

Chapter 3

Issues

Introduction

3.1 The Committee received four submissions on the Tax Laws Amendment (2007 Measures No. 4) Bill 2007, and its two complementary Bills; the Taxation (Trustee Beneficiary Non-Disclosure Tax) Bill (No. 1) 2007, and the Taxation (Trustee Beneficiary Non-Disclosure Tax) Bill (No. 2) 2007. Each commented on a different Schedule.

Responses to the Bill

Schedule 1—Foreign loss and foreign tax credit amendments

3.2 The Australian Bankers Association (ABA) provided a submission concentrating on Schedule 1. The Association expressed in principle support with the proposed amendments, but expressed concern that they were unintentionally undermining the desired intent of strengthening Australia's attractiveness as a financial centre, and that the proposed amendments create inconsistencies between the way double taxation is relieved with respect to offshore banking and non-offshore banking income. The ABA summarised its concerns in the following manner:

The calculation of the foreign tax offset limit has been drafted to allow greater averaging capacity to taxpayers, minimising the foreign income tax that goes unrelieved. As a result, the carry forward of excess foreign tax credits will no longer be available. This averaging capacity should also be extended to offshore banking income, but in such a way that the offshore banking unit is not able to use additional foreign tax to shelter non-offshore banking foreign source income;

The transitional provisions in relation to the utilisation of carried forward offshore banking foreign tax credits needs to be amended on a similar basis, to provide consistency between offshore banking and non-offshore banking income, but in such a way that the offshore banking unit is not able to use carried forward offshore banking foreign tax credits to shelter non-offshore banking foreign source income;

Clarification is required in the drafting of the foreign tax offset limit to ensure that the legislation is consistency with the policy intent...; and

Amendment is required to the anti-avoidance provisions which are drafted very widely, potentially applying to normal financing arrangements that include a standard gross-up clause. As drafted these provisions put

Australian lenders at a commercial disadvantage when participating in genuine overseas financing arrangements.¹

3.3 The Australian Financial Markets Association (AFMA) lodged a supplementary submission in support of ABA's arguments.²

Schedule 3— Superannuation investment amendments

3.4 AFMA also provided a submission on Schedule 3. AFMA supports the introduction of Schedule 3's provisions as they offer clarity and certainty for the market, while still maintaining a high level of regulatory protection for superannuation fund investors.³ AFMA also supports the amendment to the in-house asset rules, it did suggest a further amendment:

The proposed legislation, by adding clauses 8 and 9 to section 71, creates an exception to the in-house assets rule for instalment warrants that incorporate a borrowing and previously gave the regulators cause for concern under section 67. This creates an exception for instalment warrants that involve investments of any type that the superannuation fund would otherwise be permitted to invest in. As such, these investments may include equity assets that are unlisted as well as other asset classes, such as property, that are also unlisted.

Instalment-style investments that are structured so they do not feature a borrowing (and, hence, are already compliant with section 67) cannot access this exception under the current wording. Instead, they must rely on the Excluded Instalment Trust exception which is limited under the subsection 10(1) definition to listed securities.

It seems strange that instalment arrangements that feature a borrowing enjoy a broader exception than those which do not. Accordingly we recommend the subsection 10(1) definition be expanded.⁴

Schedule 8—Family trust loss regime amendments

3.5 Pitcher Partners Advisory Propriety Limited (PPAP) lodged a submission regarding Schedule 8. Although PPAP supported the provisions, the submission stated that this is on a 'something is better than nothing' basis.⁵

3.6 Through its submission, PPAP expressed its disappointment in the lack of scope in the provisions. PPAP believe that many more substantial amendments are required to lesson the practical difficulties encountered by taxpayers in their attempts to comply with the law in this area, and it provided a list of submissions PPAP

1 Australian Bankers Association, *Submission 1*, pp 1-2.

2 The Australian Financial Markets Association (AFMA), *Submission 3a*, p. 1.

3 AFMA, *Submission 3*, pp 1 – 2.

4 AFMA, *Submission 3*, p. 2.

5 Pitcher Partners Advisory Propriety Limited (PPAP), *Submission 2*, p; 1

previously provided to Treasury on an exposure draft of the Bill.⁶ PPAP argued that very few of its proposals were adopted.⁷

3.7 PPAP argued strongly that "the amendments proposed in the Bill represent only a small part of the changes that are necessary".⁸

Treasury responses

3.8 Treasury responded to the ABA's comments on Schedule 1, but limited their comments to the anti-avoidance rule. Treasury's view is that the new anti avoidance provisions are essentially a re-write of the current rules, and that their scope has not been materially affected by the proposed changes.⁹

3.9 With regard to AFMA's comments on Schedule 3, Treasury explained that these amendments had their genesis in the government's decision to allow what is already a long-standing industry practice to continue. Both the Commissioner of Taxation and APRA had previously concluded that instalment warrants constituted borrowing. Officers explained that Treasury had not formulated a position on the issues raised by AFMA about instalments with no borrowing because

- (a) these issues are essentially outside the scope of the bill; and
- (b) that particular part of the market appears to be small.¹⁰

3.10 On Schedule 8, Treasury responded to the Pitcher Partners Advisory Propriety Limited (PPAP) submission by saying that while many of PPAP's proposed changes had not been implemented, they had been considered through the consultation process. With regard to one of PPAP's key submissions – the revocation of a family trust election if a trust no longer has tax losses – Treasury argued that a family trust election is a choice that trusts and their members have to make.

3.11 A family trust election allows a trust to access losses it would not normally be able to access because it does not meet the normal rules for deducting tax losses. By opting into it, it allows the trust to utilise the losses and keep them within the family group. However there is also a penalty if the trust distributes the losses outside the family group. These are tax losses and benefits a trust wouldn't normally be able to utilise but for being able to elect into the regime. A trust and its members need to consider the advantages and disadvantages of these rules before making the decision to opt into the family trust election regime.¹¹

6 PPAP, *Submission 2*, p. 2.

7 PPAP, *Submission 2*, pp 3 – 8.

8 PPAP, *Submission 2*, p. 1.

9 Treasury, *Proof Committee Hansard*, 27 July 2007, p. 49.

10 Treasury, *Proof Committee Hansard*, 27 July 2007, pp 50-51.

11 Treasury, *Proof Committee Hansard*, 27 July 2007, p. 50.

Committee conclusions

3.12 Having examined the limited number of submissions raising concerns over the bill and heard Treasury's responses to those issues, the Committee is satisfied that the bills' provisions are appropriate.

Recommendation 1

3.13 The committee recommends that the bill be passed.

A handwritten signature in blue ink, consisting of a large, sweeping initial 'M' followed by a series of connected loops and a long horizontal stroke ending in a small dot.

**Senator the Hon. Michael Ronaldson
Chair**