to further assist unwitting investors, and work towards a settlement of this whole matter.

Senator the Hon. Brian Gibson **Senator Grant Chapman**

ADDITIONAL COMMENTS

SENATOR WINSTON CRANE

LIBERAL SENATOR FOR WESTERN AUSTRALIA

Whilst I find myself in agreement with my Government colleagues who have appended a minority report to this report, I have a number of additional comments I wish to make in respect to the level of concessions being offered to affected investors.

I have listened to many constituents who have made representations and attended the Committee's pivotal public hearing in Kalgoorlie and read many of the submissions and letters sent to the inquiry. As a result, I have come to the conclusion that the vast majority of people caught up in the ATO's crackdown on tax effective investment schemes are not professional tax avoiders. Rather, they are just everyday Australians who were trying to secure their futures and that of their children. They should be treated as such, not as tax avoiders and rorters.

My comments should not be interpreted as being intended to give tax avoiders a way of avoiding their obligations. That is not my intention or that of any of my colleagues on the Committee. My intention is simply to try and help find a way of handling a delicate and difficult situation, of helping ordinary, everyday Australians whose lives have been destabilised, whose livelihoods, health and marriages have been threatened. Some have even felt that their situations are so beyond repair that they have threatened to commit suicide – it is alleged some already have. This is too high a price to pay.

In my view, the real villains in this affair are those promoters who marketed schemes they knew were just tax avoidance rorts; and members of the legal fraternity who provided irresponsible and incomplete opinions. This gave dishonest and dubious schemes the appearance of respectability

One of the more important tasks facing regulatory authorities such as ASIC is bringing these people to account and charging them where there has been any breach of the law.

The ATO has announced that it will offer reduced penalties and interest to some investors using guidelines yet to be determined. Drawing the line between the innocent and those who deliberately avoided tax will be very difficult. The potential for getting it wrong and excluding people who should be offered the concessions is high. While I appreciate the concessions that have been made by the ATO, I do not believe they go far enough and I am concerned that they leave many people uncertain about their futures.

I am also concerned that these people may be being penalised now when ultimately they might win their cases. I do not consider it appropriate that the ATO pre-empt the findings of the courts by imposing penalties or interest on disallowed deductions. The

ATO should freeze all penalties and interest from the denial of assessment until such time as the court cases have been heard and ultimate findings have been handed down. Further, it may be applicable for this issue to become part of the arrangements of the new assessment body being proposed next.

After the test cases, matters will become clearer. If judgement is with the ATO, and there is expert legal opinion that it has a strong case, we will still have a situation where many people will have difficulty meeting their liabilities. It is my view that the ATO should not force people into bankruptcy or to sell their houses and possessions in order to pay any resulting tax debts. The ATO has advised the Committee it will work with people who have difficulties paying, in order to establish suitable repayment arrangements over an appropriate period. The ATO also told the Committee that people who face serious financial hardship could apply to the Taxation Relief Board for release from payment. While I appreciate the intent of these arrangements, I am of the view that since so many people are now distrustful of the ATO, these arrangements are insufficient.

I believe that the Government should remove hardship assessment functions from the Tax Office and establish an independent authority to undertake the task. The independent authority should also be charged with the responsibility for assessing fair payments that taxpayers could make while maintaining a reasonable standard of living for themselves and their families.

The evidence presented to the Committee is that some, perhaps many of the schemes are nothing more than tax avoidance devices and of no merit. Other evidence suggests, however, that some arrangements may have legitimate underlying businesses and the ATO may have disallowed them because of a limited range of features it considers unacceptable. (I note that the ATO itself distinguishes between schemes, classifying them according to the level of tax mischief). A further function of the independent authority proposed in the previous paragraph could be to identify schemes that might lend themselves to restructuring that would make them acceptable. If this proved feasible, the authority could then perform a mediation function between the ATO and scheme designers who undertook to restructure.

I emphasise that in putting forward this suggestion, I do not intend to give any comfort to designers and promoters of schemes that have set out to blatantly defraud the tax system or exploit investors. Rather, I intend that the initiative is taken to ensure as many investors as possible are rescued from the circumstances in which they are currently embroiled, and to ensure any project with real underlying merit proceeds. However, the Authority would have to approach its task cautiously to ensure investors' problems were not compounded.

In conclusion, I believe that the ATO should agree to a freeze on penalties and interest accrual and support the establishment of the independent hardship assessment authority to deal with the very large number of individuals who are now in very harrowing and difficult circumstances.

It is my personal view that had the ATO been more vigilant and proactive, the spread of schemes that led to this disaster could have been nipped in the bud.

Senator Winston Crane
Participating member and Liberal Senator for Western Australia

APPENDIX I

SUBMISSIONS RECEIVED

Submittor	Submission Number
Abbey, Mr Graeme, WA	198
Abbott, Mr Craig, VIC	702
Abel, Mr Colin, SA	410
ADVA Limited	799
Albinson, Messrs Peter & Andrew, WA	763
Alford, Mr Colin, WA	309
Allan, Mr David	559
Allday, Mr Mark, WA	325
Allen, Mr Richard, QLD	423
Allen, Mr Stuart	505
Allison, Ms Lynette, WA	593
Anderson, Mr Neil, WA	33
Anderson, Mr Tim, WA	28
Anderson, T & J, WA	81
Anger, Mr John, WA	547
Annandale, Mr & Mrs, WA	441
Anonymous	66
Anonymous	771
Antoniou, Mr Anthony, NSW	703
Apostolovic, Mr John & Sturzbecher, Ms Rita, QLD	704
Aram, Mr Terry, WA	476
Aram, Ms Helen, WA	475
Archer, Mr Graham, SA	706
Archibald, Mr Leslie	157
Arnold Bloch Leibler, Lawyers & Advisers	22
Arnold Bloch Leibler, Lawyers & Advisers	22A
Arnold, Mrs Tannis, WA	270
Arnott, Mr Steven, WA	226
Ash, S A, WA	450
Ashok Parekh & Co Pty Ltd	861
Atkinson, Ms Kim, WA	362
Auctioneer & Hawker	71
Audas, B M, WA	202
August, R, WA	245
Australian Agribusiness Group Research	481
Australian Forest Growers	851
Australian Native Foods Management Ltd	520
Australian Plantation Timber Limited	668
Australian Rural Group Limited	661
Australian Securities & Investments Commission	853

Submittor	**Submission Number**
Australian Securities & Investments Commission	853A
Australian Taxation Office	845
Australian Taxation Office	845A
Australian Taxation Office	845B
Bailey, Mr Michael, WA	225
Ball, Mr Allan, WA	75
Ball, Mr Derek T, SA	304
Ball, Ms Shirley, SA	301
Banner, Mr Eddie, WA	360
Bardsley, Mr Sydney Graeme	110
Barnard, Mr Gordon, WA	707
Barnes & Kohler, Messrs, WA	448
Beard, Mr Michael, WA	435
Beaver, Mr Robin, WA	43
Beckwith, Mrs Valerie, WA	437
Beeston, Mr Warren, QLD	558
Bell, Ellen & Norman, WA	58
Bell, Mr Terry	45
Bell, Mr William G, WA	823
Bellotti, R G, QLD	116
Bennett, Paul & Jenny	616
Benson, Dr Jill, SA	715
Bessell-Browne, Ms Nicola, WA	60
Bielby, K J, WA	419
Bigby, Mr Brian, WA	566
Biggs, Mr Merven, WA	594
Bishop, Mr Philip, WA	402
Blackwell, Peter & Jenifer, WA	545
Blades, John & Diane, WA	244
Blake Dawson Waldron Lawyers	852
Blohberger, Mr Werner, WA	826
Boni, Mr Angelo, WA	692
Bouras, Mr Spyro, SA	357
Bowins, Mr Steven	138
Boyd, Mr Robert Joseph, WA	788
BP Japan	142
Brakespeare, Bevin & Paulina, WA	534
Brakespeare, Mr Bevin James, WA	263
Bray, Mr Kelvin	101
Brazier, L W & A J, NSW	710
Brew, Graeme & Win, WA	258
Brew, Graeme & Win, WA	846
Briggs, Mr Robert, WA	278
Broadby, Mr Frank, WA	14

Submittor	**Submission Number**
Bronickis, Mr Manfred John, WA	111
Brooks, Mr Bob	519
Broughton, Garth & Charmaine, WA	711
Brown, Jane & Tony, WA	803
Brown, Mr Glynn, WA	783
Brown, Mr Peter, WA	365
Brown, Mr Ray, WA	178
Brown, Mr Robert, WA	352
Brown, Ms Audrey, WA	784
Brown, Robert & Claire, WA	281
Bruce, Mr Graham J, WA	61
Bruce, Mr Norman, WA	266
Bruyninckx, Mr Franciscus, WA	685
Buckley, Mr Dene, QLD	485
Buda, Mr Krzysztof Henryk, WA	95
Budgen, Mr Michael, WA	79
Buick, Mr David, QLD	90
Buirchell, Mr Anthony, WA	267
Bulley, Mr Ken, WA	883
Bunyard, Dr Michael J, WA	50
Burchardt, Mr Fred, SA	5
Burchell, Mr Derek,	179
Burnett, Mr Graeme, WA	376
Burns, Mr George	580
Burton, Mr Rodney, WA	717
Business & Financial Strategy Pty Ltd	867
C J Farley Financial Services	836
C Pope & Associates - Certified Practising Accountants	65
Cain, Mr Christopher, WA	23
Calleja, Mr Mario, WA	117
Cameron, Mr John, WA	372
Cameron, Mr Paul Andrew, WA	21
Campbell, Mr Charles, WA	233
Candy, Mr Russell, WA	47
Capital Vineyard Management Limited	714
Caraven, Mr Phillip	583
Carbon, Mr Gary	338
Carey, Mr Mark, WA	880
Carpenter Owens - Chartered Accountants	874
Carpenter, Mr Andrew, NT	843
Carrier, Mr Brian	511
Carrier, Mr Brian, WA	442
Carter, Mr Kevan, WA	27
Cassegrain, Mr Claude, NSW	93

Submittor	**Submission Number**
Cassegrain, Mr Claude, NSW	720
Cassegrain, Mr Claude, NSW	720A
Chalice Bridge Estate Ltd	864
Chamarczyk, Mr Eddie, SA	363
Chamber of Minerals & Energy	862
Chapel Road Pty Ltd	605
Chard, Mr John	279
Chatterley, Ms Victoria, NSW	721
Chatwin, Ms Marie Louise, WA	197
Chester, Graeme & Janne, WA	345
Chivers, Mr Russell, WA	657
Chong, Mr Benjamin, WA	294
Clarence, Mr Edward, WA	723
Clark, Mr Lindsay, WA	624
Clark, Mr Phillip, WA	433
Clarkson, G A D, WA	522
Clarkson, G A D, WA	574
Clayton, Mr Les, WA	491
Clements, Mr Phil	41
Cockman, Mr Graeme	151
Cole, Mr Julian, NSW	722
Coleman, Ms Suzanne, WA	191
Collier, Mr Leonard, WA	256
Collins, Mr Frank, WA	54
Collins, Mr Harvey, WA	725
Collins, Mr Ron & Miller, Mr Paul, VIC	78
Collins, Mr Trevor, WA	408
Collins, Ms Rosemary, WA	623
Colman, Mr Charles, WA	189
Colombera, Mr John Joseph, WA	238
Combes, Mr Nick	347
Commons, Adrian & Mannering, Lee, WA	818
Connelly, Mr Kevin	35
Cook, Mr James, QLD	250
Cook, Ms Elizabeth, WA	567
Cooper, Mr Darren, WA	254
Cooper, Mr Dean, WA	689
Cooper, Mr Graham,	561
Cooper, Mr Stephen, WA	470
Cooper, Ms Janet, WA	684
Cooper, P J, WA	459
Cooper, Raymond & Susan, WA	786
Corston, Mr Simon	124
Costello, Mr Kevin	649
Cotterill, M J & Forrester, R J	876

Submittor	**Submission Number**
Counter, Mr Denis John, WA	293
CPA Australia	817
Craig, Mrs Christine, WA	337
Crawford, Mr Wayne	130
Crofts, Kim, WA	221
Crooks, Mr Peter, WA	696
Crowe, D G, WA	775
Culver, Mr Neil, WA	694
Cunninghan, Rod & Anne, QLD	848
Cusworth, Mr Alan, WA	726
D'Rozario, Richard & Anna, WA	310
D'Souza, Arun	114
Dalby, Mr Stephen, WA	631
Daniels, Mr Peter, WA	361
Darragh Management Pty Ltd	877
Daszkowski, Mr John, NSW	719
David Hicks & Co	869
Davidson, Mr Allan Christopher, WA	779
Davies & Knox Maynards	870
Davies, Carolynne & Kerry, WA	235
Davies, Mr Bryan, WA	394
Davies, Mr Ian	249
Davies, Mr Roy, WA	34
Davies, Mr Trevor, WA	80
Davis, J G, WA	358
De Jongh, Ms Maria	822
De Lecq Le Montais, Mr Craig, WA	418
Deague, Mr Neville, WA	539
Dearle, Mr & Mrs G E, WA	374
Decleva, Mr Mark, VIC	430
Delfante, Mr Robert, WA	787
Del-Fante, Mr Vincent, WA	776
Dellar, Mr Bevan, WA	602
Deller, Mr Wayne Edward, WA	194
Denniss, Simon & Kelly, WA	414
Department of Agriculture Fisheries & Forestry	856
Devlin, Mr Greg, WA	791
DeVos, Mr Henk, WA	528
Dewar, Mrs Lesley	642
Dexon, Steven & Karelle, WA	399
DiCicco, Mrs Tracey, WA	62
Dickinson, Mr Jeff	805
Dickinson, Mr Jeff	805A
Dickman, Mr Russell, QLD	840

Submittor	**Submission Number**
Digby, Mr B J, WA	672
Dixon, Mr Gary, QLD	834
Dodson, Mr Andrew, WA	355
Doherty, Mr Barry, WA	523
Donaghy, Mr Michael, WA	727
Donaldson, Mr Gordon, WA	496
Donovan, Mr Denis J, WA	224
Doran, Mr Richard,	128
Douglas, Mr Gary, WA	686
Douglas, Mr Laurence, WA	30
Douglas, Mr Murray, WA	671
Doyle, Mr James J, VIC	824
Doyle, Wayne & Sheryl, WA	670
Drabble, Mr Ross, WA	452
Dragovich, David & Raylene, WA	619
Drinkwater, Mr Trevor, WA	42
Duggan, Mr Robert S, WA	780
Duncan, Mr David, WA	493
Eastwood Securities Pty Ltd	455
Edmands, Mr Neil , WA	612
Edmistone, Mr B, WA	693
Elite Business Management Services	866
Ellery, Chris	641
Elliott, Mr Bruce	9
Elphick, Mr Craig, WA	40
Elphick, Mr Grant	98
Eng, Mr Raymond	121
Erickson, Mr Steve, WA	12
Erickson, Mr Steve, WA	12A
Essex, Mr A & Mrs M, WA	765
Evans, Mr Adrian,	600
Fairweather, Mr Maurice, WA	370
Farr, Roger & Geraldine, WA	405
Farrell, Mr Anthony Guy, NSW	85
Faulkner, Mr Wayne, WA	200
Fench, Mr Simon, WA	467
Fergie, Mr Peter John, WA	223
Fergie, Ms Alison Jean, WA	211
Ferialdi, Mr M B, WA	53
Fernihough, Mr Alan, WA	589
Fetton, Mr Robert, WA	728
Fielding, Mr Andrew, WA	729
Fimmano, Ms Franca	89

Submittor	**Submission Number**
Financial Planning Association Of Australia Limited	705
Findlater, Ian & Corol	268
Finnie, Mr Dave	180
Finwest	688
Fisher, Mr Raymond Darral, WA	149
Flack, Ms Jennifer, QLD	469
Fletcher, Mr Steve, WA	315
Florkiewicz, Ms Elizabeth, WA	591
Fonda, Mr Oliver, WA	445
Forest Enterprises Australia	584
Foureur, Mr Michael, WA	586
Frame, Mr George, WA	453
Francis, Mr Jack, WA	44
Francis, Ms Lindsey	247
Frankland, Mr Scott, WA	807
Freehills Solicitors	669
Freeman, Mr Frank, WA	380
Freestone, Mr Ronald, WA	369
French, Mr Harvey, WA	769
Fuhrberg, Mr Dieter, WA	482
G T Lean & Associates	479
Gale, Mr Allen, VIC	166
Gamba, Efrem, WA	15
Garbellini, Mr Mark	626
Gardner, Mr Robert, WA	289
Garg, Atul Kumar, WA	174
Garner, Mr Shane, WA	781
Gaudie, Mr David, WA	351
George-Kennedy, Mr Gordon	16
Gertos & Co – Accountants & Advisors	873
Giannini, C, WA	150
Gilbert, Mr Keith, WA	240
Gilchrist, N & D, WA	143
Gillies Olver Design Pty Limited	585
Goldfields Community Legal Centre	860
Gorton, Mr Andrew, WA	334
Gosling, Mr Robert	350
Gouge, Mr Ronald, WA	730
Gray, Mr Andrew, WA	571
Great Southern Plantations Limited	427
Greater Western Financial Services Co. Pty Ltd	855
Greater Western Financial Services Company Py Ltd	737
Greatrex, Mr Phillip Michael, WA	241
Green, G J, WA	774

Submittor	**Submission Number**
Green, Mr Brian, WA	466
Green, Mr Peter, WA	59
Greenhalgh, Dr Steven James, WA	323
Greenslade, Mr Geoff, QLD	842
Greenwood, Mr Karl, WA	581
Greer, Mr Scott, WA	687
Gregory, Miss M, WA	413
Grgich, Mr Peter, WA	299
Grimbly, Ms Karen, WA	333
Groth-Marnat, Mr Gary, WA	10
Gudden, Mr Henry, WA	156
Guidotti, Carlo & Sandra, WA	261
Gunning, Mr Donald, ENGLAND	695
Guy, Mr Christopher, NSW	4
Guy, Mr Peter, WA	1
Guyt, Mr Leo, WA	815
Gwynne, K E & K N	540
Haast, Mr Brian	108
Hack, Geoffrey & Helen, WA	342
Hacking, Mr Robert, WA	18
Haddow, Mr David John, WA	260
Haines, Mr Stewart	175
Hall, M J, WA	73
Hallas, Duane, WA	625
Hamersley, Mr David, WA	813
Hanks, Mr Gavin David, WA	317
Harder, Mr Michael, WA	629
Hardingham, Mr Don	340
Harris, Mr Mark, WA	872
Harrold, Mr Stephen Grant, WA	209
Hars, Mr John, WA	552
Hars, Ms Jacqueline, WA	128
Hart, Michael & Rhonda, WA	465
Hartcher, Mr William J, WA	173
Hartley, Mr Neil P, WA	172
Hastie, Mr Geoff	3
Hawkins, Jamie D	330
Hay, Kelvin & Rosalie, WA	731
Haydon, GR & S, WA	109
Hayes, Earl & Lesley Ann	186
Hayward, Mr John, TAS	287
Hayward, Mr Roy, WA	438
Haywood, Mr Jeff	91
Heap, Mr David	699

Submittor	**Submission Number**
Heath, Mr Jim, WA	13
Henare, Mr Mark, WA	732
Henderson, Mr Douglas, SA	733
Henderson, Mr Geoff, NSW	734
Henderson, Mr Lawrence, WA	492
Henry, Mr Rod M, SA	57
Henseon, David & Karen, WA	343
Henzell, Tony & Gail, WA	67
Herz, Ms Jenny, NSW	735
Hewett, Mr Milton Roland, WA	232
Hicks, Greg & Carol, WA	666
Hill, Mr Stephen Thomas, WA	801
Hills, Mr Kevin, WA	681
Hodge, Mr R C, WA	131
Hodson, Mr Dave	344
Holdcroft, Mr Peter, WA	2
Holmes, Ms Narelle G & Marchibald, Mr Mark Daniel	158
Hooper, Mr T R, WA	264
Hopkins, Graeme & Susanna, WA	273
Hopkins, Mr Gareth	499
Horrigan, Mr Terry	820
Hoskin, Mr Norm	331
Howard, Mr Mathew	381
Howe, K R, WA	82
Hubbard, Mr Frank	167
Hudson Croft Thomas - Chartered Accountants	888
Huish, Mr David, WA	429
Hunter, Mr Rod, WA	546
Hurst, Mr Martin, WA	160
Hutchings, Ms Roweena, WA	163
Hutson Duddy Accountants	830
International Banks & Securities Association of Australia	603
Investment & Financial Services Association Ltd (IFSA)	868
Irvine, Mr Colin, WA	353
Ismail Frca, Ms Glenys	326
Jajda, Stamoslaw, WA	538
James, Mr Craig & Julianne, WA	126
James, Mr Michael, WA	655
Jarvis, Mr Richard, QLD	560
Joachim, Mr Ron, QLD	100
Johannes, Mr Greg, WA	96
John, Vivian, WA	527

Submittor	**Submission Number**
Johnston, Mr James F, WA	136
Jones, Mr , WA	115
Jones, Mr Gavan, WA	242
Jones, Mr Michael G K, WA	282
Jones, Mr R G, WA	513
Jones, Mr Ross, WA	645
Jonshagen, Mr Bjorn, WA	300
Jordan, Mr John, WA	713
Jordan, Mr John, WA	713A
JP Management Consulting (Asia-Pacific) Pty Ltd	839
K W & M Carlisle, WA	205
KeelHoldings Pty Ltd	395
Keep, Mr Michael	556
Kelly, Dr Anthony, QLD	802
Kelly, Mr Greg	417
Kelly, Mrs Denese, WA	411
Kennedy, Mr Alan, WA	229
Kennedy, Mr Andrew	662
Kennedy, Mr Ron, WA	68
Kenny, Mr Patrick, WA	420
Kensington Park Dental Surgery	206
Kent, Mr Anthony, WA	236
Kerferd, Mr Lloyd, WA	521
Kerr, Mr C A & Payne, Ms S M, WA	800
Kerr, Mr C A & Payne, Ms S M, WA	800A
Kidd, I R, WA	19
Kidd, Mr Michael, WA	471
Kilpatrick, Denice, WA	516
Kimber, Mr Richard, WA	564
King, James & Kathleen, WA	83
Kiss, Owen & Roslyn, WA	644
Knowles, Mr Dean, VIC	177
Kohler, Mr Paul, WA	390
Kristancic, Ms Anna, WA	214
Kyle, Michael & Anne, QLD	798
Lambourne, Adrian & Brenda, WA	129
Lambourne, Mr Adrian, WA	396
Lawson, Terry & Ana, WA	678
Lee, Mr Gary, WA	738
Lees, Mr Alan	635
Lees, Mr Richard H, QLD	84
Lenegan, Trevor & Vicki, WA	633
Levy, Mr Ian	36

Submittor	**Submission Number**
Little, Mr Simon	792
Littlely, Mr Mark, VIC	639
Lobert, Mr Martin	135
Longbottom, G P, WA	881
Longton, Mr Garry	170
Lorimer, Mr Craig, WA	480
Lustig, Mr Michael Reginald, WA	321
Lynch, Peter & Vai, WA	740
Lynn, Mr Gerald, WA	785
Lynton, Mr Brett, WA	72
Lyons, Captain Kim S	187
Machin, Ms Jan, WA	570
Machin, Ms Jan, WA	601
Macintyre, G R, WA	190
Macquarie Bank Limited	859
Maisey, Mr Geoff	819
Mal Campbell Transport	311
Malackey, Mr Brian, WA	658
Malmlof, Ms Kaylenne	327
Managed Growth Australia Pty Ltd (MGA)	426
Managed Investments Australia Limited	673
Managed Investments Australia Limited	832
Managed Investments Industry Association Limited	849
Mannum Medical Centre	611
Marchese, Mr Frank, WA	451
Margiotta, Mr Vince, WA	284
Marks & Wallings Tyrees Pty Limited	871
Marley, M J, WA	218
Marsden, Thomas & Michelle, QLD	814
Marsh, Mr Donald, WA	307
Marston, Mr John, WA	648
Masters, Mr John, WA	741
Mathers, Mr Trevor, WA	457
Mathews, Mr Mark, WA	508
Maynard, Mr John, WA	306
Mazalevskis, Mr Michael, WA	637
MBAS Corporate Services Pty Ltd	515
McAllin, P J, WA	772
McArthur, Mr Peter, WA	742
McAuley, J P, NSW	808
McCaffrey, Mr Peter, WA	474
McCann, Mrs Patsy, WA	698
McCarthy, Mr Kenneth James, WA	56
McCaughan, John & Michelle	650

Submittor	**Submission Number**
McComish, Mr Peter, WA	640
McComish, Mr Peter, WA	640A
McCormick, Mr Michael	828
McDonald, Mr Francis, ACT	675
Mcgell, J N & J D, WA	595
McGill, B M, WA	797
McGinty, Mr Michael, WA	401
McGrath, Paul & Rosemary, SA	743
McGuinness, Mr Dean, WA	388
McKays Chartered Accountants	847
McKenzie, Mr P, WA	764
McKernan, Mr Paul, VIC	447
McKiernan, Mr Terence, WA	269
McKinney, Mr Scott, QLD	761
McKinnon, R N, NT	409
McLean, Mr John, WA	468
McLean, Mr Mike, WA	790
McLean, Ms Mary Elizabeth, WA	768
McMahon, Mr B	498
McMurtrie, Mr Lloyd, WA	324
McNally, Mr Ronald, WA	425
McPartl&, Mr Stephen, WA	677
McWaters, Mr Donald, WA	604
Meins, Mr Neil	359
Meredith, Mr David, WA	400
Meredith, Mr David, WA	400A
Meredith, Mr David, WA	400B
Mews, Mr David John, WA	208
Meylan, B D & E A	161
Middleton, Mr John W, WA	827
Millar, Mr L, WA	164
Miller, D R, WA	196
Miller, J W & S A, WA	252
Miller, Mr Mark	162
Miller, Mr Peter, WA	825
Milne, Kery, WA	563
Minchin Metaland	364
Mitchell, Mr Peter J, WA	291
Mitchell, Mr Tim, WA	664
Mitchell, W J, WA	139
Moloney, Kym, WA	766
Monnery, Mr Tim, WA	230
Moore, Mr Greg, WA	483
Moore, Mr John, WA	609
Morete, Mr Syd, WA	679

Submittor	**Submission Number**
Morley, Mr Chris, WA	37
Morris, Mr Brian, WA	517
Mortensen, Michael & Lynette	274
Morton, Ms M E, VIC	444
Mosshammer, Mr Roman, QLD	796
Mott, Mr Terry	185
Mouna, L E, WA	234
Moyle, Mr Alexander J, WA	76
Ms K F Needle & Mr J G Beisley, WA	384
Mular, Taras, SA	557
Mularcayk, Mr Edward, WA	228
Muller, Mr Chris, WA	276
Mullin, Mr Michael, WA	63
Mullins, Mr Peter James, WA	87
Mumme, Jason & Sonya, WA	193
Murphy, Mr Ian, VIC	24
Murphy, Mr Ian, VIC	24A
Name & Address Withheld	255
Name & Address Withheld	184
Name & Address Withheld	535
Name & Address Withheld	555
Name & Address Withheld	718
Nerson, Mrs D, WA	736
Nesbitt, Mr Barry	169
Nicol, Mr Graham, WA	630
Nielsen, Mr Arne, WA	46
Nieuwendyk, Ms Karen, WA	393
Nieuwenhoven, Paul & Heather, NT	51
Northey, Mr Brett, VIC	804
Nottle, Mr Graham, WA	533
O'Connor, Mr Rory, WA	31
O'Connor, Ms Rebecca, WA	590
O'Donnell, B W & Godfree, D S, WA	217
O'Donnell, Ms Carol, NSW	6
O'Loughlin, Mr Steven	176
O'Malley, Mr Keith, WA	227
O'Sullivan, Mr John, WA	504
Oakley, Mr Mark, WA	219
Ogden, Mr Keith, WA	449
Ondaatje, Mr David, WA	458
Orangi, Kambiz, WA	510
Orriss, Ms Carolyn	529
O'Sullivan, Mrs R, WA	462

Submittor	**Submission Number**
Packett, Mr Wayne, WA	367
Padmore, Mr Roy, WA	506
Palinyewah Producers	750
Palmer, K R, WA	314
Papas, Paul & Lisa, WA	88
Papas, Paul & Lisa, WA	88A
Parkinson, Mr Ian, WA	412
Part, Mr Stephen, QLD	598
Partridge, Drs Ian & Stephanie, SA	745
Parusel, Mr Mike, QLD	744
Paterson, Mr Graham Ronald, WA	74
Paterson, Mr Jordan, WA	280
Peaker, Mr Kimberley, WA	183
Pemberton, Mr Anthony, WA	335
Pereira, Anthony & Linda, NSW	532
Peter Lang & Associates	878
Phelan, Mr Kevin, WA	188
Pickford, Mr Graeme, QLD	145
Pinto, C A, WA	387
Pittaway, Ian & Jacquie	132
Plant, Mr David, WA	568
Plantations Australia	366
Player, Mr Eric, WA	159
Polkinghorne, Mr Grant, WA	195
Polley, Ms Lesley, WA	446
Ponton, Mr Phillip, WA	543
Poole, Mr John	634
Popham, Mr Edward G, WA	747
Pragnell, Mr Tony,	875
Presci, Peter & Tyler, Jim, WA	113
Pricewaterhouse Coopers	588
Proctor, Ms Ann, WA	308
Przblski, Kazik	518
Psychological Medicine	708
Pullen, Mr David, WA	748
Pundy, Mr Ray, WA	397
Pynor, Dr Martin J, SA	749
Quaestus Securities Pty Ltd	652
Quest Investments Pty Ltd	501
Raven, Ms Gail & Johnston, Mr Graeme, WA	844
Rawlinson, Mr John, WA	484
Rear, Glen & Pasqua, WA	295

Submittor	**Submission Number**
Reeby, Mr Robert, WA	461
Rees, G M, WA	285
Rees, Mr James, WA	204
Reeve, Mr Colin, WA	346
Reeves, Mr Steve, WA	762
Reid, James & Patricia, WA	312
Reid, M W J & R, SA	760
Richard, V L, WA	789
Richards, Mr David, WA	638
Richards, R N, WA	319
Rickie, Mr Greg J, WA	94
Riordan, J K, WA	754
Roberts, Mr Martin, NSW	613
Roberts, Mr Phil, WA	795
Robinson, Mr Lance, WA	97
Roche Mining	259
Roney, Mr Kevin, WA	371
Rosher, Malcolm & Judith, WA	701
Ross College	653
Ross, Mr David, WA	490
Rossi, P, WA	440
Rossier, John & Judy	793
Rowen, G & S	751
Rowson, Mr Ian	29
Roy, David & Pauline, WA	473
Roy, Ms Wendy, WA	456
Rural Investment Monitoring Services	746
Ryan, Mr Laurie, QLD	739
Ryan, Mr Malcolm, TAS	821
Ryper, Mr Lawrence Edwin, WA	863
Ryper, Mr Lawrence Edwin, WA	863A
Salmon, Mr Robert	524
Sandell, Rod & Jan, WA	133
Sanderson, Mr Julien L, WA	752
Sanderson, Mr Julien L, WA	752A
Sandilands, Mr Stephen, WA	375
Saunders, Mr Craig, WA	421
Scattini, Mr Noel John, WA	886
Schauter, Thomas & Judith, WA	237
Scherl, Mr Oscar, NSW	17
Schilo, Mr James A, WA	275
Schofield, Mrs Lynnsey, WA	70
Schuster, Mr Cameron	850
Schwartz, Mr John, WA	39

Submittor	**Submission Number**
Scoble, Ms Deborah, WA	676
Searle, Mr Rod, WA	542
Self, Mr Peter, WA	422
Selsmark, Mr Glenn	231
Shahabuddin, Mir, WA	271
Shaw, Mr Paul, NT	753
Shearing, Mr Mark, WA	385
Sheil, Mr Henry, WA	569
Shell Engineering Propretary Limited	339
Shoobridge, Mr David	683
Shuard, Robert & Janice, WA	537
Sidebotham Nominees Pty Ltd	882
Simcock, Mr Wayne	168
Simpson, Mr Ian	636
Sinden, Mr Les, WA	389
Skinner, Mr Russell, WA	368
Sleight, Mr Kevin, WA	690
Slowther, Mr Phil, WA	165
Smith, D B, WA	216
Smith, Mr Desmond J, WA	778
Smith, Mr Gilbert, WA	680
Smith, Mr Jeffrey, WA	621
Smith, Mr John G, ACT	248
Smith, Mr John, WA	495
Smith, Mr L R, WA	838
Smith, Mr Michael	257
Smith, Mr Peter, WA	565
Smith, Mr Stephen	497
Smith, Mr Stephen	503
Smithers, Mr Andrew, NSW	643
Smithers, Mr Lesley, VIC	667
Smoker, Lindsay, WA	386
Snabel, Abraham & Frances, WA	632
Sorensen, Mrs Kate, WA	406
Southern, Peter & Linda, WA	415
Spence, Ms Hilary, WA	758
Spencer, Mr Steve, WA	618
Spendlove, Mr Neil, QLD	553
Staffa, Mr Kevin & Mrs Myra, WA	756
Stals, Mr Andrew, NSW	858
Standen, Mr David, WA	69
Stapely, Mr Wayne, WA	682
Steele, Mr Alan, WA	201
Steele, Mr David, WA	431
Stevens, Mr Tony	48

Submittor	**Submission Number**
Stevens, Mr Tony, WA	32
Stewart, Ms Dianne, WA	831
Stocks, R W, WA	239
Stoneman, Mr Peter, WA	659
Stoner, Mr Mike	8
Strauss, R B, WA	439
Stuart, Ms Coleen Mary, WA	215
Suba, Mr Stephen, NSW	11
Svensson, Mr Peter	349
Swami, Avinasha Kumar, WA	103
Tait, Mr David, WA	7
Tan, Norry	512
Tann, Mr Trevor, WA	428
Taylor, Mr Dan	656
Taylor, Mr David Ronald, WA	38
Taylor, Mr Geoff, WA	155
Taylor, Mr Geoff, WA	155A
Taylor, Mr Geoff, WA	155B
Taylor, Mr Geoff, WA	155C
Taylor, Mr Geoff, WA	155D
Taylor, Mr Geoff, WA	155E
Taylor, Mr John, WA	153
Taylor, Mr Phillip, WA	502
Tendeiro, Ariel	99
Terry, Mr Robin, WA	500
The Australian Managed Investments Association Ltd	622
The Australian Managed Investments Association Ltd	622A
Thiele, Mr Kent, SA	606
Thiele, Mr Kent, SA	610
Thomas, Mr Hugh, WA	243
Thomas, Mr Robert, WA	320
Thomson, L R & S J, WA	816
Thoroughbred Advertising	755
Thwaites, Mrs B, WA	383
Tilbrook, Mr Neil, WA	140
Timber 2002 Inc	107
Timber 2002 Incorporated	212
Timbercorp Limited	514
Tingle, Mr Ian, WA	777
Tonks, Mr Christopher, WA	592
Torrance, Mr Charles, WA	203
Touchell, Mr Michael Thomas, WA	154
Treagust, Dr David F, WA	144
Treagust, Dr David, WA	391

Submittor	**Submission Number**
Treloar, Mr K S & Mrs B E, WA	782
Trew, Mr Richard John, WA	222
Trinca, Aldo,	674
Trippe, Mr Rick	549
Truscott, Mr Kennith, WA	460
Truscott, P J, WA	525
Trust, McDermott & Summerell	572
Tuckerman, Mr Graham	841
Tully, Errol & Miriam, NSW	328
Tunnercliffe, T J, WA	246
Turley, Mr Patrick John, WA	770
Turner, Steve & Loretta, WA	105
Tyrer, Mr Peter Morris, QLD	152
Tyrer, Mr Peter Morris, QLD	152A
UNICORP Group Pty Limited	530
University of Western Sydney	297
Van de Ven, Mr John, WA	620
Van Den Beuken, Mr Brian, WA	700
Van Elst, Joe & Machell, WA	102
Van Eyk Capital Pty Ltd	691
Van Ierland, G H	137
Van Tuyl, Mr John, WA	283
Vaskovics, Mr George, WA	526
Vedova, Mr John D, WA	298
Vere Bowles Hunt, Mr Alan, WA	536
Vermeulen, Mr Keith, WA	341
Vermeulen, Ms Sally, WA	489
Vernon, Mr William, WA	767
Vicary, Mr David, WA	398
Victoria Hotel (WA) Pty Ltd	879
Vicziany, S J, Kalgoorlie	112
VIER Pty Ltd	26
Vinci, Mr Len, WA	125
Vis, Mr Henrick Cornelis, WA	192
Vision Excellence Optometrist	286
Vorster, Mr Steven, WA	262
Vorster, Mr Steven, WA	348
Wagner, P G & R L, WA	660
Waldock, Mr Reece, WA	118
Walker, A F, WA	812
Wall, Mr Barry, WA	829
Walmsley, Mr Peter, VIC	627

Submittor	**Submission Number**
Walsh, Mr John, WA	356
Ward, Francis P & Jeanett	127
Ward, Lynley & Roley, WA	292
Ward, Mr David, WA	573
Wardle, John & Diana, WA	434
Wardle, Mr John, WA	597
Warwicker, Mr Paul, WA	436
Wearn, Mr Bradley W, WA	86
Webster, R W & B M, WA	207
Weir, D N, WA	596
Wellman, Rob & Diane, WA	210
Wells, Mr Reginald, WA	507
Werchon, Dr Philip, SA	373
West, B J & J J M, WA	316
Western, Mr Barry,	416
White, Mr Patrick, WA	171
White, Ms Kim, WA	322
Whitehill, Mr Alan	806
Whitings - Chartered Accoutants, Business Consultants	885
Whittaker, Mr Colin, WA	582
Whyte, Mrs Olive	354
Wieland, Helen & Ross, WA	432
Willcocks, Mr Chris, WA	665
Williams, Mr Paul, WA	123
Williams, Mr Peter	253
Williamson, Mr Peter, WA	377
Willmott Forests	628
Willsher, L G & S C	277
Wilson, Joe, NSW	494
Wilson, Mr Ian, QLD	794
Wilson, Mr Ken, WA	464
Wilson, Mrs Leonie, WA	213
Wiltshire, Bruce & Cheryl	182
Winton, Mr & Mrs P J & J E, WA	454
Witcombe, Mrs Karenza, WA	884
Wolyniec, Ms Linley, WA	141
Woodbine, Mr Kevin John, WA	811
Woodhead, Mr George, WA	773
Woods, Ms Letetia, WA	809
Worley, Mr Vaughan	119
Worsnop, Mr Paul, WA	554
Yates, M G, WA	607
Young, Mr Thomas, WA	336
Zmak, Dario, WA	599

APPENDIX II

PUBLIC HEARINGS AND WITNESSES

Wednesday, 11 December 2000, Canberra

Australian Securities and Investments Commission
Johnston, Mr Ian, National Director, Financial Services
McShane, Mr Darren, Director, Managed Investments
Tanzer, Mr Greg, Regional Commissioner, Queensland

Australian Taxation Office
Balik, Mrs Antonietta, National Coordinator, Small Business
Bersten, Mr Michael, Deputy Chief Tax Counsel
Fitzpatrick, Mr Kevin, First Assistant Commissioner
O'Neill, Mr Michael, Assistant Commissioner, Tax Planners
Peterson, Mr Brett, Assistant Commissioner, Small Business
Smith, Mr Peter, Assistant Commissioner, Small Business

Wednesday, 31 January 2001, Canberra

Australian Plantation Timber Ltd
Brandsma, Mr Rinze Arjen, Managing Director
Brazenor, Mr Paul Geoffrey, Deputy Managing Director

Great Southern Plantations Ltd
Young, Mr John Carlton, Chairman and Managing Director

Timbercorp Limited
Hance, Mr Robert James, Chief Executive Officer
Rabinowicz, Mr Sol, Executive Director

James, Dr Ride Naismith, (Private Capacity)

Friday, 9 March 2001, Melbourne

Australian Agribusiness Group
Elgin, Mr Marcus, Director

Australian Rural Group Ltd
Flude, Dr Peter Gordon, Managing Director

Commonwealth Ombudsman
McPherson, Ms Catherine Mary, Acting Deputy Ombudsman and Special Tax Adviser

Winder, Mr Oliver, Acting Commonwealth/Taxation Ombudsman

Greater Western Financial Services Co. Pty Ltd
Gordon, Mr Roger Charles, Senior Consultant and Authorised Representative
Gordon, Mr Roger Charles, Senior Consultant and Authrorised Representative

Managed Investments Australia Ltd; and Hillston Grove Vineyards Ltd
Jellyman, Mr Rodney Harold, Managing Director and Director

Leibler, Mr Mark Matthew (Private Capacity)

Monday, 19 March 2001, Kalgoorlie

Chamber Of Minerals and Energy Of WA
Gordon, Mr Bradley Austin, Member, Eastern Regional Council

Goldfields Community Legal Centre
Harris, Mrs Effie Barbara, Coordinator

McKenzie Lalor
McLean, Miss Lisa Michelle, Solicitor

Bishop, Mrs Debra Maree (Private Capacity)
Broughton, Mrs Charmaine (Private Capacity)
Burns, Mr Michael Dale (Private Capacity)
Campbell, Mr Graeme (Private Capacity)
Coutts, Mr Wesley (Private Capacity)
Crooks, Mr Peter (Private Capacity)
Dunstan, Mr Ossie (Private Capacity)
Elphick, Mr Craig Stephen (Private Capacity)
Franklin, Mr Scott (Private Capacity)
Haase, Mr Barry Wayne (Private Capacity)
Hutson, Mr Michael David Frederick (Private Capacity)
Mccomish, Mr Peter, (Private Capacity)
Murison, Mrs Fiona (Private Capacity)
Reeves, Mr Steven Leslie (Private Capacity)
Roy, Mr Tim (Private Capacity)
Schofield, Mrs Lynnsey (Private Capacity)
Stewart, Mr Kim David (Private Capacity)
Woods, Miss Letetia (Private Capacity)

Tuesday, 20 March 2001, Perth

Ashok Parekh and Co., Chartered Accountants
Parekh, Mr Ashok, Chartered Accountant

Australian Managed Investments Association
Atkinson, Mr Stephen Lee, Director
Gear, Mr George, Chairman
Hennessy-Hawks, Mr Robert James, Director
Sleight, Mr Kevin Phillip, Director
Young, Mr Warwick Raymond, Director

C. Pope & Associates
Pope, Mr Colin, Partner

Chalice Bridge Estate Ltd
Edinger, Mr Robert John, Managing Director

Mbas Corporate Services Pty Ltd
Thoume, Mrs Anne Yvonne, Director

McKays Chartered Accountants
Fitz-John, Ms Valerie Ruth, Tax Consultant
McKay, Mr Murray Ranald, Partner
McKay, Mrs Lesley, Partner

Norton and Smailes
Norton, Mr Richard Stanley, Partner

Resolution Holdings
Meredith, Mr David Peter, Director

Wilson and Atkinson
Wilson, Mr Frank Cullity, Partner In Charge Of Tax Division
Atkinson, Mr Stephen Lee, Partner

Douglas, Mr Gray (Private Capacity)
Fonda, Mr Oliver (Private Capacity)
Jones, Dr Michael (Private Capacity)
Jonshagen, Mr Bjorn Herluf (Private Capacity)
Sanderson, Mr Julien Louis (Private Capacity)
O'Sullivan, Mr John (Private Capacity)
Popham, Mr Edward George (Private Capacity)
Ryper, Mr Lawrence Edwin (Private Capacity)
Sach, Mr Geoffrey Harcourt (Private Capacity)
Stewart, Mr James Roderick (Private Capacity)
Taylor, Mr Geoffrey Alan (Private Capacity)
Watts, Mr Rodney Charles (Private Capacity)

Tuesday, 3 April 2001, Canberra

Australian Taxation Office

Anderson, Mr Iain Hugh, ATO Solicitor, Assistant Commissioner, Office of the Chief Tax Counsel
Charles, Mr Robert Gerard, Assistant Commissioner, Client Account Management
Field, Miss Cheryl-Lea, Assistant Commissioner, Small Business
Holland, Ms Erin Kathleen, Acting Deputy Commissioner, Client Account Management
Oliver, Mr Nick, Assistant Commissioner, Senior Tax Counsel
O'Neill, Mr Michael Gerard, Acting First Assistant Commissioner
Scanlan, Mr Gary Brian, Director, Receivables Policy
Smith, Mr Peter Gerard, Assistant Commissioner, Small Business

APPENDIX III

CHRONOLOGY OF TAX OFFICE ACTION ON AGGRESSIVE TAX PLANNING

1997 Calendar Year

- Consultative document and draft ruling on afforestation schemes that also considers characteristics of unacceptable schemes issued.
- Processing of certain scheme related tax instalment deduction variations stopped.
- Position papers on over ten schemes issued.

1998 Calendar Year

- Withdrawal of previous tax instalment deduction variations.
- Five position papers issued to a range of promoters.
- Over 10,000 letters sent to investors in over ten schemes.
- Several hundred refunds stopped for participants in one scheme.
- Four quite pointed speeches were given and received extensive coverage.
- Product ruling system introduced.
- Draft ruling on FBT and employee benefit arrangements issued.

1999 Calendar Year

- Over 8000 letters sent to investors to cover 50 schemes.
- Five media releases making our position clear on a wide range of schemes.
- Final ruling on FBT and employee benefit arrangements issued.
- A further pointed speech made and announcement of engagement of high level expertise to support an integrated litigation strategy.

2000 Calendar Year

- Final ruling on investment schemes issued.
- A further speech made outlining variations of earlier schemes.
- Over 9000 letters sent to investors in over 20 schemes.

In addition assessments to almost 18,000 participants in mass-marketed schemes have been issued to date.

Source: ATO Submission No. 845, Attachment A, November 2000.