CHAPTER 2

The Schedules

Introduction

2.1 This is an omnibus bill containing fifteen schedules. The Committee concentrated its inquiries on schedule 5 (government grants), schedule 9 (pre-1 July 1988 funding credits), schedule 11 (new deductible gift categories), schedule 12 (GST treatment of gift deductible entities) and schedule 15 (GST treatment of residential premises).

2.2 In response to a confidential submission, Committee members also asked a number of questions about schedules 1 and 2, which deal with tax benefits for those affected by cyclones Monica and Larry. For the most part, officers were unable to provide information about the cyclone related issues, and took questions on notice. Answers received form part of the Committee's record of tabled papers.

Schedule 5

2.3 Schedule 5 will amend the *Income Tax Assessment Act 1997* to exempt the recipients of the Unlawful Termination Assistance Scheme, the Alternative Dispute Resolution Assistance Scheme and similar expense-reimbursing government grants from capital gains tax (CGT). This Schedule makes a further amendment to ensure capital losses, and not just capital gains, are exempt from CGT

2.4 These two schemes were established to support the WorkChoices package and are already in operation.

2.5 A representative of the Department of Employment and Workplace Relations told the Committee that the Alternative Dispute Resolution Assistance Scheme is used to facilitate resolution services for disputes between parties; and the Unlawful Termination Assistance Scheme is to provide eligible applicants with assistance to seek legal advice on the merits of their case. Both schemes use a voucher system for making payments.[1]

2.6 Persons receiving assistance may receive assistance up to $4,000 under the Unlawful Termination Assistance Scheme; and under the Alternative Dispute Resolution Assistance Scheme, $1,500 plus $500 for any travel expenses.[2]

2.7 A representative of the Treasury explained that that there is a possible technical reason why the payments under a voucher system might give rise to a CGT

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1 *Proof Committee Hansard*, 19 June 2006, pp. 11-12. (Mr Thomas)

2 *Proof Committee Hansard*, 19 June 2006, p. 11. (Mr Thomas)

liability, and the measure in the Schedule would ensure that such a liability does not arise:

> Where these payments come out of the payment of a voucher to pay external providers that voucher could give rise to a right to use that voucher. The use of that voucher with a legal practitioner would be the extinguishment of that right under the capital gains tax law. That would be a disposal of that capital gains tax asset. Theoretically, technically that could give rise to capital gains tax liability.[3]

2.8 As such, it is clear that this is a technical amendment which is intended to ensure that there are no unintended taxation consequences arising from the provision of benefits from these schemes.

Schedule 9

2.9 Schedule 9 will amend the *Income Tax Assessment Act 1936* (ITAA 1936) to:

- prevent the inappropriate use of pre-1 July 1988 funding credits (funding credits) by ensuring that superannuation schemes can only use them to reduce their taxation liability in respect of contributions made for the purpose of funding benefits that accrued before 1 July 1988; and
- allow regulations to be made to provide guidance to the trustee of a superannuation scheme on how to work out the amount of funding credits that can be applied to reduce the taxation liability of the trustee in respect of contributions made and to allow other methods of working out how the trustee of a superannuation scheme can apply funding credits.[4]

2.10 An officer of Treasury's Retirement Savings Division provided useful context to this amendment:

> …in 1988 the then government introduced the 15 per cent contributions tax on superannuation. When that was introduced, a transitional measure was introduced to deal with how that contributions tax would apply to unfunded superannuation schemes. To give an example, in an unfunded scheme, if somebody started work in 1968 and retired in 2008, the contribution for that person would normally only be paid in 2008. As a result, that whole contribution would be subject to the 15 per cent contributions tax. As part of that contribution related to pre-1988, there is a credit given to the funds and it can use that credit so it does not pay tax on that part of the contribution that related to pre-1988.[5]

2.11 The officer explained that there is currently scope for superannuation schemes to use credits where the Government does not think it is appropriate to do so:

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3 *Proof Committee Hansard*, 19 June 2006, p. 11. (Mr Thomas)

4 Explanatory Memorandum, p. 75.

5 *Proof Committee Hansard*, 19 June 2006, p. 20. (Mr Murray)

> Broadly speaking, they can use these credits to reduce tax on contributions that always relate to post-1988 periods of service. That was never the intention. The aim of these amendments is to correct that anomaly and ensure that the law works as was always intended.[6]

2.12 The officer went on to explain that there is currently a provision that restricts the use of these funding credits and which was designed to stop inappropriate use. However, the provision relies on a formula, which has proven ineffective and is therefore being replaced with a principle based system:

> So the bill replaces that formula with a broad principle which is placed in the act itself that you can only use credits to reduce tax on contributions made in relation to pre-1988 service and also provides a facility to provide further guidance in the regulations. It is envisaged that that will help actuaries that will be involved in this determination to follow the proper processes.[7]

2.13 The superannuation schemes most likely to be affected by this provision are unfunded schemes, traditionally operated by the State and Territory governments.[8]

2.14 The measure will save the revenue approximately $150 million per annum. The Treasury representative explained that this estimate was based on Australian Taxation Office assessments of the amount inappropriately used in the past by the funds.[9]

Schedule 11

2.15 Schedule 11 will amend the ITAA to create five new general categories of deductible gift recipient (DGR). The five new categories are:

- war memorials;
- disaster relief;
- animal welfare;
- charitable services; and
- educational scholarships.[10]

2.16 Treasury officers explained that the amendment is 'generally a simplification and streamlining measure':

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6 *Proof Committee Hansard*, 19 June 2006, p. 20. (Mr Murray)

7 *Proof Committee Hansard*, 19 June 2006, p. 20. (Mr Murray)

8 *Proof Committee Hansard*, 19 June 2006, p. 21. (Mr Murray)

9 *Proof Committee Hansard*, 19 June 2006, p. 20. (Mr Murray)

10 Explanatory Memorandum, p. 85.

> Looking at past practice and the number of additional deductible gift recipients that have been listed over the last few years, each and every time a particular organisation satisfies a requirement they need to be listed in the legislation. From experience, a lot of the cases that have been coming forward fitted into special categories. In particular, there seemed to be a lot of requests for war memorials, extensions to the time limit to repair war memorials and educational scholarships. Those types of things seemed to be more general, so we thought a generic category of deductible gift recipient may obviate the need to specifically list particular organisations by name if they fit within the general category. That was part of the thinking behind it.[11]
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> …
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> it gives some further clarity for individual applicants to know what area of the categories would best fit their circumstances. At the moment, some may fall into one or two particular categories. If they are not sure which one, they have to check as to which one might be better suited. These generic categories should open up and have more clarity for individual applicants to notice that, 'Yes, I fit in with the war memorial' or 'Yes, I'm animal welfare,' for example.[12]

2.17 The Committee noted that heritage buildings are not one of the new categories of DGR. Members sought information about why heritage buildings such as cathedrals are considered for DGR status on their individual merits, and why they are considered different to war memorials, which merit a DGR category of their own. Treasury told the Committee that war memorial restoration issues were recurrent:

> … these were issues that were coming up more recurrent. Whereas in the heritage listed area that you mentioned, going from memory, a number of years ago when I was doing a similar job, things like the St Patrick's Cathedral were subject to a fire and that was specifically listed. Those were very much one-off events whether or not they justified a general category.[13]

2.18 The Committee sought information about whether environmental bodies, some of which are listed by name, would be affected, and was advised that the position for them would not change.[14]

2.19 The Committee also sought information about where organisations that are listed as DGRs are listed. The Treasury provided the following information:

> …all organisations that are endorsed by the Australian Taxation Office (ATO) as a deductible gift recipient or a charity would be listed on the Australian Business Register. [ABR] The register can be accessed by the public through the ATO website. Consistent with that practice, information

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11 *Proof Committee Hansard*, 19 June 2006, p. 22. (Mr O'Connor)

12 *Proof Committee Hansard*, 19 June 2006, p. 23. (Mr O'Connor)

13 *Proof Committee Hansard*, 19 June 2006, p. 23.

14 *Proof Committee Hansard*, 19 June 2006, p. 22. (Mr O'Connor)

regarding those organisations endorsed by the ATO under the new DGR categories will also be available on the ABR.[15]

2.20 The Committee notes that the Explanatory Memorandum provides useful information about the criteria used to determine whether or not a particular fund will qualify for DGR status, as well as a number of practical examples, and refers interested groups concerned about their DGR status to it.

Schedule 12

2.21 Schedule 12 will amend the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to ensure that:

- the goods and services tax (GST) charity concessions apply as originally intended; and
- charities operating retirement villages, like other charities, are required to be endorsed in order to access the GST charitable retirement village concession.[16]

2.22 Treasury officers explained that this is essentially an integrity measure which was identified as part of the Government review of charities. They said that the issue was theoretical, as no cases had come to the attention of the Tax Office of people incorrectly using the provisions.

2.23 Officers explained the nature of the perceived problem:

> It is the way that the definition operates. If you are entitled to receive gifts under the DGR provisions of the Income Tax Act you are entitled to the gift deductible entity provisions. It is formulated in the broad, and the concern is that larger organisations operating a gift deductible entity as part of their overall functions could gain access to those charity concessions for their entire operation.[17]

2.24 They also gave a useful example of a situation the measure was intended to address:

> For example, a council that runs a library, a child-care centre or something like that may be able to use that clause to apply the charity's operations to its entire operation.[18]

2.25 In relation to charities operating retirement villages being endorsed by the commissioner, officers said that this was an oversight in earlier legislation, and the

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15 Additional Information provided by Treasury 20/6/06 via email.

16 Explanatory Memorandum, p. 103.

17 *Proof Committee Hansard*, 19 June 2006, p. 25. (Mr Colmer)

18 *Proof Committee Hansard*, 19 June 2006, p. 25. (Mr Colmer)

amendment 'will bring that into line with the general requirement for access to concessions in the law that there is endorsement by the commissioner'.[19]

Schedule 15

2.26 Schedule 15 will amend the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to ensure that following the decision of the Full Federal Court of Australia in *Marana Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 307 (the *Marana* decision) supplies of certain types of real property are input taxed.

2.27 The *Marana* decision was a decision of the Full Federal Court of March 2004 which decided that the sale of a unit, which was previously a room in a motel, was the sale of 'new residential premises' and therefore subject to the goods and services tax (GST); and considered that the terms 'reside' and 'residence' connoted a permanent, or at least long-term, commitment to dwelling in a particular place.

2.28 According to the Explanatory Memorandum, the decision has resulted in potential difficulties in distinguishing between supplies of premises that are residential premises and therefore input taxed, and supplies that are taxable.

2.29 The Explanatory Memorandum notes that:

> In particular, the Court's judgment is likely to lead taxpayers to seek to treat certain supplies of real property as taxable rather than input taxed, with effect from 1 July 2000 when the GST system was introduced. These supplies include:
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> - short-term letting of strata titled units such as serviced apartments by owners to guests;
> - leasing of strata titled units to hotel operators or similar operators; and
> - leasing of display homes and provision of certain short-term employee accommodation.[20]

2.30 Schedule 15 was the most contentious of the schedules examined by the Committee, and was the subject of three submissions, which form part of the Committee's record. The public submissions (Taxation Institute of Australia and KPMG) are available on the Committee's website at: http://www.aph.gov.au/senate/committee/economics_ctte.

2.31 The Committee also took evidence from Mr Mathew Munro of the Real Estate Institute of Australia (REIA). The issues identified in the REIA evidence and the TIA and KPMG submissions fall into three broad areas:

- the legislative amendment itself;

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19 *Proof Committee Hansard*, 19 June 2006, p. 25. (Mr Bignell)

20 Explanatory Memorandum, p. 115.

- the retrospectivity of the amendment; and
- shortcomings in work on redrafting the relevant taxation ruling, GSTR 2000/20.

The amendment

2.32 The REIA apparently seeks to align the taxation treatment of investors in short term accommodation such as serviced apartments with that of hotels, motels and similar facilities. Mr Munro told the Committee:

> It is our view that persons operating legitimate commercial residential premises, such as a short-stay serviced apartment leased to a manager, should be entitled to enter the GST system, as is the case with other commercial property investments.[21]

2.33 The REIA saw the *Marana* decision as opening up the opportunity for this to occur, and expressed disappointment that the amendment would prevent this.

2.34 The REIA proposed an alternative that would allow property investors to opt in to the GST system where the property was solely for short stay purposes.

2.35 KPMG also disagreed with the proposed amendments. KPMG summarised its submission in the following terms:

- The proposed amendments should be refused to the extent that the amendments apply to deny business an input tax credit for the cost of providing short-term accommodation (such as shearers quarters) to employees or contractors.
- The amendment proposed by Item 1 of Schedule 15 should be rejected because it denies input tax credits for costs incurred by employers in providing accommodation in hotels, motels etc to their employees for the legitimate business purposes of the employer – with retrospective effect from 1 July 2000.
- In general, the amendments proposed by Schedule 15 of the Bill should be rejected because the principles adopted by the Full Federal Court, which the Bill seeks to overturn, are an accurate and proper construction to be used to determine the scope of the input taxed treatment of residential premises. The position enunciated in the Explanatory Memorandum is inconsistent with the Government's original policy for the GST treatment of residential premises.[22]

Retrospectivity

2.36 Mr Munro pointed out that two years had elapsed since the decision and also said that the Government had not indicated that it would retrospectively amend the legislation in this period. He claimed that there would be some investors who would be unfairly disadvantaged:

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21 *Proof Committee Hansard*, 19 June 2006, p. 27.

22 KPMG, *Submission 3*, pp. 1-2.

> As a result, there are likely to be investors that have entered into affected property investments after the Marana decision was made public in good faith and on the understanding that an input tax credit may be claimed upon purchase of their investment property. Obviously, the ability to claim a 10 per cent ITC would have been paramount in the assessment of the likely long-term return on that investment.
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> Whilst some may maintain that the impact of the *Marana* decision remained open for debate, the fact that the ATO commenced amending GSTR 2000/20 and that the Commonwealth has now moved to amend the legislation is a clear indicator that the ITC was in fact allowable at the time the investment was made. Thus the REIA maintains that persons entering into affected investments in good faith between the Marana and Commonwealth announcements should not be disadvantaged by retrospective legislation. To do otherwise would impact significantly on the cash flow of affected investors who may be required to repay ITCs which have been previously granted.[23]

2.37 The Taxation Institute of Australia also raised concerns about the retrospective application of the measure, and argued that there should be transitional provisions in the Bill to ensure that taxpayers who had invested in accordance with the *Marana* decision are not disadvantaged by the retrospective application of the provisions.[24]

Redrafting work on GSTR 2000/20

2.38 In the period following the *Marana* decision, the REIA was involved with the ATO, as part of a 'property and construction partnership' in work on redrafting GSTR 2000/20 to reflect the decision. Mr Munro maintained that the direction that was adopted by the ATO in this redrafting indicated to the REIA that the ruling would reflect the decision. An issues paper was prepared and provided to the REIA in confidence. Mr Munro told the Committee that this led the REIA to believe that there would be a 'use test' in the redrafted ruling.[25]

2.39 However, the position paper was withdrawn, and the amendment in Schedule 15 apparently reverses the position that was in the issues paper. Mr Munro summed up his position:

> We might as well have gone back and torn up all the work the ATO had done in manufacturing or drafting the rewrite of 2000/20.[26]

2.40 The REIA appears to consider that it was somewhat misled by this process.

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23 *Proof Committee Hansard*, 19 June 2006, p. 28.

24 Taxation Institute of Australia, *Submission 1*, p. 1.

25 *Proof Committee Hansard*, 19 June 2006, p.30.

26 *Proof Committee Hansard*, 19 June 2006, p. 30.

2.41 The Committee sought information about how many people were affected by the change. Mr Munro thought that it was low, but that quite a large number of transactions might be involved.[27]

Treasury Response

2.42 Treasury representatives commenced their evidence by pointing out that the *Marana* decision was not focused on the key issues discussed by the Committee:

> The *Marana* decision was about related issues around when something is new residential property. It dealt with the situation where an old motel was converted into strata title units, so it was quite a specific case. As part of that, the court made some comments about what residential property might be, as opposed to what new residential property might be.[28]

2.43 As such, the comments were '*obiter dicta*'.[29]

2.44 Treasury representatives also said that they had not been able to determine how many people would be adversely affected by the amendment, but thought 'we are dealing with a very small number of people'.[30]

2.45 However, the representatives said that it the decision was applied in the way suggested by the REIA:

> …at least 8,000 people would need to go back to 2000, redo all their GST work and quite possibly redo all their income tax work and capital gains tax returns for that period in order to apply, I guess, the most favourable interpretation of Marana.[31]

2.46 The Committee explored with the officers the possibility of an amnesty for those people who had successfully claimed an input tax credit. However, officers advised that:

> Then you would very quickly get claims from the next group of people—and the ATO can probably speak more about these—who made inquiries to the ATO, were told that the situation was under review and were asked to hold on to their claims until the situation had been resolved. If you extended

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27 *Proof Committee Hansard*, 19 June 2006, p. 31.

28 *Proof Committee Hansard*, 19 June 2006, p. 35. (Mr Colmer)

29 An **obiter dictum** (plural *obiter dicta*, often referred to simply as *dicta*), Latin for a statement said 'by the way', is a remark or observation made by a judge that, while included in the body of the court's opinion, does not form a necessary part of the court's decision. Unlike the *rationes decidendi*, obiter dicta are not the subject of the judicial decision. Under the doctrine of *stare decisis* obiter dicta are therefore not binding although, in some jurisdictions (such as England and Wales), they can be strongly persuasive. From http://en.wikipedia.org/wiki/Obiter_dictum

30 *Proof Committee Hansard*, 19 June 2006, p. 35. (Mr Colmer)

31 *Proof Committee Hansard*, 19 June 2006, p. 35. (Mr Colmer)

> the amnesty to include that group, which I think you would inevitably have to do, you would then have to come up to the next lot of people who knew about this because some of their business associates or their friends, relatives or whatever had been told by the ATO to put their claim in.
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> …
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> ...there are also people—again, I think the ATO can probably provide some more detail about this—who approached the ATO at various levels of formality…[32]

2.47 Treasury representatives told the Committee that fundamentally, this is a 'boundary issue':

> Fundamentally, what we are dealing with here is a boundary issue. The position we find ourselves in is that there is a formal government policy that residential property should be input taxed and that commercial property should be taxable with an input tax credit. We are finding that over the last six years, or possibly a little longer than that, there has been a change in that middle section of the property market. I would just refer you to the figures that Mr Munro quoted about the growth of the serviced apartment area of—I think he said—two per cent over other forms of commercial accommodation or residential accommodation.
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> We are finding that there is a blurring in the middle. We have had six years of accepted practice, as defined by the ATO ruling GSTR 2000/20, which has been operating since the start of the GST. We are faced with the decision of whether to overturn that for a large number of people or to try and maintain some new treatment for what, on the face of it, as best we can see, is a very small number of people.[33]

2.48 ATO officers added to this evidence, pointing out that because the comments in the decision about what constitutes residential property were incidental (ie: *obiter dicta*), they needed to be treated with some caution by property advisers:

> I think there are dangers in reading into decisions which are not on point and taking a stance which is contrary to the published view of the commissioner, which is what has actually been described here. The 2000/20 ruling that you have heard mentioned is the authoritative view of the commissioner and has been in place since the implementation of GST.[34]

2.49 Similarly, in relation to the issues paper discussed by Mr Munroe, ATO officers also maintained that taking an unpublished view was dangerous:

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32 *Proof Committee Hansard*, 19 June 2006, p. 36. (Mr Colmer)

33 *Proof Committee Hansard*, 19 June 2006, p. 36. (Mr Colmer)

34 *Proof Committee Hansard*, 19 June 2006, p. 36. (Mr Jackson)

> But I think that taking an unpublished view that the commissioner has put forward for comment and consultation, and taking that as a decision, is a dangerous course of action.[35]

2.50 In relation to whether the industry was misled by the draft position paper, the ATO officer said that it was a 'fair assessment' that the paper was a representation of the current state of thinking, but a final position had not been reached. Until a final decision was reached, the GSTR 2000/20 ruling remained in force.

Committee's view

2.51 The Committee finds itself in agreement with the Treasury and ATO positions. It considers that it would have been imprudent of any investor to make investment decisions that were contrary to a current ruling, as GST 2000/20 clearly was.

2.52 As such, the Committee does not consider that any changes to Schedule 15 can be justified on the basis of any of the evidence it has received.

Recommendation

The Committee recommends that the Senate pass the Bill.

Senator George Brandis
Chair

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[35] *Proof Committee Hansard*, 19 June 2006, p. 37. (Mr Jackson)