ADDITIONAL REMARKS: LABOR SENATORS

Labor Senators comments relate to schedule 2 and schedule 4.

Schedule Two

Labor Senators believe that Schedule Two should be amended to provide for tax exempt status of the asbestos compensation fund for victims of asbestos related disorders resulting from the operations of James Hardie.

The government has already provided a billion dollars in a company tax break to James Hardie through changes to the black hole provisions of the tax act.

However, the whole scheme has been put into jeopardy by failing to ensure that payments from James Hardie to the fund are deductible in the hands of the fund and fund earnings are tax free. By denying this the Government is effectively trying to claw it back the $1m of concession it has already granted.

This hard-hearted approach imposes a tax on both the payments the fund receives from the Company and on its earnings. It could mean ripping up to $1.4 billion out of the pockets of asbestos victims and their families.

This amendment to the bill is needed urgently to give certainty to the victims and their families.

Schedule 4

This schedule involves a major reduction in the capital gains tax base for non-residents. In evaluating this measure there is of course the initial consideration of cost. The Explanatory Memorandum posits a cost of $65m per annum. This in itself is significant, but Labor Senators note that this cost could be expected to increase substantially, either as a result of proposed Government amendments or as result of prospective mergers, especially the hostile takeover bid for Coles.

Such costs have to be weighed judiciously against the suggested economic benefits of increasing the attractiveness of Australia as a source of international capital. It is regrettable that this judgement has not been assisted by adequate argument or modelling from the Government or Treasury in the hearing. Decisions of this nature by the Parliament require the highest levels of analysis this country can afford. In this case, the Government has not put its argument with sufficient economic rigour.

This may be the fault of the political process or perhaps of officials. Whatever the case, it must be corrected and Labor Senators call upon the Government to devote more resources to make its argument to the people through the Parliament.

Why does the Government not provide the Parliament with the best analysis available? Why should this nation settle for second best in making difficult decisions of this nature?

Treasury officials have indicated that two amendments will be made to the Bill. While this in itself is justification for Labor's reference of the Bill to the Committee it also reveals a dangerous trend in tax legislation. Time and again imperfect bills are put to the Parliament. How many times has the Parliament been forced to consider amendments to consolidation measures, and the international tax measures (for example the International Tax: Participation Exemption Bill 2004). The debacle of the TLAB (Loss Recoupment and Other Measures) Bill 2005 is still unresolved. Labor's amendments were rejected in the morning and the Bill made subject to review in the afternoon, a review that is now eight months overdue! The legislative error rate is becoming appallingly high in taxation matters.

Schedule 4 seeks to align Australian international tax arrangements with the model OECD treaty in relation to taxation of capital gains for non residents. Labor supports the policy intent in principle but is concerned that the reduction in the capital gains tax base for non-residents is very significant. An additional major concern of Labor Senators relates to whether this Bill will actually disadvantage resident CGT taxpayers compared to non-resident CGT taxpayers.

With this in mind, Labor asked the following questions to officials in advance of the hearing:

1. The Explanatory Memorandum to the Bill contains two principal measures as outlined in 4.12 p33:

    - narrows the range of assets which may be subject to Australian CGT to Australian real property directly held by a foreign resident and any CGT asset (other than Australian real property) used by the foreign resident at any time in carrying on a business through a permanent establishment in Australia; and
    - strengthens the application of CGT to foreign residents in Australia's domestic law by applying CGT to non-portfolio interests in interposed entities (including foreign interposed entities), where more than 50 per cent of the value of the interposed entities' assets is attributable, whether directly, or indirectly through one or more other interposed entities, to Australian real property.

The stated cost of the measures in the EM is $50m in 2006/7 and $65m thereafter.

To Treasury: Disaggregate the cost to revenue from the first measure and the gain, if any, to revenue from the second measure.

2 To what extent will non-resident companies who will now be able to avoid CGT as result of this Bill be able to structure their affairs from tax havens or other low tax jurisdictions to avoid paying CGT altogether?

3 What proportion of the revenue forgone as a result of this measure is likely to be captured by CGT or similar tax arrangements in other countries?

4 To what extent will these measures disadvantage an Australian firm, investing in shares that will remain captured by the current CGT net relative to a non-resident firm that invests in Australians shares?

5 Will non-resident firms and Australian firms investing in the same Australian shares be likely to have different tax rates on these investments? If so, please outlined the likely disparities?

6 The Bill was drafted before the announced takeover bid for Coles by a consortium of non-resident investors. Has the impact of this bid been factored into the costings explicitly. If so, what is the impact of this bid in the costings in the EM.

7 If the impact of this bid has not been included in the costings in the current Bill, identify the likely additional cost to revenue from the Bill if the foreign takeover is successful, and the firm is subsequently sold by the new non-residents owners within 4 years.

8 To what extent will the assets of Coles be defined as real property for the purposes of CGT law? What proportion of the income producing assets of Coles is expected to relate to real property?

9 How much CGT would be saved if:

- The sale of Coles to foreign interests proceeded;
- The assets were sold by the non-residents according to normal commercial patterns;
- The Bill was not passed and the current CGT provisions of non residents remained.

Labor Senators were not granted an answer to these questions at the hearing. This is not acceptable and is a significant breach of process by officials.

Moreover, Labor Senators are of the view that the questions were dealt with in a dismissive fashion by officials. This is deeply disturbing. Furthermore, officials had to be pressed to take the questions on notice! Salt was added to the wound by failing to answer these questions in time for consideration of the Senate report. Labor Senators now call for an explanation for this unacceptable conduct. Labor Senators need to remind officials of the seriousness of their obligations to this Parliamentary

process. It is open to the Minister to make good this defect in the ensuing Parliamentary debate.

Labor Senators believe that Senators Murray is making additional comments in relation to this Bill. Labor supports concerns of Senator Murray in relation to Schedule 4 of the Bill.

While Labor supports in principle comments made in relation to proposed amendments to the Bill, Labor reserves its position on these amendments until they are made available to the Parliament.

1.1 Labor Senators also indicate their in principle support of other amendments proposed by the joint submission of the Minerals Council of Australia, Australian Petroleum Production and Exploration Association Ltd and Corporate Tax Association, and the comments of the Institute of Chartered Accountants in Australia. This joint submission argued that taxable CGT gains or losses on Australian real property need to be more precisely focussed by specifying that only a proportion of the gain on the sale of interests in a resident or non-resident entity that is land-rich should be subject to CGT, equal to the Australian land-rich proportion.

1.2 To address the problem, the submission proposed:

> …all that would be needed would be the introduction of provisions somewhat similar to subsections 768-505(2) and 768-505(4) which similarly pro-rate a total CGT gain or loss in the context of the participation exemption provisions of subdivision 768-G (albeit while only applying in the context of the range 50% to 100%).[1]

Labor Senators believe this proposal warrants further consideration and regrets that the matter was not further developed in the Government Senators report.

Labor Senators reiterate their concerns in relation to manifest failures of process in relation to the conduct of this piece of legislation by the Government.

Senator Ursula Stephens	Senaror Ruth Webber	Senator Kate Lundy
Senator for NSW	Senator for WA	Senator for the ACT

[1] The Minerals Council of Australia, The Australian Petroleum Production and Exploration Association Ltd and The Corporate Tax Association, *Submission 1a,* p. 6.