The Senate

# Economics
# Legislation Committee

## Tax Laws Amendment (2010 Measures No. 2) Bill 2010 [Provisions]

May 2010

ISBN 978-1-74229-233-5

Printed by the Senate Printing Unit, Parliament House, Canberra.

# Senate Economics Legislation Committee

**Members**

| | |
|---|---|
| Senator Annette Hurley, Chair | South Australia, ALP |
| Senator Alan Eggleston, Deputy Chair | Western Australia, LP |
| Senator David Bushby | Tasmania, LP |
| Senator Doug Cameron | New South Wales, ALP |
| Senator Louise Pratt | Western Australia, ALP |
| Senator Nick Xenophon | South Australia, IND |

**Secretariat**

Mr John Hawkins, Secretary
Ms Sandra Kennedy, Principal Research Officer
Dr Richard Grant, Principal Research Officer
Ms Hanako Jones, Executive Assistant
Mr Joshua See, Executive Assistant

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3540
Fax: 02 6277 5719
E-mail: economics.sen@aph.gov.au
Internet: http://www.aph.gov.au/senate/committee/economics_ctte/index.htm

# TABLE OF CONTENTS

**Membership of Committee** ..... **iii**

**Glossary** ..... **vii**

**Recommendations** ..... **ix**

**Chapter 1** ..... **1**

**Introduction** ..... **1**

Background ..... 1

Conduct of the inquiry ..... 1

Structure of the report ..... 2

**Chapter 2** ..... **3**

**Schedule 1: non–commercial loans** ..... **3**

Background ..... 3

The changes ..... 3

**Chapter 3** ..... **17**

**Extending the tax file number withholding provisions** ..... **17**

Introduction ..... 17

The proposed changes ..... 17

Views on the proposed changes ..... 18

**Chapter 4** ..... **21**

**Income tax concessions proposed in the bill** ..... **21**

Schedule 3 – HECS—HELP benefits ..... 21

Schedule 4 – Deductible gift recipients ..... 22

Schedule 5 – Taxation of the Global Carbon Capture and Storage Institute Limited ..... 24

**Chapter 5 ..... 27**

**The remaining provisions – schedule 6 of the bill ..... 27**

Background ..... 27

The amendments ..... 27

Views on the bill ..... 27

**Additional Comments by Coalition Senators ..... 29**

Conduct of the inquiry ..... 29

Schedule 1: non-commercial loans ..... 29

Chapter 4: Income tax concessions proposed in the bill ..... 32

Conclusion ..... 32

**APPENDIX 1 ..... 35**

**Submissions Received ..... 35**

**Additional Information Received ..... 35**

**APPENDIX 2 ..... 37**

**Public Hearings and Witnesses ..... 37**

# Glossary

| | |
|---|---|
| CCS | Carbon capture and storage; means of preventing $CO_2$ emissions from coal burning entering the atmosphere and contributing to global warming |
| Closely held trusts | Discretionary trusts or trusts where the beneficiaries (there can be up to 20 beneficiaries) have a fixed entitlement, which between them is at least 75 per cent share of the income or capital |
| DGR | Deductible gift recipient; an entity for which donations are tax-deductible |
| Discretionary trusts | Discretionary trusts provide flexibility in relation to distributions of income and assets among members |
| Family trusts | A trust is a family trust when the trustee has made a family trust election. The trustee of a family trust is given wide discretionary powers to distribute different categories of income to different beneficiaries and to treat as trust income, capital gains or receipts deemed to be income for tax purposes. The trustee is usually a company controlled by the family |
| HECS-HELP benefit | A HECS-HELP benefit gives eligible recipients a reduction in their compulsory HECS debt repayment and/or their HELP debt repayment, or, where a repayment is not required due to low income, a direct reduction in their HELP debt |
| IP | Intellectual property; copyright in ideas |
| ITAA | Income Tax Assessment Act |
| Legal disability | A taxpayer may be deemed to be under a legal disability if they are a minor (under the age of 18) |
| R&D | Research and development |
| Resident trust | A trust is a resident trust if the trustee is an Australian resident or the central management and control of the trust is in Australia |
| TFN | Tax file number |
| Unit trusts | A unit trust is a 'public unit trust' if any of the units are listed for quotation on a stock exchange, the units are held by 50 or |

| | |
|---|---|
| | more persons, or any of the units are offered to the public. A unit trust is not a public unit trust if 20 or fewer persons hold 75 per cent or more of the beneficial interests in the income or property of the trust |
| Unpaid present entitlement | An unpaid present entitlement to trust income arises where a beneficiary is entitled to a share of trust income but the share of income is not paid/distributed to them |
| YALP | Yachad Accelerated Learning Project; a not-for-profit organisation aiming to improve literacy and numeracy outcomes of students in remote areas |

# Recommendations

**Recommendation 1**

**2.23 The committee recommends that the bill be amended so that company title apartments (where the company title arrangement, its memorandum and articles creates a right for the occupier) are clearly excluded from its coverage before the bill is passed.**

**Recommendation 2**

**2.47 The committee recommends that the Commissioner of Taxation review Draft Ruling 2009/D8 following passage of the Schedule 1 amendments to ensure it is operating appropriately.**

**Recommendation 3**

**2.54 The committee recommends that Item 2 of the bill dealing with the commencement date of the provisions be amended to reflect that Schedule 1 takes effect from 1 July 2010. The committee is of the view that this time frame strikes the appropriate balance between providing taxpayers with time to prepare for the changes with the need to strengthen the integrity of the tax laws.**

**Recommendation 4**

**3.18 The committee recommends that the Senate pass Schedule 2 of the bill.**

**Recommendation 5**

**4.10 The committee supports Schedule 3 of the bill and recommends its passage unchanged.**

**Recommendation 6**

**4.21 The committee recommends that Schedule 4 of the bill be passed without amendment.**

**Recommendation 7**

**4.33 The committee recommends that Schedule 5 of the bill be passed without amendment.**

**Recommendation 8**

**5.8 The committee recommends that Schedule 6 of the bill be passed.**

# Chapter 1

# Introduction

## Background

1.1 Tax Laws Amendment (2010 Measures No. 2) Bill 2010 aims to improve the integrity and operation of Australia's taxation laws by introducing a range of measures; set out in its six schedules. These measures will:

- prevent shareholders of private companies from accessing tax free dividends from the provision of company assets for less than market value (Schedule 1);
- extend the existing tax file number withholding arrangements to cover closely held trusts, including family trusts (Schedule 2);
- ensure the HECS–HELP benefit received by an eligible applicant is exempt from income tax (Schedule 3);
- update the list of deductible gift recipients through the addition of two new entities and extend the DGR status of an existing entity (Schedule 4);
- provide the Global Carbon Capture and Storage Institute Limited with income tax exempt status for a period of four years (Schedule 5); and
- repeal over 100 provisions throughout the various taxation laws that provide the Commissioner of Taxation with an unlimited period in which to amend taxpayers' assessments.[1]

1.2 The majority of measures contained in the bill were previously announced.[2]

## Conduct of the inquiry

1.3 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.

1.4 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 Mr Griffin MP, Minister for Veterans' Affairs, *House of Representatives Hansard*, Wednesday 17 March 2010, pp 6–7.

2 Explanatory Memorandum, Tax Laws Amendment (2010 Measures No. 2) Bill 2010, pp 3–6.

1.5 In referring the provisions of the bill for consideration, the Senate requested that the committee ensure there will be no unintended consequences as a result of the bill, particularly arising from the amendments set out in Schedule 1.[3]

1.6 The committee advertised the inquiry in *The Australian* and on its website. A large number of stakeholders across all schedules of the bill were also invited to make submissions.

1.7 The committee received 12 submissions (listed in Appendix 1) which are available for viewing on the committee's website (http://www.aph.gov.au/Senate/committee/economics_ctte/tlab_02_2010/submissions.htm) and held public hearings in Sydney, Melbourne and Canberra on 28, 29, and 30 April 2010. (A list of the stakeholders who appeared before the committee is set out in Appendix 2.)

1.8 The committee thanks all those submitters and witnesses for their contribution and participation in the inquiry process.

## Structure of the report

1.9 The main issues raised throughout the inquiry concerned the operation of the changes proposed in relation to non-commercial loans (Schedule 1) and tax file number withholding (Schedule 2). This report examines the particular issues raised in respect of these amendments in Chapters 2 and 3.

1.10 The remaining schedules of the bill are discussed in Chapters 4 and 5. Chapter 4 addresses the tax concession measures proposed in Schedules 3, 4 and 5 and Chapter 5 examines Schedule 6 of the bill.

1.11 At the time of writing this report, the Senate Scrutiny of Bills Committee had not tabled any comments on the bill.

3 Selection of Bills Committee, Report No. 5 of 2010, 18 March 2010, Appendix 2.

# Chapter 2

## Schedule 1: non–commercial loans

### Background

2.1 Division 7A of the *Income Tax Assessment Act 1936* contains provisions that ensure that in situations where a private company pays an amount or forgives a debt to an associated entity because of that relationship, that the benefit is taxed in the hands of the recipient by deeming that the payment received is a dividend.[1]

2.2 On 12 May 2009 the Government announced that it would tighten these rules to remove the ability of private companies to allow a company's assets to be used, by its shareholders or their associates, for free or at less than their arm's length value, without the payment of tax; the same use of the asset by an employee would attract fringe benefits tax.[2] The reforms set out in Schedule 1 of the bill are integrity measures, designed to ensure that the Division 7A rules operate in accordance with their original intent.

2.3 The changes will commence from 1 July 2009 and are expected to have small revenue savings, of $10 million per year, over the forward estimates.[3]

### The changes

2.4 The closing of 'loopholes' through these measures was generally regarded as appropriate:

> …it extends the equity provisions in division 7A to shareholders who have a right to use property. I basically support this extension on the grounds of equity. Currently the provision of rights to shareholders to use private company assets confers benefits in a seemingly non-taxable form. I think this is inequitable to other taxpayers, to other shareholders and to shareholders in public companies. I support the move. I think it is an appropriate move to address a benefit in an untaxed form.[4]

---

1 CCH Australia Limited, *Master Tax Guide 44th Edition*, 2009, para 4–200, p. 125.

2 The Hon Wayne Swan, Treasurer of the Commonwealth of Australia and The Hon Chris Bowen, Assistant Treasurer and Minister for Competition Policy and Corporate Law, Improving Fairness and Integrity in the Tax System, Media Release No. 67, 12 May 2009.

3 Explanatory Memorandum, Tax Laws Amendment (2010 Measures No. 2) Bill 2010, p. 3.

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

> It is certainly about integrity and equity. In fact, that was the message that the government put out with its press release.[5]
>
> Without question, we fully support the government's overarching objective of improving fairness and integrity in our tax system.[6]

2.5 Two main amendments to Division 7A were the focus of concern throughout the course of the inquiry: (i) the introduction of a new section 109CA which will broaden the definition of payment; and (ii) the introduction of new Subdivision EB which will ensure that in situations of unpaid present entitlements, interposing an entity between the company and a shareholder cannot circumvent the operation of Division 7A.[7] Submitters are concerned that the breadth of the changes will have unintentional consequences, particularly given the retrospective effect of the measures.

### *Extending the definition of payment*

2.6 Under the existing provisions of Division 7A, section 109C sets out that a payment to an entity means:

> (a) a payment to the extent that it is to the entity, on behalf of the entity or for the benefit of the entity; and
>
> (b) a credit for an amount to the extent that it is:
>
> a. to the entity; or
>
> b. on behalf of the entity; or
>
> c. for the benefit of the entity; and
>
> (c) a transfer of property to the entity.[8]

2.7 Through the introduction of a new section, s109CA, this definition will be extended to cover the provision of an asset for use (other than a transfer of property), including the provision of an asset for use under a lease or license.[9] Section 109CA will set out that payment is made when the entity first:

- uses the asset with the permission of the provider; or
- has a right to use the asset, at a time when the provider does not have a right to use the asset or to provide the asset for use by another entity.

---

5 Mr Raphael Cicchini, Manager, Business Tax Division, Department of the Treasury, *Proof Committee Hansard*, Friday 30 April 2010, p. 21.

6 Mr Yasser El-Ansary, Tax Counsel, Institute of Chartered Accountants in Australia, *Proof Committee Hansard*, Wednesday 28 April 2010, p. 13.

7 Explanatory Memorandum, Tax Laws Amendment (2010 Measures No. 2) Bill 2010, p. 9.

8 Subsection 109C(3) of the ITAA 1936.

9 Tax Laws Amendment (2010 Measures No. 2) Bill 2010, item 13, lines 20–22, p. 7.

2.8 It should be noted however that provision has been made to ensure certain benefits that would otherwise be captured by the amended provisions and deemed to be payments will be excluded from the definition of payment; these exceptions will be set out in new subsection 109CA(4) and include situations where:

- the provision of the asset is a minor benefit; or
- the entity using the asset would be able to claim a once-off deduction in respect of the expense of using the asset had they paid for the use of the asset; or
- certain dwellings are being used.

2.9 These exceptions are covered in paragraphs 2.31 to 2.38 of this chapter.

### *Available for use*

2.10 The introduction of section 109CA, particularly the proposal that where a shareholder has a right to use the asset, ie the asset is 'available for use', is considered by some to be much too broad. They argue that it will penalise taxpayers who, for reasons other than tax avoidance, have elected to hold private assets, acquired with after tax dollars, in company structures.

2.11 Submitters argue that:

> …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.[10]

> 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 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,

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

> 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.[11]
>
> 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.[12]

2.12 Treasury however reiterated that these measures are integrity measures, designed to close a loophole that previously existed within the construct of Division 7A and recognise that by holding certain assets in a company, taxpayers have been able to obtain tax savings and benefits that were unintended.[13] The extension of the definition of payment addresses this issue by ensuring shareholders of private companies cannot take value out of a company without paying the comparable amount of tax.

*Committee view*

2.13 The committee considers that within the small business community there is a level of misunderstanding on the legal obligations that arise from the establishment and operation of companies. The committee has formed this view in light of its discussions, particularly around the aspect of proposed section 109CA concerning 'available for use' in the context of the plumber who takes the company ute home of an evening. The committee considers that when entering into business arrangements and structuring businesses, there should be a greater onus on tax and legal advisers to ensure that the appropriate structures and arrangements are being put in place. In the example of the plumber's ute, if the plumber were an employee of the company, the company would pay fringe benefits tax for the value of his use of the ute as well as provide him with benefits of wages, superannuation, and various other entitlements. The committee takes the view that this is not equitable and does not provide a level playing field for other small businesses with whom the plumber may be competing.

---

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

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

13 Mr Raphael Cicchini, Manager, Business Tax Division, Department of the Treasury, *Proof Committee Hansard*, Friday 30 April 2010, p. 22.

2.14 On that basis the committee does not share the concerns raised by various submitters that extending the definition of payment to assets that are available for use although notes that there may be additional compliance and administrative burdens.

2.15 The committee does however consider that the issue of company title housing was not intended to be captured by the operation of the provisions.

*The company title apartment issue*

2.16 Company title used to be a fairly common method of organising the ownership of apartments and in the older Australian cities is still in use. In some streets in long established areas of Sydney, a prospective buyer may prefer an apartment with company title over a similarly priced one with strata title just due to a preference for art deco over modernist design. There is no tax avoidance motivation.

2.17 The buyer of such an apartment is technically buying a share in a company that owns the building and looks after the common areas (and has no trading activities). There will only be a few shares in the company, and they all confer distinct rights. Rather than entitling the owner to received dividends the share gives the owner the right to live in (or rent out) a specified apartment in the building. In many ways the company is more analogous to a 'body corporate' in a strata title apartment block than to a trading company.

2.18 The Law Council raised the concern that the bill would have the unintended consequence of treating the owner of a company title apartment as though the company were giving them a benefit, imposing a large tax on them which would not be imposed on someone who owned an otherwise 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…[14]

2.19 Another legal expert was less sure company title apartments would be captured, but thought it safer to exclude them explicitly:

> I think it would be good if the legislation had an express provision which said that company title arrangements would not give rise to a deemed dividend. The potential issue is whether, in a company title arrangement, it is the company itself that is granting the right or it is a provision in the constitution of the company itself, its memorandum and articles, that creates the right. You get into some complex legal issues about whether the legislation applies to company title.[15]

---

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

15 Mr Philip de Haan, Partner, Thomson Playford Cutlers, *Proof Committee Hansard*, 28 April 2010, p. 10.

2.20 The Law Council overstates the problem a bit as there is an exemption for owner occupied homes purchased before June 2009. But even if they are not liable for the tax themselves, should the current owner wish to sell, a prospective buyer will know they are facing a large ongoing tax liability if they buy the company title apartment rather than a similar apartment down the street. This would likely lead to a large drop in the value of company title apartments. Apartments (such as a holiday home) that are not the main residence would still attract tax. Furthermore, it may be that the pre 2009 exemption would be lost to all owners in the building once a majority of the apartments had been resold.[16]

2.21 It may be possible for owners of company title apartments to restructure to strata title but this would require the agreement of most or all the owners in each building and involve extensive legal fees and stamp duties.[17]

2.22 Treasury conceded this was an unintended consequence of the legislation:

> The first time we were made aware of that sort of situation was in the submission here…. We certainly were not aware of this arrangement when we drafted the bill.[18]

**Recommendation 1**

**2.23 The committee recommends that the bill be amended so that company title apartments (where the company title arrangement, its memorandum and articles creates a right for the occupier) are clearly excluded from its coverage before the bill is passed.**

***Valuation of use***

2.24 Where private use of a company asset gives rise to a 'payment' or 'benefit' under the amended Division 7A, the recipient will be taxed on the value. The amended provisions will require that the value of the payment be the amount that would have been paid for the provision of the asset by parties dealing at arm's length, less any consideration actually paid.[19]

---

16 A 'significant change in ownership of the company' could trigger this; Mr Raphael Cicchini, Manager, Business Tax Division, Department of the Treasury, *Proof Committee Hansard*, 30 April 2010, p. 20.

17 Alexis Kokkinos, Chair, National Tax Technical Committee, Institute of Chartered Accountants, *Proof Committee Hansard*, 28 April 2010, p. 14.

18 Mr Raphael Cicchini, Manager, Business Tax Division, Department of the Treasury, *Proof Committee Hansard*, 30 April 2010, p. 20.

19 Explanatory Memorandum, para 1.24, p. 15.

2.25 In situations where the consideration paid equals or exceeds the amount that would have been paid by the parties dealing at arm's length, the amount of the payment will be nil.[20]

2.26 The committee was told that the requirement to value assets provided/available for use would impose 'unreasonable and extremely high compliance costs [on] many businesses, especially small businesses'[21] as:

> these businesses will be required to determine the extent of any provision of an asset for use—not just the actual use. They [will] then need to determine the market value of that use on a year–by–year basis. That will require valuations to be obtained every single year.[22]

2.27 The evidence received highlighted the concern that an 'arms–length' amount will not be easy to determine.[23] Mr John Passant, Senior Lecturer in Tax Law at the University of Canberra however discounted the claims by other stakeholders who contend that professional valuations will be required. He said:

> The fact is that it is not just that you need the professionals to do it to make it arm's length; it is the circumstances that you are looking at to say, 'in this case I've looked at the market and made a valuation of what the arms–length value is.'[24]

2.28 Mr Passant explained that this method of valuation is appropriate in Australia given that 'we have a self–assessment process…which relies on taxpayers making these value judgments all the time in a whole range of other circumstances.'[25]

2.29 An alternative valuation system was suggested by some submitters. They contend that extending the relevant valuation provisions of the *Fringe Benefits Tax Assessment Act 1986*[26] would provide more certainty and could be more reliably used by taxpayers. They also suggest that it would promote consistency across the tax laws

---

20 Explanatory Memorandum, para 1.24, p. 15.

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

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

23 Mr Andrew Gardiner, Spokesman, National Tax and Accountants Association, *Proof Committee Hansard*, Thursday, 29 April 2010, p. 18.

24 Mr John Passant, Senior Lecturer Tax Law, University of Canberra, *Proof Committee Hansard*, Friday 30 April 2010, p. 6.

25 Mr John Passant, Senior Lecturer Tax Law, University of Canberra, *Proof Committee Hansard*, Friday 30 April 2010, p. 6.

26 Section 58P of the Fringe Benefits Tax Assessment Act sets out in detail (from paragraph (a) to (f) how to determine whether a benefits is a minor benefit; it also specifically excludes some benefits from being minor benefits, eg an airline transport benefit.

as the same valuation methodology would be applied.[27] As an alternative, the Institute of Chartered Accountants suggested that a 'safe harbour' valuation method, possibly based on applying the Division 7A interest rate to the original cost of the asset be implemented.[28]

*Committee view*

2.30 In light of the evidence taken by the committee at its public hearings and from submissions received, the committee is satisfied that the valuation provisions proposed in the amendments of Schedule 1 of the bill will not impose an unmanageable compliance and administrative burden on taxpayers and their tax agents. The committee considers that the valuation provisions are reflective of the self assessment regime in which the Australian taxation system operates and is confident that taxpayers will be able to manage the changes.

***Exceptions to the extended definition of payment***

2.31 Following public consultation on the exposure draft of the legislation, the Government introduced exceptions to the definition of payment to cover situations where:

- the provision of the asset is a minor benefit; or
- the entity using the asset would be able to claim a once-off deduction in respect of the expense of using the asset had they paid for the use of the asset; or
- certain dwellings are being used.

2.32 These exceptions have been proposed to ensure that compliance costs for taxpayers affected by the changes are minimised and that unintended consequences do not arise.[29]

*Minor benefits*

2.33 This exception is based on the rules concerning minor benefits as set out in the fringe benefits tax legislation. Those rules provide that where a benefit that has a notional taxable value less than $300 is provided to an employee, it is an exempt benefit and therefore one in respect of which the employer is not required to pay

27 Mr Noel Beharis, Director, Tax Technical Services, Dominion Private Clients, *Proof Committee Hansard*, Thursday 29 April 2010, p. 12; Mr Andrew Gardiner, Spokesman, National Tax and Accountants Association, *Proof Committee Hansard*, Thursday 29 April 2010, p. 18.

28 Institute of Chartered Accountants, Submission 9, p. 14.

29 Explanatory Memorandum, pp 16–17.

fringe benefits tax.[30] In determining a minor benefit, the fringe benefits rules also refer to factors such as infrequency and irregularity of the benefit.[31]

2.34 The minor benefit exception that will be introduced into Division 7A will be set out in subsection 109CA(4). It will ensure that an amount will not be treated as a payment if the provision of the asset would constitute a minor benefit if it were done in respect of the employment of an employee.[32]

*Otherwise deductible payments*

2.35 Proposed subsection 109CA(5) will contain an exception that operates to ensure that the definition of payment will not extend to amounts that, had the person incurred and paid for the provision of an asset, they would have been entitled to claim a tax deduction for that amount.[33]

2.36 Based on evidence heard throughout the course of the inquiry the committee understands that these exceptions may apply to minimise the affect of the changes for certain taxpayers, for example in situations where a car is used for personal use.

> …the otherwise deductible rule, you have to ask yourself what business is a shareholder in that would enable the shareholder to claim a deduction for using that vehicle…if they are a shareholder and an employee then you have to look to the substance of the arrangement. It depends on facts and circumstances.[34]

*Dwellings*

2.37 There are two exceptions that apply to dwellings set out in section 109CA.

2.38 Subsection 109CA(6) which provides an exception for the provision of a dwelling for use by a shareholder where the provision of the dwelling is for private purposes provided the following circumstances are met:

- The entity or their associate is carrying on a business;
- The entity or their associate uses or is granted or has a lease, license or other right to use land, water or a building for carrying on the business; and

30 Explanatory Memorandum, p. 16.

31 Explanatory Memorandum, p. 16.

32 Explanatory Memorandum, p. 16.

33 Explanatory Memorandum, p. 17.

34 Mr Raphael Cicchini, Manager, Business Tax Division, Department of the Treasury, *Proof Committee Hansard*, Friday 30 April 2010, p. 13.

- The provision of the dwelling to the entity is connected with that use or with that lease, license or other right to use the land, water or building to carry on a business.

***Proposed Subdivision EB – interposed entities and unpaid present entitlements***

2.39 The amendments set out in Schedule 1 of the bill will also introduce a new subdivision to Division 7A, Subdivision EB. Subdivision EB has become necessary to ensure taxpayers are unable to avoid tax on unpaid present entitlements by interposing entities between the private company and themselves.

2.40 Unpaid present entitlements are presently covered in Division 7A, Subdivision EA. Effectively they ensure:

> …an unpaid present entitlement where there is then a payment from the trustee to a shareholder is the provision of a benefit and so is caught under Division 7A, Subdivision EA.[35]

2.41 Subdivision EB will extend these provisions further to ensure that interposing another entity 'does not remove the flow of funds to the shareholder from the taxing regime' of Division 7A.[36]

2.42 Throughout the course of its inquiry, the committee heard concerns that the introduction of Subdivision EB would result in complexity, particularly in situations where any business group is operating through a multitude of trusts.[37] Mr Beharis of Dominion Private Clients explained that although in the 'vanilla case'[38] amending Division 7A to cover interposed entities will 'work in an appropriate manner'[39] the complexity arises when there are many entities involved.[40] The particular concern that Mr Beharis raised relating to what he considers an 'open-ended discretion' that will allow the Commissioner to determine the amount of a payment or loan to an interposed entity under what will be new section 109XH. Mr Beharis contends that the

35 Mr John Passant, Senior Lecturer Tax Law, University of Canberra, *Proof Committee Hansard*, Friday 30 April 2010, p. 4.

36 Mr John Passant, Senior Lecturer Tax Law, University of Canberra, *Proof Committee Hansard*, Friday 30 April 2010, p. 5.

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

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

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

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

legislation should provide more detail of the factors that the Commissioner must consider when determining that amount.[41]

2.43 When questioned about the possible uncertainty that may arise if the concerns of witnesses are realised, Treasury responded:

> Division 7A by itself does not need to be complex; it is when individuals and companies and trusts are set up with particular structures for whatever reason…invariably result in complexity...that is just a function of choosing particular structure for whatever purposes, some of them tax, some of them non-tax.[42]

2.44 The Institute of Chartered Accountants in Australia believes a recent Tax Office ruling renders Subdivisions EA and EB redundant:[43]

> Within that ruling the ATO have concluded that an unpaid present entitlement for the purposes of division 7A, in their view, is a loan. So, as soon as they have defined that unpaid present entitlement as a loan, effectively subdivisions EA and EB have become redundant provisions, or they will not operate unless there is an unpaid present entitlement for the purpose of revisions. The ruling goes on further to state that, although legally it would be an unpaid present entitlement, for the purposes of the provisions it is a loan, which means it is not an unpaid present entitlement just for the operation of these provisions. In order to address that issue and restore purpose to subdivisions EA and EB, we propose an amendment specifically highlighting that an unpaid present entitlement is not a loan for the purposes of division 7A. In terms of providing that amendment, we believe that it provides certainty to the provisions so that taxpayers know exactly why EA and EB are there and what they are intended to address as issues, and there is no uncertainty or ambiguity in terms of the ATO view as contained in the ruling.[44]

2.45 Tax expert Mr Passant commented on this view stating that:

> …although they are related, they are actually separate concepts that are being dealt with here. One is specifically dealing with unpaid present entitlements through the law and the other is a ruling which is going to say that some of those entitlements may be caught by other provisions of the same division which are wider and may have different consequences… these are interpretive matters about law that already exists and they do not impact on changes to the law. When and if the new law is passed it will still have effect. The rulings process is still that it is only the considered view of

---

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

42 Mr Raphael Cicchini, Manager, Business Tax Division, Department of the Treasury, *Proof Committee Hansard*, Friday 30 April 2010, p. 13.

43 Institute of Chartered Accountants in Australia, *Submission 9*, p. 2.

44 Mr Alexis Kokkinos, Chair, National Tax Technical Committee, Institute of Chartered Accountants in Australia, *Proof Committee Hansard*, Wednesday 28 April 2010, p. 14.

> the ATO. We let the ATO develop its own views in consultation with taxpayers and others who have been making submissions to the ATO and we see what comes out of that. But, even if the ruling as it presently exists as a draft becomes final in its present form, I do not think that is going to have a major impact on the changes that the government is proposing for division 7A around unpaid present entitlements.[45]

*Committee view*

2.46 The committee considers some uncertainty remains as to the interaction between draft Subdivision EB and Tax Office Draft Ruling 2009/D8.

**Recommendation 2**

**2.47 The committee recommends that the Commissioner of Taxation review Draft Ruling 2009/D8 following passage of the Schedule 1 amendments to ensure it is operating appropriately.**

***Corporate Limited Partnerships***

2.48 A minor amendment set out in Schedule 1 of the bill will be the introduction of section 109BB into Division 7A of the ITAA 1936. Section 109BB will operate to ensure that corporate limited partnerships no longer escape the operation of Division 7A where:

- they have fewer than 50 members; or
- the entity has, directly or indirectly, and for its own benefit, an entitlement to a 75 per cent or greater share of the income or capital of the partnership.[46]

***Retrospectivity***

2.49 The amendments set out in Schedule 1 of the bill will be retrospective in operation, applying from 1 July 2009.

2.50 Throughout the course of the inquiry, this particular feature of Schedule 1 received much criticism, stakeholders generally of the view that the retrospective nature of the changes does not provide taxpayers with the opportunity to restructure their affairs if they will be unintentionally affected by the changes.

2.51 Submitters also raised the brevity of the period for public consultation as an issue of concern and appealed to the committee for a period during which roll–over relief is made available. This would also enable affected taxpayers who have not been

---

45 *Proof Committee Hansard*, Friday 30 April 2010, p. 5.

46 Explanatory Memorandum, paras 1.36–1.37, p. 20.

keeping sufficient records to put processes in place to ensure they will be able to comply with their obligations

2.52 When asked if roll-over relief had been contemplated, Treasury advised that roll-over relief is not necessary to facilitate restructures.[47]

*Committee view*

2.53 On the balance of the evidence received throughout the course of its inquiry detailing the complexity of the Schedule 1 amendments and the modest revenue savings projected over the forward estimates, the committee takes the view that Schedule 1 should not operate retrospectively. Rather, taxpayers and tax agents should be given time to make changes to their business arrangements and structures as they consider appropriate. The committee does however note that this is an important integrity measure.

**Recommendation 3**

**2.54 The committee recommends that Item 2 of the bill dealing with the commencement date of the provisions be amended to reflect that Schedule 1 takes effect from 1 July 2010. The committee is of the view that this time frame strikes the appropriate balance between providing taxpayers with time to prepare for the changes with the need to strengthen the integrity of the tax laws.**

47 Mr Paul McCullough, General Manager, Business Tax Division, Department of the Treasury, *Proof Committee Hansard*, Friday 30 April 2010, pp 16–17.

# Chapter 3

## Extending the tax file number withholding provisions

3.1 In the 2009-10 budget, the Government announced that it would extend the existing tax file number (TFN) withholding arrangements to closely held trusts,[1] including family trusts, to ensure that assessable distributions paid to beneficiaries of those trusts are taxed.[2] The provision of TFNs will assist the Tax Office with data matching.[3]

3.2 The amendments set out in Schedule 2 take effect from 1 July 2010. They are expected to save around $50 million a year.

### Introduction

3.3 Division 12 of the *Taxation Administration Act 1953* identifies payments from which amounts must be withheld. Subdivision 12-E prescribes that where the recipient of an investment payment has not quoted their TFN or Australian business number, the entity making the payment is required to withhold an amount from the payment made.

3.4 While withholding arrangements currently apply to various entities, including unit trusts that pay or distribute income, they do not extend to situations involving closely held trusts. Schedule 2 of the bill will rectify this omission.[4]

### The proposed changes

3.5 The amendments will ensure that where an eligible beneficiary receives a distribution, or is presently entitled to income of the trust at the end of an income year, but has not quoted their TFN to the trustee of the trust, the trustee will be required to withhold an amount from the beneficiary's payment or entitlement.[5]

---

1 Closely held trusts are either discretionary trusts or trusts where the beneficiaries (there can be up to 20 beneficiaries) have a fixed entitlement, which between them is at least 75 per cent share of the income or capital. CCH Australia Limited, *Australian Master Tax Guide* 44th Edition, Sydney, 2009, para 6-275, p. 237.

2 The Hon Wayne Swan MP, Treasurer of the Commonwealth of Australia, The Hon Chris Bowen MP, Assistant Treasurer and Minister for Competition Policy and Corporate Law, 'Improving Fairness and Integrity in the Tax System', *Media Release* No. 67, 12 May 2009.

3 Explanatory Memorandum, Tax Laws Amendment (2010 Measures No. 2) Bill 2010, p. 36.

4 Explanatory Memorandum, p. 36.

5 Explanatory Memorandum, p. 36.

3.6 The trustee will then need to report and remit any amounts withheld to the Commissioner of Taxation.[6] Consistent with the existing TFN withholding rules, the beneficiary will be entitled to a credit equal to the amount withheld and remitted by the Trustee when the beneficiary's income tax return is lodged.[7]

3.7 A trustee who fails to withhold and/or remit any withheld amounts under the provisions will incur penalties in accordance with the existing TFN withholding penalty arrangements.[8]

*Exceptions to the amendments*

3.8 The amendments set out in Schedule 2 will not apply to non-resident trusts and special rules will apply to unit trusts.[9] Similarly, the measure will not extend to beneficiaries who are non-residents, an entity whose income is tax-exempt or those under a legal disability (eg the beneficiary is a child).[10]

3.9 Schedule 2 also sets out special rules for situations where:

(i) the trustee of the trust is liable to pay tax on behalf of a beneficiary; or

(ii) the trustee is liable to pay family trust distribution tax; and

(iii) the trustee is subject to trustee beneficiary reporting rules.[11]

3.10 These exceptions did not attract comment throughout the course of the inquiry.

## Views on the proposed changes

3.11 The measures set out in Schedule 2 of the bill were generally supported in principle:

> Senator CAMERON—On schedule 2, that amends the tax laws to extend the tax file number withholding arrangements to closely held trusts including family trusts. That is a reasonable proposition as well, isn't it?
>
> Mr El-Ansary—It is…Certainly from a conceptual perspective, from a policy perspective that is a consideration here, we do not have any philosophical concerns…[12]

---

6 Explanatory Memorandum, p. 37.

7 Explanatory Memorandum, paras 2.92–2.93, p. 57.

8 Explanatory Memorandum, p. 37.

9 Explanatory Memorandum, paras 2.20–2.21, p. 40.

10 Explanatory Memorandum, p. 41.

11 Explanatory Memorandum, pp 40-43.

12 Mr Yasser El-Ansary, Tax Counsel, Institute of Chartered Accountants in Australia, *Proof Committee Hansard*, 28 April 2010, p. 18.

> I support the extension of the TFNs provisions and the reporting requirements to beneficiaries and trustees of closely held trusts…[13]

3.12 Some concern was expressed, however, that the proposed changes will introduce a significant compliance burden on trustees:

> …we are very concerned that the proposed arrangements will entail considerable administrative burden and in some areas will be very difficult, if not impossible, to comply with within the suggested timeframes.[14]
>
> But the issue that must be taken into account is that the amendments as proposed, the imposed compliance obligations and complexity on tax agents in particular, are in our view unreasonable...this will impose significant compliance obligations on practitioners who typically deal with small, closely held trusts.[15]
>
> As a tax agent I am greatly concerned with the proposed measures in Schedule 2 as they seek to impose a significant amount of compliance onto trustee/trust taxpayers and indirectly onto their tax advisers.[16]

3.13 These views relate primarily to the obligations (for trustees) that will be introduced by the amendments including:

(i) the need to register, or be registered, for PAYG withholding;

(ii) the requirement to remit amounts withheld in an approved form through the business activity statement system;

(iii) the requirement to lodge an annual report for withheld amounts;

(iv) the requirement to report TFNs quoted to the Commissioner;

(v) the requirement to report the amounts withheld and amounts distributed to the Commissioner; and

(vi) the requirement to notify beneficiaries of amounts withheld through the issuing of payment summaries.[17]

3.14 Some submitters contended that the requirements are unnecessarily complex and result in duplication:

> There are already a number of other existing provisions that require trustees to withhold tax. The Institute's position is that these should be streamlined

13 Mr John Passant, *Proof Committee Hansard*, 30 April 2010, p. 2.

14 Trustee Corporations Association of Australia, *Submission 5*, p. 1.

15 Mr Yasser El-Ansary, Tax Counsel, Institute of Chartered Accountants in Australia, *Proof Committee Hansard*, 28 April 2010, p. 20.

16 Mr Darren Bates, *Submission 6*, p. 1.

17 Explanatory Memorandum, pp 51–56.

> rather than continuing to introduce new provisions that overlap each other in certain areas.[18]
>
> As part of the trust return lodgement process, the Commissioner has already collected TFN information for beneficiaries in the Distribution Statements that are lodged with the Trust Income Tax Return. From a practical perspective, Trustees of Trusts should not have to lodge a further report where the Commissioner has already been provided the TFN information in prior years.[19]

3.15 It was also argued it may be hard for beneficiaries to provide TFNs:

> …a lot of these older Australians may not even have a tax file number. There are two reasons for that. Having a tax file number is not a compulsory part of receiving an aged pension from Centrelink and there are exemptions through the share registries for aged pensioners and the like to not have to quote their tax file number to the share registry, so they do not have withholding tax taken from their dividends that they have directly.[20]

### *Committee view*

3.16 The tax file number system has made an important contribution to the integrity of the Australian tax system. The committee supports this extension of its applicability.

3.17 The committee regards the concerns expressed about the schedule as overstated. Collecting TFNs from the beneficiaries of trusts covered by the bill will not be onerous as by definition a closely held trust only has a small number of beneficiaries. Often they will be relatives. Retirees who have retired in the past two decades will still have TFNs from when they are working, those with high incomes already have them and for those without a TFN it is an easy and costless matter to obtain one.

### Recommendation 4

**3.18 The committee recommends that the Senate pass Schedule 2 of the bill.**

---

18 Institute of Chartered Accountants in Australia, *Submission 9*, p. 14.

19 Dominion Private Clients, *Submission 11*, p. 23.

20 Mr Christopher Holloway, Trustee Corporations Association of Australia, *Proof Committee Hansard*, 29 April 2010, p. 2.

# Chapter 4

# Income tax concessions proposed in the bill

4.1 Tax Laws Amendment (2010 Measures No. 2) Bill 2010 contains three schedules which propose income tax concessions; Schedules 3, 4 and 5.

## Schedule 3 – HECS—HELP benefits

4.2 Schedule 3 of the bill sets out amendments that will operate to ensure HECS–HELP benefits paid to eligible recipients in 2008–09 and later years will not be included in the recipient's income.

### *Background*

4.3 One of the aims of the *Higher Education Support Act 2003* is to support students undertaking higher education and certain vocational education and training. One of the mechanisms through which support is provided is a loan scheme that the recipient repays over time.

4.4 The amount of a person's HECS-HELP debt is the value of the 'loan' they receive when the Government makes payment to an educational institution for their course of study. The value of the loan accumulates over time, throughout the duration of the course. The accumulated debt is also indexed.[1]

4.5 The law provides for compulsory repayment of a HECS-HELP debt where the income of the loan recipient has reached a certain threshold amount. Where the threshold amount has been met, the Commissioner of Taxation will make an assessment of the debt that is required to be repaid and notify the person of that amount.[2]

### *The HECS-HELP benefit*

4.6 The HECS–HELP benefit was introduced to encourage graduates of certain courses to pursue employment in specific occupations. It operates to reduce eligible recipients' compulsory repayment amounts (or, in the cases where a repayment is not required due to low income, directly reduces the person's HELP debt) where that person is a graduate of a prescribed course and is working in that profession.[3]

---

1 Division 140, *Higher Education Support Act 2003*.

2 Division 152, *Higher Education Support Act 2003*.

3 Explanatory Memorandum, Tax Laws Amendment (2010 Measures No. 2) Bill 2003, p. 59.

4.7 The proposed amendments will ensure that the value of the HECS–HELP benefit received by an eligible recipient is exempt from income tax.[4]

4.8 Initially the HECS–HELP benefit was only available to graduates of maths or science and early childhood education courses; however, its application was extended in the 2009–10 budget to cover certain education and nursing (including midwifery) courses.[5]

### *Views on Schedule 3*

4.9 This measure, which will operate retrospectively from the 2008–09 income year, attracted little comment throughout the course of the inquiry. Comment that was made was supportive.

> The AWU believes these are important reforms aimed at encouraging greater uptake of relevant skills directly relevant to industry and to the economy more broadly. The measures are aimed at addressing the growing skills gap… The measures will also promote access to higher education, in particular for those on lower income.[6]

**Recommendation 5**

**4.10 The committee supports Schedule 3 of the bill and recommends its passage unchanged.**

## Schedule 4 – Deductible gift recipients

### *Background*

4.11 The income tax law enables certain organisations and entities to attract public support for their operations by attaining deductible gift recipient status. Any taxpayer who makes a donation of $2 or more to an organisation with DGR status is entitled to claim a tax deduction for the amount given.

4.12 To qualify for DGR status an organisation must fall within one of the general categories of Division 30 of the *Income Tax Assessment Act 1997* or be specifically listed within the Division.

### *About the proposed amendments*

4.13 Schedule 4 of the bill will amend section 30-80 of the ITAA 1997 to add the Sichuan Earthquake Surviving Children's Fund and the Bali Peace Park Association

---

4 Explanatory Memorandum, paragraph 3.4, p. 59.

5 Explanatory Memorandum, paragraph 3.2, p. 59.

6 The Australian Workers' Union, *Submission 2*, p. 2.

Incorporated to the specific list of eligible international affairs organisations[7] who have DGR status.[8]

4.14 The Sichuan Earthquake Surviving Children's Fund aims to raise money through donations that can be used to assist in the reconstruction of schools in the Sichuan Province of China destroyed by the earthquake on 12 May 2008.[9]

4.15 The Bali Peace Park Association Incorporated aims to raise funds sufficient for the acquisition of the Sari Club site in Bali, Indonesia, and establishment of a peace park on that site. It also aims to establish an annual national awareness day on the anniversary of the terrorist attack at the site. Through establishing a peace park the association aims to promote tolerance and understanding across cultures and religions whilst ensuring that the events of 12 October 2002 are not forgotten.[10]

4.16 These proposed amendments will have retrospective operation – the bill sets out that they will apply to the 2007–08 income year and later although special provisions will prescribe that:

- gifts to the Sichuan Earthquake Surviving Children's Fund must be made between the period 11 May 2008 and before 13 May 2010; and
- gifts to the Bali Peace Park Association must be made after 15 December 2009 and before 17 December 2011.[11]

4.17 Schedule 4 of the bill also proposes that the DGR status of the Yachad Accelerated Learning Project be extended to end on 30 June 2012.[12]

4.18 The Yachad Accelerated Learning Project Ltd[13] is a not-for-profit educational organisation that aims to improve literacy and numeracy outcomes of indigenous and non-indigenous students in remote, regional and rural locations within Australia.[14]

---

7 Division 30 of the ITAA 1997 provides a general category of International Affairs (at section 30–80 of the ITAA 1997) which prescribes that any public fund declared by the Treasurer to be a developing country relief fund when certain conditions are satisfied, is a DGR.

8 Explanatory Memorandum, p. 62.

9 Explanatory Memorandum, p. 62.

10 Explanatory Memorandum, p. 62.

11 Explanatory Memorandum, p. 62.

12 Explanatory Memorandum, p. 62.

13 YALP was officially launched by the former education minister in August of 2004 after meetings with indigenous leaders and communities within the East Kimberley, North Queensland and Victoria and the provision of $3 million in funding by the Department of Education, Science and Training for a three year pilot project.

14 Yachad Accelerated Learning Project Ltd, http://www.yalp.org.au .

4.19 The existing provisions of Division 30 of the ITAA 1997 provide YALP with DGR status for gifts made after 29 June 2005 and before 1 July 2008. This proposed amendment will extend that DGR status to gifts made until 30 June 2012.[15]

### *Committee view*

4.20 Although Schedule 4 of the bill did not attract any comment throughout the course of the inquiry, where a charity is established for a specific purpose, for example, in the case of the Bali Peace Park, the committee questions whether further inquiry should be made into the governance structures around such charities, particularly to determine what should occur where money remains after the purpose for which the charity was established has been achieved.

**Recommendation 6**

**4.21 The committee recommends that Schedule 4 of the bill be passed without amendment.**

## Schedule 5 – Taxation of the Global Carbon Capture and Storage Institute Limited

### *Background*

4.22 Under the income tax law certain entities are exempted from paying income tax; in some cases this exemption is subject to special conditions.[16] Division 50 of the ITAA 1997 lists the exempt entities and sets out any special conditions that they must satisfy.[17]

### *The proposed changes*

4.23 Schedule 5 of the bill proposes an amendment to section 50-5 of the ITAA 1997 specifically to extend income tax exempt status to the Global Carbon Capture and Storage Institute Limited.

4.24 In September 2008 Prime Minister Rudd announced that a global institute to accelerate the development and deployment of carbon capture and storage technology

15 Subsection 30–25(2) table item 2.2.34, *Income Tax Assessment Act 1997*. It is noted that there is a drafting error/typo in the bill in respect of this amendment. On page 34 of the bill, item 1, line 1 in respect of subsection 30–25(2) table item 2.2.34, the instruction is to 'Omit "1 July 2009". The act however refers to 1 July 2008 at subsection 30–25(2) table item 2.2.34.

16 Section 50–1, *Income Tax Assessment Act 1997*.

17 An example of an entity exempted from income tax under Division 50 is a public educational institution (section 50–5).

would be established.[18] The Global Carbon Capture and Storage Institute Limited,[19] is a part of the government's response to the environmental and economic challenges of climate change.[20]

4.25 When launched, the Government committed up to $100 million in funding on an annual basis to the Institute.[21]

4.26 Schedule 5 of the bill proposes that the Global Carbon Capture and Storage Institute Limited be given income tax exempt status for a period of four years, commencing from 1 July 2009.[22] The proposed amendments provide for its income tax exemption through the addition of the Institute to the list of exempt entities in section 50–5 and section 11–5 of the ITAA 1997.

4.27 The explanatory memorandum also explains that any information and expertise developed by the Institute is to be shared generously for the 'benefit of both the Australian and global carbon capture and storage communities.'[23]

***Views on Schedule 5***

4.28 The proposed income tax exempt status of the Global Carbon Capture and Storage Institute Ltd did attract some comment during the course of the inquiry, contributors questioning its rationale.

4.29 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?[24]

---

18 The Hon. Martin Ferguson AM MP, Minister for Resources and Energy, Global Carbon Capture and Storage Initiative, Media Release 19 September 2008.

19 Established as a not-for-profit company limited by guarantee in early 2009. Explanatory Memorandum, p. 63.

20 The Hon. Martin Ferguson AM MP, Minister for Resources and Energy, Launch of Global Carbon Capture and Storage Institute, Media Release, 16 April 2009.

21 The Hon. Martin Ferguson AM MP, Minister for Resources and Energy, Launch of Global Carbon Capture and Storage Institute, Media Release, 16 April 2009.

22 If the proposed amendment is passed the Institute's tax exempt status will expire on 30 June 2013. Explanatory Memorandum, p. 63.

23 Explanatory Memorandum, p. 63.

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

4.30 The Global Carbon Capture and Storage Institute Limited explained:

> The goals of the organisation are, on a global level, to assist in accelerating the deployment of CCS technology. To do that, one of the objectives of the institute is to establish a diversified funding program on a global level and to be able to attract funding from global members, in particular, other governments. It was deemed that it would not be satisfactory if those members were contributing funds which were then taxed by the Australian government.[25]

4.31 Similarly, the Department of Resources, Energy and Tourism submitted:

> In its preparatory work the Institute received advice from members that the imposition of Australian income tax on contributions is likely to be perceived as a threat to the Sovereignty of contributing nations and therefore a significant disincentive to investment.[26]

### *Committee view*

4.32 The committee notes that the Global Carbon Capture and Storage Institute is engaged in research for the public good. While it acknowledges the point regarding the broad scope of the proposed income tax exemption, it also acknowledges the unique nature of this body which is set up to attract international funding, and that the Bill provides only for exemption during the first four years of its startup.

### Recommendation 7

**4.33 The committee recommends that Schedule 5 of the bill be passed without amendment.**

25 Ms Sue Steele, Chief Financial Officer, Global Carbon Capture and Storage Institute Limited, *Proof Committee Hansard,* 30 April 2010, p. 11.

26 Department of Resources, Energy and Tourism, *Submission 7*, p. 1.

# Chapter 5

# The remaining provisions – schedule 6 of the bill

5.1 Schedule 6 of the bill proposes amendments that will remove unlimited amendment periods.

## Background

5.2 The Commissioner of Taxation's power to amend assessments is set out in section 170 of the *Income Tax Assessment Act 1936*. These provisions have been amended in recent years and now reflect that the standard period in which the Commissioner can amend an assessment for most individuals and small businesses is two years; for taxpayers with more complex tax affairs the period during which an amendment can be made is contained to four years.[1]

5.3 These provisions within the ITAA 1936 however do not apply to assessments involving fraud or evasion.[2]

## The amendments

5.4 The amendments set out in Schedule 6 of the bill will amend the remaining provisions spread throughout the various taxation laws that specifically provide exceptions and give the Commissioner an unlimited period in which to amend an assessment. The affect of these changes being that the general amendment provisions of the ITAA 1936 will apply.[3]

5.5 These changes are designed to provide certainty by ensuring that whether or not a taxpayer has paid the correct amount of tax in a year, their assessment will become final. It is noted however, that the existing rule that provides the Commissioner with the authority to amend an assessment at any time in situations where taxpayers have deliberately sought to avoid their responsibilities by fraud or evasion will continue to apply.[4]

## Views on the bill

5.6 Throughout the course of the inquiry, both in the submissions received and at the public hearings held, very little comment was made in respect of Schedule 6. In

---

1 CCH Australia, *Australian Master Tax Guide* 44th Edition, Australia, 2009, paragraph 25–300, p. 1343.

2 CCH Australia, *Australian Master Tax Guide* 44th Edition, Australia, 2009, paragraph 25–330, p. 1347.

3 Explanatory Memorandum, p. 66.

4 Explanatory Memorandum, paragraph 6.2, p. 65.

general, submitters are supportive of the proposed amendments[5] although it was suggested by one that:

> …I hope there is some review going on overall into the impact of the certainty that is provided by the two-year and four-year time limits on amendments.[6]

### *Committee view*

5.7 The committee is satisfied that the introduction of the amendments set out in Schedule 6 of the bill will not result in any unintended consequences but rather will improve outcomes for taxpayers by increasing certainty.

### Recommendation 8

**5.8 The committee recommends that Schedule 6 of the bill be passed.**

**Senator Annette Hurley**
**Chair**

5 Dominion Private Clients, *Submission 11*, p. 28.

6 Mr John Passant, Senior Lecturer, Faculty of Law, University of Canberra, 30 April 2010, p. 2.

# 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]

---

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]

---

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.

---

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**

# APPENDIX 1

## Submissions Received

| Submission Number | Submitter |
|---|---|
| 1 | BLW LLP |
| 2 | Australian Workers Union |
| 3 | Thomson Playford Cutlers |
| 4 | Pitcher Partners |
| • | Supplementary Submission |
| 5 | Trustee Corporations Association of Australia |
| 6 | Mr Darren Bates |
| 7 | Department of Resources, Energy and Tourism |
| 8 | JMA Legal |
| 9 | The Institute of Chartered Accountants in Australia |
| 10 | Law Council of Australia |
| 11 | Dominion Private Clients |
| 12 | Mr Christopher Knott |

## Additional Information Received

**QUESTIONS ON NOTICE**

- Received from Dr Jeannie Patterson on 30 April 2010; answers to Questions on Notice taken at a public hearing in Melbourne on 29 April 2010.

**TABLED DOCUMENTS**

- Document tabled by Pitcher Partners at a public hearing in Melbourne on 29 April 2010: "Evidence from Peter Riley of Pitcher Partners Advisors"
- Document tabled by Dominion Private Clients at a public hearing in Melbourne on 29 April 2010: "109XF, 109XG and 109XH Vanilla Case"
- Document tabled by Trustee Corporations Association of Australia at a public hearing in Melbourne on 29 April 2010: "Opening Statement"
- Document tabled by Global Carbon Capture and Storage Institute Ltd at a public hearing in Canberra on 30 April 2010: "Constitution"
- Document tabled by Treasury at a public hearing in Canberra on 30 April 2010: "If it smells fishy is it fishy?"

# APPENDIX 2

## Public Hearings and Witnesses

**SYDNEY, Wednesday 28 April 2010**

APPLEBY, Mr Daniel, Member, Taxation Committee,
Law Council of Australia

BALAZS, Mr John George, Member, Taxation Committee,
Law Council of Australia

de HAAN, Mr Philip, Partner,
Thomson Playford Cutlers

EL-ANSARY, Mr Yasser, Tax Counsel,
Institute of Chartered Accountants in Australia

KOKKINOS, Mr Alexis, Chair, National Tax Technical Committee
Institute of Chartered Accountants in Australia

**MELBOURNE, Thursday 29 April 2010**

BEHARIS, Mr Noel, Director, Tax Technical Services,
Dominion Private Clients

GARDINER, Mr Andrew James, Spokesman,
National Tax and Accountants Association

HOLLOWAY, Mr Christopher James, Taxation Manager,
Equity Trustees Ltd and Trustee Corporations Association of Australia

RILEY, Mr Peter Thomas, Executive Director,
Pitcher Partners Advisors

**CANBERRA, Friday 30 April 2010**

CICCHINI, Mr Raphael, Manager, Small Business, Trusts and Regulation,
Business Tax Division, The Treasury

MATTHEWS KRSTESKI, Mrs Stacey Narelle,
Manager, Global Carbon Capture and Storage Institute

McCULLOUGH, Mr Paul, General Manager, Business Tax Division
Treasury

PASSANT, Mr John,
Private capacity

ROUSSEL, Mrs Sandra, Treasury

STEEL, Mrs Sue, Chief Financial Officer, Global Carbon Capture and Storage Institute