

The Senate

Standing Committee on Economics

Tax Laws Amendment (2008 Measures
No. 4) Bill 2008 [Provisions]

August 2008

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Senate Standing Committee on Economics

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Chapter 1

Introduction

Background

1.1 The Tax Laws Amendment (2008 Measures No. 4) Bill 2008 was introduced into the House of Representatives on 26 June 2008 by the Treasurer, the Hon. Wayne Swan MP.

1.2 On 26 June 2008, on the recommendation of the Selection of Bills Committee, the Senate referred the provisions of the Bill to the Economics Committee for report by 27 August 2008.

1.3 The bill contains three unrelated schedules. The first refers to demutualisation of private health insurers and the second to family trusts. These are discussed in the following two chapters. The third schedule implements various minor amendments to the law, correcting terminology, and grammatical or punctuation errors. The third schedule is completely uncontroversial, not being mentioned by submitters or witnesses, and is not discussed further in this report.

Conduct of the inquiry

1.4 The committee advertised the inquiry in the national press and invited written submissions by 21 July 2008. The seven submissions received are available at http://www.aph.gov.au/Senate/committee/economics_ctte/tlab_4_08/submissions/sublist.htm.

1.5 The committee held a public hearing on the bill in Canberra on 12 August. The witnesses are listed in Appendix 2.

1.6 All the submissions, and all of the discussion at the hearing, was about schedule 2 of the bill.

1.7 The Committee thanks those who participated in the inquiry.

Recommendation

1.8 Taking into account the analysis in the following chapters, the committee believes some reduction in the benefits allowed to people using family trusts is a reasonable savings measure.

Recommendation 1

1.9 The committee recommends that the Senate pass the bill.

Chapter 2

Demutualisation of private health insurers

2.1 Schedule 1 of the bill provides relief from capital gains tax (CGT) for private health insurance policyholders when their insurer converts from a mutual not-for-profit operation into a for-profit insurer. The CGT exemption applies both to policyholders who receive shares and those who receive a cash payment.

2.2 The amendment in Schedule 1 has particular currency in light of the merger of MBF with BUPA Australia Group and MBF's demutualisation on 16 June 2008. NIB demutualised in October 2007. The demutualisation of health insurance funds follows a number of demutualisations of building societies and insurance companies.¹

2.3 The MBF demutualisation entitled MBF's policy holders to a cash payment for the disposal of certain membership rights. Division 9AA and Schedule 2H of the *Income Tax Assessment Act 1936* provide a tax exemption for capital gains from demutualisations of life insurers, general insurers and some other mutuals.² However, many policyholders of health insurers are not captured under the Act's definition of 'members'.³ This bill will extend the capital gains tax exemption to all private health insurance policyholders.

2.4 The ATO notes on its website:

Until the proposed new law is enacted, there is some uncertainty about what amount, if any, should be included in your tax return as a result of the demutualisation. In light of this uncertainty, the Tax Office will allow you to lodge your 2007/2008 tax return without including any capital gain from the receipt of cash from the MBF demutualisation at this stage. The Tax Office and MBF will let you know what amount (if any) to include in your tax return and how to do this at a later time.⁴

2.5 If the bill is passed, MBF policyholders who received a cash payment in June 2008 will not be liable to pay CGT on this sum, and nor will future beneficiaries of demutualisations. The cost to revenue is estimated at around \$2 million in 2009-10

1 Better known examples include Colonial Mutual, AMP and St George. See 'Demutualisation in Australia', *Reserve Bank of Australia Bulletin*, January 1999, pp 1-10.

2 *Explanatory Memorandum*, p. 5.

3 The Hon. Chris Bowen, Minister, Competition Policy and Consumer Affairs, *Second Reading Speech*, 26 June 2008.

4 Australian Taxation Office, 'Demutualisation of MBF', <http://www.ato.gov.au/individuals/content.asp?doc=/Content/00147168.htm>.

and \$1 million in following years.⁵ This amount would obviously vary with the number of funds which demutualise in coming years, which is hard to predict.

2.6 The demutualisation of a private health insurance fund is clearly of financial benefit for existing policyholders. However past policyholders, who have also contributed to building up the fund's reserves, will not receive any benefit. Taxpayers in general have also contributed to the reserves of the health insurance funds through the very generous subsidies given to private health insurance funds, such as the 30 per cent rebate and the exemption from the Medicare levy surcharge. This suggests there is an argument that at least some of the windfall gains accruing to those people who happen to be policyholders at the time of demutualisation should be returned to the community by making the gains taxable.

2.7 The Government has argued that this taxation exemption 'is intended to facilitate the demutualisation of private health insurers'. Demutualisation contributes to the spread of share ownership in the community. It allows the entity concerned to raise external capital more readily, which may enable it to expand or diversify its operations. Arguably, the accountability arrangements pertaining to a listed company are stronger than those applying to a mutual association.

Chapter 3

Family trusts

3.1 Schedule 2 of the bill amends Schedule 2F of the *Income Tax Assessment Act 1936* (ITAA) to narrow the definition of 'family' and limit variations in the 'test individual' in the election rules for family trusts.¹

3.2 The Government's intent is to reduce the scope for family trusts to use tax losses to lower income tax. Minister Bowen described the measures in terms of improving the integrity of the tax system and achieving cost savings to 'help fund more urgent priorities'.²

3.3 The bill essentially reverses some (but not all) changes to family trust arrangements introduced last year in the *Tax Laws Amendment (2007 Measures No. 4) Act 2007*. Treasury explained the changes in the bill as follows:

The trust loss rules in schedule 2F of the *Income Tax Assessment Act 1936* are primarily there to prevent the tax benefits arising from the recruitment of trust losses being passed to beneficiaries that did not bear the economic loss or the bad debt when it was incurred. It does this basically by tracing through the underlying ownership. Many family trusts are discretionary trusts, which means that the beneficiaries may not have a fixed interest, so it will be difficult to trace through their economic ownership in the trust. Therefore, in many cases, they would not be able to meet the standard rules

1 A family trust is generally established for the benefit of members of a 'family group'. It provides a mechanism to pass family assets to future generations and can ensure that all family members use their income tax 'tax-free thresholds'. The family trust can be the subject of a family trust election which provides it with certain tax advantages, provided that the trust passes the family control test and makes distributions of trust income only to beneficiaries of the trust who are within the 'family group'. Family trusts are typically used by farming families and those running small businesses. One witness described them as 'a legitimate vehicle in which to run business and to hold family assets for all the reasons of asset protection, business succession, family protection of assets in the instance of marriage breakdown and the like. Tax is very much an incidental.'; Mr John Brazzale, Taxation Institute of Australia, *Proof Committee Hansard*, 12 August 2008, p. 16.

There are over 400 000 family trusts in Australia; Mr Ali Noroozi, Institute of Chartered Accountants in Australia, *Proof Committee Hansard*, 12 August 2008, p. 9. They may have over \$200 billion in assets; Senator Barnaby Joyce, *Proof Committee Hansard*, 12 August 2008, p. 14. Around 185 000 to 200 000 of these trusts have made family trust elections over the past decade; Mr Raphael Cicchini, Treasury, *Proof Committee Hansard*, 12 August 2008, p. 2.

2 The Hon. Chris Bowen, Minister, Competition Policy and Consumer Affairs, 'Family Trusts—Savings Measure', *Media Release*, 13 May 2008.

for determining whether they can carry forward and utilise a loss to reduce income tax in later years.

As part of that background, in recognition of that, the rules within schedule 2F provide a special concession to family trusts. That is, if you make an election and specify a test individual, you may carry forward your losses and utilise them without meeting the other rules. Provided that you only distribute to family members or members within the family group, you are not subject to family trust distribution tax, which is charged at the top marginal tax rate, plus the Medicare levy, of 46.5 per cent. So, in essence, this is a concession within the tax law to family trusts. The previous government made amendments in 2007 that varied the operation of those rules and made them more concessional...This government has reversed two of those measures, one applying, in effect, with a transitional rule.

You have asked when it might affect people. The answer is that the rules currently provide for variations, and they can only be made in two circumstances. One is where there is a family breakdown and the control of the trust changes to the spouse; in that case, they can make a variation. The other rule was, if you met certain conditions, you could change the test individual once, and only once, going forward. Those conditions were about who you had distributed to previously. So to meet the conditions you had to only distribute or confer present entitlement to people who would have been in the family group, had that person always been the test individual.³

Changes to the definition of 'family'

3.4 The bill amends the definition of 'family' in the family trust election rules to limit lineal descendants to children or grandchildren of the test individual or the spouse of the test individual (excluding lineal descendants of nephews, nieces or great-grandchildren of the test individual).

3.5 This change was criticised by the Institute of Chartered Accountants in Australia. They argued:

The definition of "family" only extends down two generations. We don't perceive any policy rationale for placing a generational limit on the definition of family especially given that the typical life of a trust is 80 years, which means they commonly extend into a fourth generation. This means that many family trusts will eventually have to distribute outside the family group and such distributions will be subject to FTDT.⁴

3 Mr Raphael Cicchini, *Proof Committee Hansard*, 12 August 2008, p. 2.

4 *Submission 1*, p. 2. FTDT stands for Family Trust Distribution Tax

3.6 CPA Australia argued that the measures proposed in Schedule 2 of the 2008 bill effectively amounts to a de facto inheritance tax; and is 'wholly inconsistent' with trust law and commercial practice.⁵

3.7 On the broader issue of the definition of a family, CPA Australia gave the example of a family living with (elderly) grandparents, parents and children. If one of the parents is nominated as the test individual, the lifespan of the trust is limited to the lifespan of the grandchildren (if Family Trust Distribution Tax is to be avoided). If one of the children is nominated, the lifespan of the trust may be longer but the descendants of their siblings will be disadvantaged since only one generation beyond the sibling can benefit from the trust without incurring the tax.

3.8 CPA Australia thereby argued:

It is difficult to see a policy justification for placing a generational limit on trusts that have made a FTE. Most trusts typically have a life span of 80 years, which will commonly span four generations. In our view there is no compelling reason why two generations should be sliced off the normal lifespan of a trust.⁶

Limitations to variations in 'test individual'

3.9 The bill prevents family trusts from making a once-off variation to the test individual specified in a family trust election (other than for the 2007–08 income year or in the case of marriage breakdown).

3.10 The Institute of Chartered Accountants in Australia argued there were cases where it was justified to change the test individual. They cited the Explanatory Memorandum from the 2007 Act which refers to :

the situation where a trust has chosen the wrong test individual in its family trust election but the trust had acted in the past as if the proposed new test individual was always the test individual.⁷

3.11 CPA Australia argues the bill would add significant complexity to tax law, such as in cases where an inappropriate person is selected as the test individual by family businesses especially from an estate planning and succession perspective.⁸

The extent of budget savings

3.12 The Government estimates that the measure will save \$1 million in 2008–09 and \$6 million each in the following three years.⁹ As the provisions refer to events occurring in future generations, there may be more substantial savings in distant years.

5 *Submission 2*, p. 1.

6 *Submission 2*, p. 3. FTE stands for family trust election.

7 *Submission 1*, p. 2.

8 CPA Australia notes that the test individual cannot be a deceased person. *Submission 2*, p. 3.

3.13 This estimate is consistent with the revenue costs estimated last year for the 2007 Act, which this bill largely revokes.¹⁰ The estimated costs for the 2007 bill were \$8 million a year but not all its provisions are being revoked.

3.14 Mr Mark Leibler of Arnold Bloch Leibler questioned the basis for this estimate:

it is inconceivable to me that the estimate of \$8M per annum could have related to the inclusion of the lineal descendents of family members. The inclusion of lineal descendents is only likely to have revenue cost implications - if at all - well into the future.¹¹

3.15 Mr Leibler told the committee that he had 'seen some work' from Pitcher Partners showing that family trust distribution tax on average to the year 2005-06 was just under \$1.5 million. The committee took evidence from the Director of Pitcher Partners who made no mention of this revenue estimate.

3.16 Mr Leibler argued that the government's costing assumes the reversal of family trust status for people who were included in a family trust group under last year's amendments. However, he believed the removal of the 'lineal descendants of family members' provision would not involve 'a reversal of family trust status'. Accordingly, Mr Leibler reasoned that there will be a significantly smaller revenue gain than the Treasury estimates. He claims:

The idea that even \$1 million per annum would be saved in relation to the lineal descendants issue is a complete and total nonsense.¹²

There's no revenue in it. All it will do is create complications and anomalies.¹³

3.17 In a similar vein, the Institute of Chartered Accountants opined:

We doubt very much if it will save the government any money and, if it does, it will be very little.¹⁴

3.18 The Taxation Institute of Australia also argued the lineal descendants measures in the bill will not result in any significant savings:

in respect of the lineal descendants, I do not see these measures raising anywhere near the amount of revenue that perhaps our friends from

9 *Explanatory Memorandum*, p. 4.

10 Mr Colin Brown, Treasury, *Proof Committee Hansard*, 12 August 2008, p. 7.

11 Mr Mark Leibler, *Submission 4*, p. 1.

12 Mr Mark Leiber, *Proof Committee Hansard*, 12 August 2008, p. 12.

13 Mr Mark Leiber, *Proof Committee Hansard*, 12 August 2008, p. 14.

14 Mr Ali Noroozi, Institute of Chartered Accountants in Australia, *Proof Committee Hansard*, 12 August 2008, p. 8.

Treasury [expect] ... it will be many, many, years before trusts will hit a position where the only surviving beneficiaries that are able to receive distributions might be great grandchildren. At that point in time, the trust will restructure and perhaps vest rather than incur a penalty tax.¹⁵

3.19 However they suggested a capital gains tax event could be triggered sooner as a result of the measures in the bill.¹⁶ Similarly, Family Business Australia suggested the measures could convert some assets currently exempt from capital gains tax due to being purchased before the tax was introduced into assets that now would be subject to the tax, but they also did not quantify the impact.¹⁷ Mr Leibler also referred to capital gains tax implications in the longer term:

it is likely going forward that capital gains are going to be brought forward because people are going to want to vest their trusts because, as you run into grandchildren or great-grandchildren who are no longer beneficiaries rather than paying penalty tax on distributions you may want to vest the trust in relation to beneficiaries who are still alive and who comply.¹⁸

3.20 Treasury's Colin Brown agreed the changes to rules on lineal descendants did not have large revenue implications in the short-term and there was a degree of uncertainty around them:

The bulk of the cost saving in this measure comes from the reversal of the measure to be able to change the test individual over the forward estimates period. The component that is related to changing the lineal descendants has a different cost over a different time frame. It has a longer term cost, which is larger.¹⁹

My recollection of the costing of this is that the lineal descendants, over the forward estimates period, is a very small part, probably around \$1 million [each year] ... but that that number outside of the forward estimates period would grow...the costings are very indicative. There is not a lot of data on which to base an assessment.²⁰

Committee view

3.21 The committee does not believe that, because the revenue savings from the lineal descendants amendment is allegedly only a quarter that of Treasury's estimate,

15 Mr John Brazzale, Taxation Institute of Australia, *Proof Committee Hansard*, 12 August 2008, p. 16.

16 Mr John Brazzale, Taxation Institute of Australia, *Proof Committee Hansard*, 12 August 2008, p. 16.

17 Mr Donald O'Brien, Family Business Australia, *Proof Committee Hansard*, 12 August 2008, p. 19.

18 Mr Mark Leiber, *Proof Committee Hansard*, 12 August 2008, p. 12.

19 Mr Colin Brown, Treasury, *Proof Committee Hansard*, 12 August 2008, p. 5.

20 Mr Colin Brown, Treasury, *Proof Committee Hansard*, 12 August 2008, p. 6.

the amendment should be cut from the bill. The proposed amendment will achieve the government's stated objective of cost savings (however large) and fulfil its pre-election commitment to tighten family trust arrangements. Beyond the forward estimates period, the lineal descendents amendment could potentially realise quite significant cost savings. It is, moreover, in keeping with the broader objective of Schedule 2 of the bill which is to preserve the integrity of the tax system.

Compliance costs

3.22 The Government stated 'these amendments are expected to have a small impact on compliance costs'.²¹

3.23 This was contested by some submitters and witnesses. The Taxation Institute of Australia argues that the 2007 amendments were 'specifically targeted to overcome a number of acknowledged problems with the operation of the family trust election rules and reduce the onerous associated compliance costs'.²² This would seem to imply that the 2008 bill would render compliance costs once again onerous.

3.24 CPA Australia also argue the bill runs counter to the objective of reducing the compliance burden on taxpayers.²³

3.25 Senator Joyce suggested it will only be accountants that benefit as a large number of trusts need to rearrange their affairs.²⁴

Senator Annette Hurley

Chair

21 *Explanatory Memorandum*, p. 4.

22 *Submission 3*, p. 1.

23 *Submission 2*, p. 1.

24 Senator Barnaby Joyce, *Proof Committee Hansard*, 12 August 2008, pp 14 and 20.

Dissenting Report from Coalition Senators

Senators Alan Eggleston (Deputy Chair),
Barnaby Joyce and David Bushby

Overview

Schedule 1

To assist in the demutualisation of private health services, as wished for by private health insurers, the passage of Schedule 1 brings into effect a capital gains tax exemption to current policy holders for the one off gain.

The bill does this by expanding the definition of “members” under the current exemptions for tax in regard to demutualisations covered in Div 9AA and Schedule 2H of the *Income Tax Assessment Act 1936*.

In summary, there is an intended exemption in the act for demutualisation and this change brings current manifestations of demutualisation into the net of exemptions prescribed by the act.

Recommendation

It is the belief of the Coalition Senators that this situation is in need of remedy and the purpose of the act is to return the legislation to its original intent so should be supported.

Schedule 2

In brief, this schedule makes changes to lineal descendents laws for Family Trusts and changes to the variation of the Test Individual.

The current moves against changes to family trusts have little to do with closing loop holes and are far more, it appears, a move to transition trusts to entity taxation laws. The move to restrict the inter-generational nature of trusts works against the implicit nature of why we have trusts.

...a lot of trusts have a typical vesting period of around 80 years. In practice, they can typically cover four generations. The proposed amendment to limit the definition of family is out of line with the expected life span of trusts.¹

1 Mr Julian Cheng, Institute of Chartered Accountants, *Proof Committee Hansard*, 12 August 2008, p. 8.

The issue with the change to the test individual is that it starts to limit the lifespan of the trust and forces the trust to an event horizon where either the trust vests or the penalty tax is paid at 46.5 per cent. As that is at a premium to the corporate tax rate then the trust will become obsolete and companies will take their place. The benefit to the treasury is the long term removal of the tax advantage of discretionary trusts.

As discretionary trusts are one of the major ownership vehicles in family assets, especially rural land, then all current ownership structures will have to be reviewed, which has already started. For the discerning, majority non real property asset structures will be moved overseas, for the majority of trusts however they will, for no apparent reason, have the tax nature of their asset changed.

CHAIR—Are you aware of any groups of people who form family trusts—for example, in rural areas...

...I understand that there are in the area of the rural communities. It would mainly be in the farming sector, where the land may be held separately to the business...it might be because you want to segregate and control your assets in succession planning.²

These proposed changes effect a reversal of some of a suite of amendments made in this area by the previous Government under the *Tax Laws Amendment (2007 Measures No. 4) Act 2007*.

The rationale for reversing these amendments was stated in the Explanatory Memoranda as being a savings measure:

The trust loss measures protect the integrity of the income tax system by preventing the tax benefits arising from the recoupment of a trust's tax losses and bad debts being transferred to persons who did not bear the economic loss or bad debt when it was incurred.³

This was reinforced by evidence received by Treasury:

When this measure was announced by the current government, it was announced as a savings measure.⁴

However, the methodology for calculating the quantum of savings was seen to be less than rigorous and, at least as far as it extended to the proposed amendment relating to lineal descendants, almost entirely absent:

The costing of this represents the reversal of the earlier measure, so it is based essentially on the earlier costing of the changes to family trusts and family trust elections... My recollection of the costing of this is that the

2 Mr Raphael Cicchini, Treasury, *Proof Committee Hansard*, 12 August 2008, p. 3.

3 *Explanatory Memorandum*, p. 33.

4 Mr Raphael Cicchini, Treasury, *Proof Committee Hansard*, 12 August 2008, p. 4.

lineal descendants, over the forward estimates period, is a very small part, probably around \$1 million.⁵

Evidence received from other witnesses (refer to comments by Mr Ali Noroozi below) suggests strongly that there will be no savings from the amendment relating to lineal descendants.

Given the lack of clear evidence that the amendment – particularly as it relates to the changes to lineal descendants – will save the government any money, the rationale for this change is questionable, given the clear evidence of the problems the 2007 amendment addressed and passing of the bill would reintroduce.

Despite the questionable calculations of savings, any savings that may be achieved as a result of the proposed changes will be well and truly lost by the cost that so many of the 400 to 500 thousand trusts will have to incur in order to re-adjust for the changes with no economic gain to the economy from this expenditure. In fact the forward figure itself, as proposed by the treasury, seems unlikely if the motivation for this law is, as stated, 'closing a loophole' and not the first step of much more encompassing change.

I do not believe that this is an integrity measure. As Treasury confirmed, it was seen as a savings measure...we doubt very much if it will save the government any money and, if it does, it will be very little and will be by way of almost a penalty tax...⁶

The fact that the test individual cannot be changed has serious implications where there is an unforeseen death, such as a car accident. The effect of the changes is that any new family trusts cannot nominate the deceased person as the test individual; therefore these trusts potentially cannot be included in the family group of the original test individual. Similarly, new companies owned by trusts may not be able to make interposed entity elections to be included in the family of the original test individual.

One of the things with the test individual is that...the families of today are smaller and, therefore, you may well find yourself in the position where you do not have any direct lineal descent.⁷

Whilst the Coalition was in government, the TLAB (4) 2007 allowed the test individual to be varied once, and for a good reason, to make better policy.

5 Mr Colin Brown, Treasury, *Proof Committee Hansard*, 12 August 2008, p. 5.

6 Mr Ali Noroozi, Institute of Chartered Accountants, *Proof Committee Hansard*, 12 August 2008, p. 8.

7 Mrs Genevieve Power, Family Business Australia, *Proof Committee Hansard*, 12 August 2008, p. 21.

Recommendation

Coalition Senators recommend that Schedule 2 be opposed as it is a change to the current structure and intent of trusts and a move which mitigates the effect of trusts - a widely used vehicle of asset ownership and protection, as well as being an essential element of an effective family tax structure.

Schedule 3

Technical amendments.

Recommendation

It is the belief of the Coalition Senators that this situation is in need of remedy and the purpose of the act is to return the legislation to its original intent so should be supported.

Senator Alan Eggleston

Deputy Chair

LP

Senator Barnaby Joyce

LNP

Senator David Bushby

LP

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	The Institute of Chartered Accountants
2	CPA Australia
3	Taxation Institute of Australia
4	Family Business Australia
5	Financial Planning Association of Australia Ltd
6	Mr Mark Leibler, Arnold Bloch Leibler
7	Halperin & Co. P/L

APPENDIX 2

Public Hearings and Witnesses

CANBERRA, TUESDAY, 12 AUGUST 2008

- BRAZZALE, Mr John,
Executive Director, Pitcher Partners
- BROWN, Mr Colin, Acting General Manager,
Tax Analysis Division, Treasury
- CHENG, Mr Julian Christopher, External Representative,
Institute of Chartered Accountants in Australia
- CICCHINI, Mr Raphael, Manager Trusts,
Business Tax Division, Treasury
- LEIBLER, Mr Mark, Senior Partner,
Arnold Bloch Leibler
- McMAHON, Mr Paul, Manager,
Capital Gains Tax Unit, Treasury
- NOROOZI, Mr Ali, Tax Counsel,
Institute of Chartered Accountants in Australia
- O'BRIEN, Mr Donald Geoffrey, Adviser,
Family Business Australia
- POWER, Mrs Genevieve, Director,
Family Business Australia

