Additional Comments by Coalition Senators

1.1 The Coalition has some considerable concerns about aspects of the Tax Laws Amendment (2010 Measures No. 2) Bill 2010.

Conduct of the inquiry

1.2 On 17 March 2010 Tax Laws Amendment (2010 Measures No. 2) Bill 2010 was introduced into the House of Representatives when it was read a second time and debate was adjourned. On 18 March 2010, on the recommendation of the Senate Selection of Bills Committee, the Senate referred the provisions of the bill to the Senate Economics Legislation Committee for inquiry. The Senate resolved that the committee report by 11 May 2010.

1.3 Coalition Senators are extremely concerned about the way the Government has pursued this legislation and pushed this inquiry along. It is highly inappropriate for a Committee Report to be tabled on Budget Night when the Chair of the Committee has held their part of the report until the day before the report is due to be tabled.

1.4 Additionally, the Committee was not briefed by Treasury officials prior to the commencement of hearings held on 28, 29 and 30 April. In fact, Treasury did not appear before the Committee until the last day of hearings, 30 April 2010.

Schedule 1: non-commercial loans

1.5 Many submissions concentrated on the problems associated with Schedule 1.

1.6 Several submitters argued that the introduction of section 109CA was considered too broad.

> …the scope of the proposed use of asset rules reaches well past what was stated in the budget night announcement. There was no indication on budget night or in the budget papers that company assets merely available for use, rather than in fact put to use, by shareholders would be caught by the new laws.[1]
>
> The proposed amendments will apply in respect of virtually any asset of a private company, regardless of when that asset was acquired, and it will operate to deem a dividend to the shareholders of a company where the company has merely provided an asset for the use of a shareholder or their associate, without any disguised or other distribution of company profits… The extension of the division goes well beyond the original intent of the

1 Mr Yasser El–Ansary, Tax Counsel, Institute of Chartered Accountants in Australia, *Proof Committee Hansard*, Wednesday 28 April, p. 13.

> division. It will apply where there is no transfer of company resources away from the company, it will apply where those assets being used were not acquired with company profits and it will apply where there are simply no company profits. It will deem a dividend regardless... In many cases—whether it is for asset protection, succession or other reasons—individuals will use a company structure funded from their own after–tax moneys to hold assets. The money used on those circumstances by the company is the shareholder's own after–tax funds. It is not company profits. The bill will, however, tax the use of such an asset acquired in that fashion as if it was a dividend made out of profits, which it is not.[2]
>
> Going forward we would have to look at every asset that a company holds and work out if those assets would be used by the shareholders or be available for use by the shareholders. We would then have to ascertain if there is any risk in terms of them being used or available to be used by way of the technical definition in the act. So we are talking about small businesses understand exactly what that definition means and how wide that definition can be. We then would require them to keep track of their use or their availability for use on an annual basis and we would then have to ask them to value those uses, so we would have to get a market valuation for each of those. We then would have to determine whether those are under the exceptions. They are proposing to introduce a minor benefit exception for infrequent use or if it is under $300 in value. It would have to be ascertained whether it falls within those exceptions. We see that as a significant level of compliance for small business taxpayers.[3]

1.7 These submissions point out that this could penalise taxpayers unnecessarily.

1.8 The Coalition senators argue that there needs to be a reasonable interpretation of personal use so that if a taxpayer drives a work ute from home to work and home again, and has a personal vehicle, there should be no penalty.

> The ute is an interesting example, Senator, because under the fringe benefits tax legislation that would be an exempt fringe benefit, where as under division 7A it is taxable. So if you have your contract plumber who operates through a company who uses the ute and you query whether the ute is given to them in their capacity as employee of their company or as shareholder, if it is as a shareholder, they are subject to tax under division 7A, if it is as an employee, they are not subject to tax under the fringe benefits tax legislation.[4]

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2 Mr Daniel Appleby, Taxation Committee, Law Council of Australia, *Proof Committee Hansard*, Wednesday 28 April, p. 2.

3 Institute of Chartered Accountants in Australia, *Proof Committee Hansard*, Wednesday 28 April, p. 17.

4 Mr Noel Beharis, Director, Tax Technical Services, Dominion Private Clients, *Proof Committee Hansard*, Thursday 29 April 2010, p. 14.

1.9 An additional issue was the lack of knowledge among the small business community regarding the legal obligations that arise from the establishment and operation of companies, and the onus placed on legal and tax advisers.

Recommendation 1

1.10 The Coalition Senators recommend that there be an increased level of education made available to small businesses entering into business arrangements and restructuring businesses, and that tax and legal advisors be encouraged to ensure that the appropriate structures and arrangements are being put in place.

1.11 The Coalition supports the view of the Law Council regarding the treatment of the owner of a company title apartment. It is inappropriate to treat the owners as though the company was giving them a benefit, imposing a large tax on them which would not be imposed on someone who owned a similar apartment under strata title.

> The owners of company title apartments or duplexes—their own homes—will be deemed to have received income, taxable to them, every year equal to the notional rental of their own home…The Law Council considers the bill should not operate in respect of company titled assets…[5]

1.12 The Coalition supports Recommendation 1 listed at paragraph 2.23

1.13 Subdivision EB received considerable debate from Dominion Private Services.

> The point of schedule 1 to the bill is to expand the operation of division 7A to cover interposed entities and, in a vanilla case… they work in an appropriate manner; however, there are cases where there are a multitude of trusts in a group. Just to illustrate, the first slide is a very vanilla case that is meant to be covered by proposed sections 109XF, XG and XH. In the diagram, you will see that there is a trust that distributes income to a corporate beneficiary—'distribute' meaning that the trust resolves to make a gift to the corporate beneficiary of $100. It generally remains unpaid for a period of time. Then that trust subsequently makes a loan to an interposed entity of $100, and then that interposed entity makes a loan to a shareholder. Sections 109XF, XG and XH are meant to say that the trust, by making the loans through the interposed entity to the shareholder, is actually deemed to have caused this thing called a notional loan between the corporate beneficiary and that shareholder of $100. And the reason for that is that that original $100 was ostensibly sourced from the distribution made by the trustees for the beneficiary. So that is what XF, XG and XH are meant to do, in a very vanilla case.[6]

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5 Mr Daniel Appleby, Taxation Committee, Law Council of Australia, *Proof Committee Hansard*, 28 April 2010, p. 3.

6 Mr Noel Beharis, Director, Tax Technical Services, Dominion Private Clients, *Proof Committee Hansard*, Thursday 29 April 2010, p. 9.

> Then you get to something a little more complex—'complex' in the sense that there are a lot of entities; in terms of why it happens, it is probably not so complex. You tend to see this quite a lot—or, at least, I have seen it quite a lot—in practice amongst property development groups. But it is not confined to property development groups; it applies to any kind of business group that operates through a multitude of trusts. Typically, one trust holds investments and has a lot of money relative to all the other trusts.[7]
>
> My view of taxation is that it is not meant to provide an open-ended discretion like that to any particular body. The taxpayer should at least be able to point to an amount and say, 'That amount is assessable or not.'[8]

1.14 The Coalition does support Recommendation 2 at paragraph 2.47

1.15 The retrospectivity of the Bill was of considerable concern, particularly given that this Bill is coming in so late in the financial year. The Coalition supports Recommendation 3 at paragraph 2.54 as this will allow the relevant structures to reorganise or make appropriate record keeping changes to ensure that they are not caught short at the end of financial year 2009/10.

Chapter 4: Income tax concessions proposed in the bill

1.16 There is a reasonable question to be asked about the tax deductibility of the Global Carbon Capture and Storage Institute Ltd.

1.17 Mr John Passant, an academic expert, questioned why the tax system is being used rather than an explicit grant:

> …one of the issues that arises in terms of tax exemptions or tax deductions is that they create expenditures that are disguised. So they are not transparent and they are not analysed … would we be better off doing it through a direct grant system where you would have a capping on the amount of expenditure, and a clearer understanding of who was getting it and the reasons for it?[9]

Conclusion

1.18 The Coalition senators again point out the rush associated with this Bill, where some submissions and witnesses expressed substantial concern about the speed at which this Bill, and as a result this inquiry, has been pushed through.

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7 Mr Noel Beharis, Director, Tax Technical Services, Dominion Private Clients, *Proof Committee Hansard*, Thursday 29 April 2010, p. 9.

8 Mr Noel Beharis, Director, Tax Technical Services, Dominion Private Clients, *Proof Committee Hansard*, Thursday 29 April 2010, p. 10.

9 Mr John Passant, Senior Lecturer, Faculty of Law, University of Canberra, *Proof Committee Hansard*, 30 April 2010, p. 2.

1.19 The Coalition continues to express disappointment at the Government for holding rushed hearings into poorly drafted legislation which leaves numerous unintended and inadequately examined consequences, and does not serve the interests of the people of Australian.

1.20 The Coalition supports the amendments recommended in this report.

Senator Alan Eggleston
Deputy Chair

Senator David Bushby