# APPENDIX 1

# SUBMISSIONS TO THE INQUIRY

| Submission No. | |
|---|---|
| 1 | Mr K Horsley, Registered Tax Agent, QLD |
| 2 | Law Reform Commission of Victoria |
| 3 | Mr D MacNeil, Hampton Partners Boyup Brook, Certified Practising Accountants |
| 4 | Mr S Duffield, Child Support Action Group (Inc in South Australia) |
| 5 | Mr K James, TAS |
| 6 | Mr L Keller, VIC |
| 7 | Mr J W Ahern, NSW |
| 8 | Mr K Copeland, WA |
| 9 | Mr M Screen, ACT |
| 10 | Mr R Neale, University of Western Sydney |
| 11 | Inverell Senior Citizens Welfare Association |
| 12 | Mr J Kennedy, NSW |
| 13 | H A Yoxall, NSW |
| 14 | Mr R Raynor, WA |
| 15 | Mr R Thompson, WA |
| 16 | Mr M Leibler, Senior Partner, Arnold Bloch Leibler, Solicitors |
| 17 | Mr G G Manners, Isle of Man |
| 18 | Mr P De Corso, SA |

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|---|---|
| 19 | Latrobe Regional Commission |
| 20 | Mr G A Taylor, Chartered Accountant, NSW |
| 21 | Mrs A Cutler, TAS |
| 22 | R G Murray, Tax Agent and Accountant, NSW |
| 23 | Dr R Holzheimer, QLD |
| 24 | Mr F Feher, WA |
| 25 | Mrs B I Owen, NSW |
| 26 | Arthur Andersen |
| 27 | Dr J Teicher, Monash University |
| 28 | Deloitte Ross Tohmatsu |
| 29 | Australian Pharmaceutical Manufacturers Association Inc. |
| 30 | KPMG Peat Marwick |
| 31 | Sly and Weigall |
| 32 | Mr G Hawthorne, QLD |
| 33 | Mr A Glambedakis, NSW |
| 34 | National Institute of Accountants, Tasmanian Division |
| 35 | Ms B Smith, Deakin University |
| 36 | Corporate Tax Association of Australia Inc. |
| 37 | Metal Trades Industry Association |
| 38 | Commonwealth Bank |
| 39 | Australian Council of Social Service |
| 40 | DellaVedova Hollands Beard & Co, Chartered Accountants |
| 41 | Mr L Aarons, NSW |
| 42 | Department of Finance |

| | |
|---|---|
| 43 | Commissioner of Taxation |
| 44 | Public Sector Union |
| 45 | Australian Taxpayers' Association |
| 46 | Taxation Institute of Australia |
| 47 | Australian Bankers' Association |
| 48 | Federation of Ethnic Communities' Councils of Australia Inc. |
| 49 | Australian Society of Certified Practising Accountants |
| 50 | Mr M Leibler, Senior Partner, Arnold Bloch Leibler, Solicitors |
| 51 | Business Council of Australia |
| 52 | Federated Clerks Union of Australia (Taxation Officers Branch) |
| 53 | Confederation of Australian Industry |
| 54 | Mr D Williams, Partner, Mallesons Stephen Jaques |
| 55 | Mr D Clarke, NSW |
| 56 | The Institute of Chartered Accountants in Australia |
| 57 | Mr A V Barker, NSW |
| 58 | Dr J Mathews, University of New South Wales |
| 59 | Office of Parliamentary Counsel |
| 60 | Australian Society of Certified Practising Accountants |
| 61 | Mallesons Stephen Jaques |
| 62 | Mr K J Burges, Mallesons Stephen Jaques |
| 63 | Ms B Smith, Deakin University |
| 64 | Commissioner of Taxation |
| 65 | Commissioner of Taxation |
| 66 | Commissioner of Taxation |

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| 67 | Commissioner of Taxation |
| 68 | Mr A V Barker, NSW |
| 69 | Citizens Electoral Councils |
| 70 | Mr A J Parker, T L Parker and Co, Certified Practising Accountants |
| 71 | Mr D Booth, VIC |
| 72 | Arthur Andersen |
| 73 | Australian National Audit Office |
| 74 | Queensland Concrete and General Construction Co. Pty. Ltd. |
| 75 | Mr A V Barker, NSW |
| 76 | The Taxation Institute of Australia |
| 77 | Mr E Wajsbrem, Deakin University |
| 78 | Mallesons Stephen Jaques |
| 79 | Barker Gosling |
| 80 | Corporate Tax Association |
| 81 | Department of Finance |
| 82 | Mr D Booth, Team Manager Complex Audit, Australian Taxation Office |
| 83 | Dr R Holzheimer, QLD |
| 84 | Hogbin, Quinn & Bentley, Chartered Accountants |
| 85 | Department of Finance |
| 86 | Commissioner of Taxation |
| 87 | Taxation Institute of Australia |
| 88 | Mr L L'Estrange, L'Estrange & Kennedy, Barristers and Solicitors |
| 89 | Ms B Smith, Deakin University |
| 90 | Hon Michael Duffy, Attorney-General |

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|---|---|
| 91 | Mr M Leibler, Senior Partner, Arnold Bloch Leibler, Solicitors |
| 92 | Mr D Clarke, NSW |
| 93 | Department of Finance |
| 94 | Corporate Tax Association |
| 95 | Mr W Johns, VIC |
| 96 | Mr D Clarke, NSW |
| 97 | Commissioner of Taxation |
| 98 | Department of Finance |
| 99 | Commissioner of Taxation |
| 100 | Commissioner of Taxation |
| 101 | Commissioner of Taxation |
| 102 | Commissioner of Taxation |
| 103 | Commissioner of Taxation |
| 104 | Commissioner of Taxation |
| 105 | Commissioner of Taxation |
| 106 | Commissioner of Taxation |
| 107 | Commissioner of Taxation |
| 108 | Commissioner of Taxation |
| 109 | KPMG Peat Marwick |
| 110 | KPMG Peat Marwick |
| 111 | Commissioner of Taxation |
| 112 | Commissioner of Taxation |
| 113 | Commissioner of Taxation |
| 114 | Commissioner of Taxation |

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|---|---|
| 115 | P J Seccombe, A/g Registrar, Federal Court of Australia |
| 116 | M K Curtis, Executive Officer, Administrative Appeals Tribunal |
| 117 | Mr A S Cole, Secretary, The Treasury |
| 118 | Commissioner of Taxation |
| 119 | Mr D Clarke, NSW |
| 120 | Senator J Watson |
| 121 | Commissioner of Taxation |
| 122 | Commonwealth Ombudsman |
| 123 | Commissioner of Taxation |
| 124 | *Administrative Review Council* |
| 125 | Commissioner of Taxation |
| 126 | Commissioner of Taxation |
| 127 | Administrative Appeals Tribunal |
| 128 | Commissioner of Taxation |

# APPENDIX 2

# PUBLIC HEARINGS - WITNESSES TO THE INQUIRY

## FRIDAY, 29 MAY 1992 - CANBERRA

**Australian Taxation Office**

Mr T P W Boucher
Commissioner

Mr M Carmody
Second Commissioner

Mr M D'Ascenzo
Assistant Commissioner
Self Assessment

Mr K Fitzpatrick
Acting First Assistant Commissioner
Legislative Services

Mr A W W Godfrey
Second Commissioner

Mr R Highfield
First Assistant Commissioner
Revenue Collection Group

Mr E Killesteyn
Senior Assistant Commissioner
*Corporate Services Group*

Ms J R McKenry
First Assistant Commissioner
Taxpayer Assistance

Mr C Mobbs
Assistant Commissioner
Corporate Management Support

Mr B M Nolan
Second Commissioner

Ms M J Scollay
First Assistant Commissioner
Corporate Services Group

Mr G R Seymour
First Assistant Commissioner
*Information Technology Services*

**Department of Finance**

Mr A T Pearson
Assistant Secretary
Public Administration
and Accounting Development
Branch

## TUESDAY, 9 JUNE 1992 - ADELAIDE

**Citizen**

Mr R A Raynor

## THURSDAY, 9 JULY 1992 - MELBOURNE

**Australian Taxpayers Associations**

Mr E R Risstrom
National Director

**Arnold Bloch Leibler**

Mr M M Leibler
Senior Partner

**Business Council of Australia**

Dr T M Dwyer
Consultant

Mr A M Soutter
Assistant Director

## FRIDAY, 10 JULY 1992 - MELBOURNE

**Federated Clerks Union of Australia**

Mr B S Jackson
Honorary Treasurer
Taxation Officers Branch

Mr J Lapidos
Honorary Assistant Secretary
Taxation Officers Branch

Mr A J Nucifora
Secretary
Taxation Officers Branch

Mr J F Pickering
Honorary President
Taxation Officers Branch

**Law Reform Commission of Victoria**

Mr C J Balmford
Executive Assistant

Mr D St L Kelly
Chairman

**Arthur Andersen**

Mr G K Treloggan
Principal (Tax Consulting)

**Public Sector Union**

Mr S P O'Connell
Secretary
Tax Division

Mr D P Rennardson
Senior Deputy President
Tax Division

## FRIDAY, 24 JULY 1992 - SYDNEY

**Sly and Weigall**

Mr T J McCarthy
Consultant

**KPMG Peat Marwick**

Mr P R Thomas
Tax Partner

**Citizen**

Dr J Mathews

**Mallesons Stephen Jaques**

Mr K J Burges
Partner

Dr R D Eagleson
Consultant on Plain English

Mr E Kerr
Partner

Mr D J P Williams
Partner

**Commonwealth Bank of Australia**

Mr P M Leslie
Group Taxation Controller

## THURSDAY, 13 AUGUST 1992 - CANBERRA

**Australian Society of Certified Practising Accountants**

Mr F P Burke
Research Consultant
Taxation

Mr K W James
Chairman
Tax Committee

Mr A J Parker
Member
ACT Division of the
Public Practice Committee

**Corporate Tax Association**

Mr J G Brodie
Executive Committee Member

Mr R J Bryant
Executive Director

Mr J A Smith
President

**Australian Bankers Association**

Mr M G Crowe
Chairman
Taxation Committee

Mr A C Cullen
Executive Director

**Department of Finance**

Mr P J Barrett
Deputy Secretary

Mr I McPhee
First Assistant Secretary
Financial Management Division

Mr A Pearson
Assistant Secretary
Public Administration and
Accounting Development Branch
Financial Management Division

Mr E Wojcik
Director
Financial and Administration Estimates Section

## FRIDAY, 14 AUGUST 1992 - CANBERRA

**Institute of Chartered Accountants in Australia**

Mr M J Croker
Member
Tax Committee

Ms H M Warner
Taxation Consultant

**Citizen**

Ms B Smith

**Australian Taxation Office (VIC)**

Mr J D Thorburn
Case Manager
Complex Audit

**Taxation Institute of Australia**

Mr I Langford-Brown
National President

Mr K G Petersson
Technical Director

## TUESDAY, 25 AUGUST 1992 - CANBERRA

**Australian Taxation Office (VIC)**

Mr D F Booth
Team Manager
Complex Audit

**Australian National Audit Office**

Mr J A Bowden
Executive Director

Mr P K Green
Senior Director
Audit Operations

Mr D S Lennie
Executive Director

Mr A N Mellick
Senior Director
Audit Operations

Mr G M Williams
Group Director
Industry, Commerce and Finance Group

**Australian Taxation Office (NSW)**

Mr R L Fitton
Prosecution Manager

Mr B M Flynn
Assistant Deputy Commissioner

Mr E B Morris
Taxation Auditor

Mr C B Seage
Key Client Manager

Mr P M Smith
NSW Project Coordinator
for Source Deduction Audit

## WEDNESDAY, 26 AUGUST 1992 - CANBERRA

**Australian Taxation Office**

Mr T P W Boucher
Commissioner

Mr M Carmody
Second Commissioner

Mr C J Coleman
Director
Child Support Agency

Mr M D'Ascenzo
Assistant Commissioner
Self Assessment

Mr K Fitzpatrick
Acting First Assistant Commissioner

Mr R Highfield
First Assistant Commissioner

Mr E Killesteyn
Senior Assistant Commissioner
Corporate Services

Mr D V Lewis
First Assistant Commissioner
Child Support

Ms J R McKenry
First Assistant Commissioner
Taxpayer Assistance

Mr R G Mills
Chief Tax Counsel

Mr C Mobbs
Assistant Commissioner
Corporate Management Support

Mr J L Nicholls
Deputy Commissioner

Mr B M Nolan
Second Commissioner

Ms M J Scollay
First Assistant Commissioner
Corporate Services Group

Mr G R Seymour
First Assistant Commissioner
Information Technology Service

Mr P E Simpson
First Assistant Commissioner
Legislative Services Group

Mr R J Tomkins
First Assistant Commissioner
Appeals and Review

## MONDAY, 28 SEPTEMBER 1992 - BRISBANE

**Queensland Concrete and General Construction Co Pty Ltd**

Mr G F Fearn
Director/Secretary

Mr N Heiniger
Manager/Director

Mr G D R Hogarth
Tax Agent

Mr P S Thompson
Hoger Thompson and Partners

**Australian Taxation Office (VIC)**

Mr C J R Adams
Assistant Deputy Commissioner

Mr J Brazzale
Audit Group Head

Mr B J Egan
Case Manager
Complex Audit

Mr A Gamble
Audit Intelligence Officer

**Australian Taxation Office (NSW)**

Ms J P Farrell
Tax Counsel (Legal)

Mr K G Johnson
Technical Adviser

Mr A C Morrow
Case Manager
Complex Audit

**Australian Taxation Office (QLD)**

Mr L J Hill
Audit Chief Brisbane

Ms W T Hudson
Primary Audit Manager
CBD Brisbane

Mr D A Neilson
Special Audit Manager

Mr R W Sonnenburg
Group Head
(Taxpayer Assistance Group)

**Australian Taxation Office (WA)**

Mr C K Sharma
Director
Intelligence Unit

**Australian Taxation Office**

Mr T P W Boucher
Commissioner

Mr M Carmody
Second Commissioner

Mr M D'Ascenzo
Assistant Commissioner
Self Assessment

Mr A W Godfrey
Second Commissioner

Mr R Highfield
First Assistant Commissioner

Mr C Mobbs
Assistant Commissioner
Corporate Management Support

Mr B M Nolan
Second Commissioner

Ms M J Scollay
First Assistant Commissioner
Corporate Services Group

Mr P E Simpson
First Assistant Commissioner
Legislative Services Group

Mr R J Tomkins
First Assistant Commissioner
Appeals and Review

**Australian Taxation Office**

Mr T P W Boucher
Commissioner

Mr M Carmody
Second Commissioner

Mr M D'Ascenzo
First Assistant Commissioner
Self Assessment

Mr A W Godfrey
Second Commissioner

Mr R Highfield
First Assistant Commissioner

Mr C Mobbs
Assistant Commissioner
Corporate Management Support

Mr B M Nolan
Second Commissioner

Ms M J Scollay
First Assistant Commissioner
Corporate Services Group

Mr P E Simpson
First Assistant Commissioner
Legislative Services Group

Mr R J Tomkins
First Assistant Commissioner
Appeals and Review

## FRIDAY, 30 OCTOBER 1992 - CANBERRA

**Australian Taxation Office**

Mr T P W Boucher
Commissioner

Mr M Carmody
Second Commissioner

Mr M D'Ascenzo
First Assistant Commissioner
Self Assessment

Mr R Highfield
First Assistant Commissioner

Mr C Mobbs
Assistant Commissioner
Corporate Management Support

Ms M J Scollay
First Assistant Commissioner
Corporate Services Group

Mr P E Simpson
First Assistant Commissioner
Legislative Services Group

Mr R J Tomkins
First Assistant Commissioner
Appeals and Review

## WEDNESDAY, 16 JUNE 1993 - CANBERRA

**Australian Taxation Office**

Mr M Carmody
Commissioner

Mr K J Fitzpatrick
Assistant Commissioner

Mr R F Highfield
Second Commissioner

Mr E Killesteyn
Chief Finance Officer

Mr V T Mitchell
First Assistant Commissioner
Taxpayer Audit

Mr C G Mobbs
Assistant Commissioner
Corporate Management Support

Mr B M Nolan
Second Commissioner

Ms M J Scollay
First Assistant Commissioner
Corporate Services Group

## THURSDAY, 17 JUNE 1993 - CANBERRA

**Australian Taxation Office**

Mr M Carmody
Commissioner

Mr K J Fitzpatrick
Assistant Commissioner

Mr R F Highfield
Second Commissioner

Mr E Killesteyn
Chief Finance Officer

Mr V T Mitchell
First Assistant Commissioner
Taxpayer Audit

Mr C G Mobbs
Assistant Commissioner
Corporate Management Support

Mr B M Nolan
Second Commissioner

Ms M J Scollay
First Assistant Commissioner
Corporate Services Group

# APPENDIX 3

## EXHIBITS RECEIVED

| | | |
|---|---|---|
| 1 | Australian Taxation Office | 'Risks to Revenue' - table |
| 2 | Australian Taxation Office | 'Large Business Segment' - tables |
| 3 | Mr Raynor | Confidential |
| 4 | Mr Risstrom | Letter to Mr E Risstrom from Privacy Commissioner, dated 17 June 1992 |
| 5 | Corporate Tax Association | Opening Statement from Corporate Tax Association |
| 6 | Mrs B Smith | *Pharmaceutical Industry Audit European Trip 1988*, Australian Taxation Office, Sydney |
| 7 | Mrs B Smith | Trust related documents |
| 8 | Mrs B Smith | 'Distributions to overseas charities by families previously involved in tax avoidance schemes' |
| 9 | Mrs B Smith | FOI request to ATO, Melbourne, dated 21 May 1992 |
| 10 | Mrs B Smith | Letter dated 27 November 1990 from Mr B Nolan, Second Commissioner, Australian Taxation Office to Mr S Martin, Chairman of the House of Representatives Standing Committee on Finance and Public Administration; and Letter dated 4 August 1992 from Mr T Murphy, Secretary, Council of Academic Staff Associations to Mrs B Smith |

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|---|---|---|
| 11 | Mrs B Smith | FOI documents dated 6 October 1988 and 16 March 1990 regarding Avoidance of Tax - Trust Distributions to non Resident Beneficiaries |
| 12 | Mr Booth | Letter dated 30 May 1988 to Mr C Wilmot, Citibank, from Mr R Conwell, ATO - annexure to an affidavit of D F Booth, 8 July 1988. |
| 13 | Mr Booth | Legal Professional Privilege press article clippings |
| 14 | Mr Booth | Australian Taxation Office, *Complex Audits - Guidelines for the Conduct of Taxpayers and Taxation Auditors,* Second Edition; and<br><br>Australian Taxation Office, *Access to Professional Accounting Advisors' Papers-Guidelines for the Exercise of Access Powers,* 1991 Edition (Operative from 27 November 1991); and<br><br>Australian Taxation Office, *Access to Lawyers' Premises-Guidelines* |
| 15 | Mr Booth | Complex Audit Managers Meeting 21 November 1989 - motion of ATO officers |
| 16 | Mr Booth | Opening Statement dated 25 August 1992 and newspaper articles |
| 17 | Australian Taxation Office | 'Technical Employment in Australian Taxation Office' |
| 18 | Australian Taxation Office | Observations by Commissioner of Taxation, Mr Trevor Boucher, to Public Accounts Committee, 26 August 1992 |
| 19 | Australian Taxation Office | Taxation Affairs of Members of Parliament |

| | | |
|---|---|---|
| 20 | Mr Thompson | Confidential |
| 21 | Mr Thompson | Confidential |
| 22 | Mr Fearn | Confidential |
| 23 | Mr Thompson | Confidential |
| 24 | Australian Taxation Office | Australian Taxation Office Brisbane, *Keeping records for small business * some guidelines * what you should know and do* * and a similarly entitled leaflet |
| 25 | Australian Taxation Office | Overhead transparencies |
| 26 | Mr Johnson | Bibliography:'Advance pricing agreement between Apple Computer, the ATO and the IRS' |
| 27 | Mr Johnson | Media release:'Historic transfer pricing agreement reached between Apple Computer, the Australian Taxation Office and the US Internal Revenue Service' |
| 28 | Australian Taxation Office | Treasurer's Press Release, dated 22 October 1992 - 'Commissioner of Taxation' |
| 29 | Australian Taxation Office | Circular:'To each ATO Staff Member', dated 22 October 1992, from Commissioner of Taxation |
| 30 | Australian Taxation Office | 'ATO Separations from the APS' - table |
| 31 | Australian Taxation Office | 'Movements to DSS and DEET' - table |
| 32 | Australian Taxation Office | 'Wastage Rates by Branch Office' - table |
| 33 | Australian Taxation Office | 'Wastage Rates by Branch Office 1992/93' - table |

| | | |
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| 34 | Australian Taxation Office | *The Tax Office Modernisation agreement - Analysis of Costs and Benefits* |
| 35 | Australian Taxation Office | Union Research Centre on Office Technology, Annual Report 1991-92 |
| 36 | Australian Taxation Office | Agreement between the Commissioner of Taxation and the Australian Public Sector and Broadcasting Union |
| 37 | Australian Taxation Office | Donovan Research, *'Executive Summary Report Volume 1: Tax Agents' Satisfaction with Service 1992'*, including two additional volumes of Data Tables, August 1992 |
| 38 | Australian Taxation Office | 'Income Tax and Desk Audit' - pamphlet |
| 39 | Australian Taxation Office | Extracts from submissions and correspondence |
| 40 | Australian Taxation Office | 'Assessment of Service to Taxpayers', Sheila Bird, Marketing and Research Strategies, dated 29 October 1992 |
| 41 | Confidential | Confidential |
| 42 | Australian Taxation Office | 'Separations from the Australian Taxation Office: 1 July 1992 - 11 June 1993 - table |

# APPENDIX 4

## BRIEFINGS/INSPECTIONS

The Committee was briefed by officers and inspected three of the ATO premises as follows:

| DATE | PLACE |
|---|---|
| 13 May 1992 | Regional Taxation Office<br>Parramatta |
| 14 May 1992 | National Taxation Office<br>Canberra |
| 9 June 1992 | Australian Taxation Office<br>Adelaide Branch |

# APPENDIX 5

## COMMISSIONERS OF TAXATION 1910 TO 1993

| | |
|---|---|
| 1910 - 1916 | Mr G A McKay |
| 1916 - 1939 | Mr R Ewing CMG |
| 1939 - 1946 | Mr L S Jackson |
| 1946 - 1961 | Sir P S McGovern CBE |
| 1961 - 1963 | Mr J D O'Sullivan CBE |
| 1963 - 1964 | Mr D L Canavan CBE |
| 1964 - 1976 | Sir E T Cain CBE |
| 1976 - 1984 | Mr W J O'Reilly CB, OBE |
| 1984 - 1993 | Mr T P W Boucher, AO |
| 1993 - | Mr M Carmody |

# APPENDIX 6

# BRANCH OFFICES OF THE AUSTRALIAN TAXATION OFFICE

| BRANCH OFFICE | OPENING DATE |
|---|---|
| **New South Wales** | |
| Albury | July 1986 |
| Bankstown | July 1992 |
| Chatswood | July 1987 |
| Hurstville | January 1994* |
| Newcastle | July 1985 |
| Parramatta | July 1975 |
| Penrith | June 1990 |
| Sydney | 1910 |
| Sydney South | July 1989 |
| Wollongong | January 1994* |
| **Victoria** | |
| Box Hill | July 1992 |
| Dandenong | July 1987 |
| Geelong | July 1993 |
| Melbourne | 1910 |
| Moorabbin/Cheltenham | July 1992 |
| Victoria North/Moonee Ponds | July 1986 |
| **Queensland** | |
| Chermside | July 1992 |
| Brisbane | 1910 |
| Townsville | July 1985 |
| Upper Mount Gravatt | July 1992 |

**South Australia**

| | |
|---|---|
| Pulteney | August 1993 |
| Waymouth | August 1993 |

**Western Australia**

| | |
|---|---|
| Cannington | July 1992 |
| Northbridge | July 1992 |

**Tasmania**

| | |
|---|---|
| Hobart | 1910 |

**Australian Capital Territory**

| | |
|---|---|
| Canberra | July 1976 |

* Due to open

# APPENDIX 7

# CHARTER OF THE NATIONAL TAX LIAISON GROUP

The Australian Taxation Office and professional tax advisers play interconnecting roles in the administration of the Australia Taxation System, with the common goal that the system be fair and Efficient.

The Tax Liaison Group exists to raise for discussion and resolution, broad issues of procedure and policy in tax administration, and through subcommittees, to examine particular issues in more detail.

The task of the Group is to identify significant issues in tax administration, discuss them, and together, identify and implement solutions.

# APPENDIX 8

# CHARTER OF THE COMMISSIONER'S ADVISORY PANEL

1. The Commissioner's Advisory Panel exists to provide advice to the Commissioner of Taxation on broad issues of tax administration which are of concern to the community or sectors of it.

2. There is a shared view that maintenance of a fair and efficient tax administration for the benefit of all Australians is a matter of highest priority.

3. Members of the Panel agree to bring forward for discussion, significant matters of tax administration which are of concern to the interests they represent.

4. Where administrative problems are identified, the Panel will be constructive and creative in helping to arrive at workable solutions and will advise the Commissioner on the likely impact of implementing suggested changes to administration of the tax system.

5. Membership of the Panel will be chosen by the Commissioner from among bodies representing business and wider community interests. Membership will be reviewed annually.

6. The members of the Panel agree to act on behalf of the sector they represent, not just the members of the organisations that nominated them, and to keep in mind the need for tax equity in matters of administration in all sectors of the Australian Community.

7. The Panel will meet twice a year, but may carry out studies, liaison or other work in the times between meetings.

Australian Taxation Office



# Taxation Ruling
## Income tax: deductions for home office expenses

**other Rulings on this topic**
IT 126; IT 2115; IT 2397



*This Ruling, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the* ***Taxation Administration Act 1953****, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Ruling is a public ruling and how it is binding on the Commissioner.*

## What this Ruling is about

1. This Ruling is about the deductions allowable for "home office" expenses. In particular, it explains:

- when an area of the home is considered to be a private study;
- when an area of the home is considered to be a place of business;
- what deductions are allowable in each case and how they should be calculated; and
- the deductibility of rates and taxes under section 72 of the *Income Tax Assessment Act* 1936 and repairs under section 53.

It also deals with the capital gains tax implications on the disposal of a private residence for which home office expenses have been allowed.

This Ruling consolidates previous Rulings on home office expenses.

## Ruling

2. As a general rule, expenses associated with a taxpayer's home are of a private or domestic nature and do not qualify as deductions for taxation purposes. An exception to this general rule is where part of the home is used for income producing activities and has the character of a "place of business". In such cases some of the expenses incurred in respect of the home such as rent, interest, repairs, house and contents insurance, rates and property taxes may be partly deductible.

3. Another exception to this general rule is where part of the home is used in connection with the taxpayer's income earning activities but does not constitute a place of business. In this case, a more limited range of deductions may be available.

4. Whether an area of the home has the character of a place of business is a question of fact which depends on the particular circumstances of each case. This is likely to be the case where a part of a residence is set aside exclusively for the carrying on of a business by a self employed person (e.g., a doctor's surgery). Another example is where part of the home is used as a taxpayer's sole base of operations for income producing activities (e.g., where no other work location is provided to an employee by an employer).

5. The following factors, none of which is necessarily conclusive on its own, may indicate whether or not an area set aside has the character of a "place of business" :

- the area is clearly identifiable as a place of business;
- the area is not readily suitable or adaptable for use for private or domestic purposes in association with the home generally;
- the area is used exclusively or almost exclusively for carrying on a business; or
- the area is used regularly for visits of clients or customers.

6. The deductible expenses in respect of a home office can be divided into two broad categories:

- Expenses relating to ownership or use of a home which are not affected by the taxpayer's income earning activities (i.e., occupancy expenses). These include rent, mortgage interest, municipal and water rates and house insurance premiums.
- Expenses relating to the use of facilities within the home (i.e., running expenses). These include electricity charges for heating/cooling, lighting, cleaning costs, depreciation, leasing charges and the cost of repairs on items of furniture and furnishings in the office.

7. If an area of the home has the character of a place of business as outlined in paragraph 5, some part of the expenses from both categories may be claimed as a deduction. In most cases the apportionment of expenses should be made on a floor area and, in addition, where the area of the home is a place of business for part of the year, a time basis. However, where an area of the home is simply used in connection with income producing activities, but does not have the character of a place of business, only expenses in the latter category (the running expenses) are allowable. The amounts allowable as deductions are the additional expenses incurred as a result of income producing activities.

## Date of effect

8. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

## Explanations

9. Expenses which relate to the use or ownership of a home (or to facilities in it) normally have a private or domestic character and are not allowable deductions under subsection 51(1); [*Thomas v FC of T* (1972) 3 ATR 165; 72 ATC 4094 and *FC of T v Faichney*(1972) 129 CLR 38; (1972) 3 ATR 435; 72 ATC 4245 (*Faichney's Case*)]. However, in certain circumstances, part of these expenses may be allowed as a deduction. The allowable deductions will depend on whether an area of the home has the character of a place of business or is merely a private study.

10. In deciding cases concerning home office expenses, courts and tribunals have consistently drawn a distinction between cases:

- where part of a home can be characterised as a place of business; and
- where a room is used as a study or home office merely as a matter of convenience.

The reason this distinction is important is that if an area of the home has the character of a place of business then expenses associated with that part of the home can be said to take on a business or businesslike character and are allowable deductions [*Swinford v FC of T* (1984) 15 ATR 1154; 84 ATC 4803 (*Swinford's Case*)]. In effect, the area used loses its domestic character.

## When is an area of a home a place of business rather than a private study?

**Place of business:**

11. Paragraph 5 lists some of the factors which may indicate that a part of a home has the character of a place of business. The existence of any of these factors or a combination of them will not necessarily be conclusive in ascertaining the character of an area used as a home office. Rather the decision in each case will depend on whether, on a balanced consideration of:

- the essential character of the area;
- the nature of the taxpayer's business; and
- any other relevant factors,

the area constitutes a "place of business" in the ordinary and common sense meaning of that term.

12. The absence of an alternative place for conducting income producing activities has also influenced a court or tribunal to accept a part of a taxpayer's residence as a place of business. Examples include:

- a self employed script writer using one room of a flat for writing purposes and for meetings with television station staff (*Swinford's Case)*;
- an employee architect conducting a small private practice from home (*Case F53*, 74 ATC 294; *Case 65*, 19 CTBR(NS) 452);
- a country sales manager for an oil company whose employer did not provide him with a place to work (*Case T48*, 86 ATC 389; *Case 47*, 29 CTBR(NS) 355).

In each of these cases the taxpayer was able to show that, as a matter of fact, there was no alternative place of business, it was necessary to work from home, and that the room in question was used exclusively or almost exclusively for income producing purposes.

13. In circumstances such as those referred to in paragraph 12, a place of business will exist only if:

- it is a requirement inherent in the nature of the taxpayer's activities that the taxpayer needs a place of business;
- the taxpayer's circumstances are such that there is no alternative place of business and it was necessary to work from home; and
- the area of the home is used exclusively or almost exclusively for income producing purposes.

**Private Study:**

14. The circumstances where part of a home is considered to have the character of a place of business can be contrasted with the more common case where a taxpayer maintains an office or study at home as a matter of convenience (i.e., so that he or she can carry out work at home which would otherwise be done at his or her regular place of business or employment). Examples of this include:

- a barrister who reads client briefs at home;
- a teacher who prepares lessons or marks assignments at home and
- an insurance agent who maintains client files and occasionally interviews a client in his or her home office.

In these circumstances the area of the home and the expenses incurred (subject to the exceptions listed below) retain their private or domestic character (*Handley v FC of T* (1981) 11 ATR 644 ; 81 ATC 4165 (*Handley's Case*) and *Forsyth v FC of T* (1981) 11 ATR 657; 81 ATC 4157).

## Which expenses can be claimed?

15. The expenses that may be associated with a home office or study can be divided into two broad categories. These are:

- Occupancy expenses relating to ownership or use of a home. These include rent, mortgage interest, municipal and water rates and house insurance premiums.
- Running expenses relating to the use of facilities within the home. These include electricity charges for heating/cooling, lighting, cleaning costs, depreciation, leasing charges and the cost of repairs on items of furniture and furnishings in the office.

**Occupancy Expenses:**

16. If part of a taxpayer's home qualifies as a place of business, the taxpayer may be able to claim a portion of the occupancy expenses incurred under subsection 51(1).

17. The actual amount which can be claimed is dependent on the taxpayer's individual circumstances. In most cases, the apportionment of the total expense incurred on a floor area basis is the most appropriate method.

18. However, where an area of the home is a place of business for part of the year only, it may be necessary for expenses to be apportioned on a floor area and a time basis. The time apportionment under this method should reflect the period of the year in which the room is used for income producing purposes.

***Running Expenses:***

19. Running expenses may take on a different character where taxpayers, who have a home office, establish that they have incurred additional expenditure on the running expenses as a result of their income producing activities (refer *Faichney's Case)*. In appropriate circumstances, taxpayers are entitled to a deduction for the expenditure actually incurred through their income producing activities which is additional to their private expenditure.

20. While it is not practicable to provide a list of the running expenses which may be allowable as income tax deductions, the following paragraphs illustrate the type of expenses which may be claimed.

*Heating/Cooling and Lighting Expenses:*

21. A deduction may be allowable where additional heating/cooling and lighting expenses are incurred as a result of income producing activities. However, the extra expenditure must relate to facilities provided exclusively for the taxpayer's benefit while he or she works. For example, if a taxpayer merely sits in the lounge room with his or her family and at the same time does some work related activity, the expenditure for lighting and heating/cooling retains its private or domestic character (refer *Faichney's Case*). This would be the case where, for example, a teacher marks school work in a room where other family members are watching television or listening to music.

22. However, if the taxpayer uses the room at a time when others are not present or uses a separate room, he or she is entitled to a deduction. This is the case even if the room used is not set aside solely as a home office. In this respect the treatment of lighting and heating expenses is different to most other home office expenses. This is because heating/cooling and lighting expenses relate to the use by the occupant rather than to the premises occupied.

23. The amount that the taxpayer is entitled to claim is the difference between what was actually paid for heating/cooling and lighting and what would have been paid had he or she not worked from home.

24. Once it has been established that a taxpayer does, in fact, incur additional expense by reason of working at home, an appropriate formula for calculating the additional expense for an appliance is:

| *Formula* |
| --- |
| **(a) x (b) x (c)** |

where -

(a) is the cost per unit of power used;

(b) is the average units used per hour; and

(c) is the total annual hours used for income producing purposes.

25. Generally speaking however, the quantum of any allowable deduction for the additional expense will be small. Accordingly, a *bona fide* estimate based on a reasonable percentage of the household annual fuel bill will be acceptable.

***Depreciation:***

26. Taxpayers are entitled to claim depreciation on items which are used wholly or partly for carrying out income producing activities. This includes a professional library and items of equipment used at home.

27. Where items used for business purposes are also used for domestic or private purposes the taxpayer will need to apportion the depreciation allowance. To do this a *bona fide* estimate of the percentage of business use of the item should be made. This is the proportion of the annual depreciation which the taxpayer is entitled to claim.

## Other Considerations:

### Rates and Taxes:

28. Many taxpayers simply maintain a private study in their homes to enable them, as a matter of convenience, to do work at home rather than at their regular place of work. It has been suggested that such taxpayers may be entitled to claim a proportionate amount of council and water rates. This argument relies on a deduction being allowable under section 72.

29. Section 72 provides that no deduction is allowable unless the property is used for the purpose of gaining or producing income or carrying on a business for the same purpose.

30. Taxation Ruling IT 2673 deals with the capital gains tax implications of using a sole or principal residence for income producing purposes. As indicated in that Ruling, conducting income producing activities from a residence is not necessarily the same as using the residence for the purpose of producing assessable income. The view taken in IT 2673 was that for a dwelling (or part of it) to be regarded as being "used for the purpose of gaining or producing income" it must constitute a place of business in the way described in paragraphs 11 to 13 above. Using similar reasoning to that in IT 2673, no deductions are allowable under section 72 for rates and taxes in respect of a residence where the only income producing activities are associated with a private study.

31. Where the area is used as a place of business a deduction for rates and taxes will be allowable under subsection 51(1) or section 72.

### Repairs to a Home Office:

32. Section 53 allows a deduction for non-capital expenditure on repairs to premises, or part of premises, held, occupied or used by the taxpayer for the purpose of producing assessable income, or in carrying on a business for that purpose.

33. The principles explained above in relation to rates and taxes should be applied in determining whether the taxpayer is entitled to claim the cost of repairs to that part of the residence used as a home office or study.

34. In general if part of the home qualifies as a place of business, then the cost of repairs referable to that part of the home is deductible under section 53.

35. Where the premises, or part of the premises are used partly for income-producing purposes and partly for other purposes, the cost of repairs is deductible only to the extent to which the premises are used for income-producing purposes [refer subsection 53(3)]. For example, the cost of repairing a broken window in a doctor's surgery is wholly deductible, while the cost of repairing a broken window in a home office which is also used for private purposes would have to be apportioned accordingly.

**Capital Gains Implications:**

36. *Generally, capital gains tax does not apply to a person's sole or* principal residence. However, subsection 160ZZQ(21) applies to deem a capital gain (or loss) to have accrued to the extent to which the sole or principal residence disposed of was also used for the purpose of gaining or producing assessable income during the period of ownership. IT 2673 states that as a rule of thumb, it can be expected that where an area of a home is a place of business the capital gains provisions will apply . The calculation of any capital gain or loss is discussed in paragraphs 21 and 22 of IT 2673.

## Previous Rulings

37. The relevant principles from Taxation Rulings IT 140, 191, 192, 193, 194, 2061, 2135 and 2338 have been incorporated into this Ruling. Accordingly, those Taxation Rulings are now withdrawn.

**Commissioner of Taxation**

30 September 1993

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*case references*

- Thomas v FC of T (1972) 3 ATR 165; 72 ATC 4094.
- FC of T v Faichney (1972) 129 CLR 38; (1972) 3 ATR 435; 72 ATC 4245.
- FC of T v Forsyth (1981) 11 ATR 657; 81 ATC 4157.
- Handley v FC of T (1981) 11 ATR 644; 81 ATC 4165.
- Swinford v FC of T (1984) 15 ATR 1154; 84 ATC 4803.
- Case 65, 19 CTBR(NS) 452; Case F53, 74 ATC 294.
- Case 47, 29 CTBR(NS) 355; Case T48, 86 ATC 389.

Australian Taxation Office

Cnr Moore Street and Barry Drive, Canberra
(GPO Box 2669, Canberra ACT 2601)

Telephone : (06) 216-3000
Facsimile : (06) 216 2564

Our Reference :
Contact Officer :
Your Reference :
Contact Phone :

[redacted]

Dear [redacted]

**PRIVATE RULING**
[redacted]
**Primary Production Status**

We refer to your letter dated [redacted] concerning your request for a Private Ruling.

Enclosed is a Notice of Private Ruling together with a pamphlet setting out your rights in respect of that Ruling.

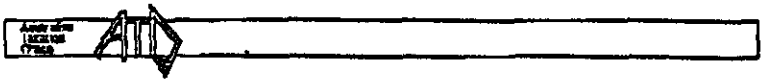
The attached Notice of Private Ruling applies to each taxpayer who is identified in the Notice and each taxpayer has review rights in respect of the Notice. It is your responsibility as applicant to notify each taxpayer identified in the Notice.

Should you wish to discuss this matter further, please contact the officer named above.

Yours faithfully

[redacted]

DEPUTY COMMISSIONER OF TAXATION



NOTICE OF PRIVATE RULING

*This Ruling is a "Private Ruling" for the purposes of Part IVAA of the Taxation Administration Act 1953.*

**THIS RULING APPLIES TO:**

Name: [redacted]

Tax File Number [redacted]

**YEAR OF INCOME TO WHICH THIS RULING APPLIES:**

Year of income ending 30 June 1993

**TAX LAW:**

Subsection 6(1) of the Income Tax Assessment Act
Subsection 25(1) of the Income Tax Assessment Act
Subsection 51(1) of the Income Tax Assessment Act

Ferguson v FCT (1979) 9 ATR 873; 79 ATC 4261,
Thomas v FCT (1972) 3 ATR 165; 72 ATC 4094,

**WHAT THIS RULING IS ABOUT:**

The applicant has requested the Commissioner provide a Private Binding Ruling on whether the activites constitute the carrying on of a business of primary production.

**THE SUBJECT OF THE RULING:**

In accordance with the arrangements as set out in your application dated [redacted]

**COMMENCEMENT OF ARRANGEMENT:**

1 July 1992

**RULING:**

Your activities are considered to be carrying on a business of primary production for the purposes of the Income Tax Assessment Act.

[redacted]
DEPUTY COMMISSIONER
[redacted]

**********

**EXPLANATION: (This does not form part of the Notice of Private Ruling):**

Subsection 6(1) of the Income Tax Assessment Act defines primary production as meaning production directly from -

a. the cultivation of land;
b. the maintenance of animals or poultry for the purpose of selling them or their bodily produce, including natural increase;
c. fishing operations;
d. forest operations; or
e. horticulture,

and includes the manufacture or diary produce by the person who produced the raw material used in that manufacture.

There is little doubt that your activities would constitute primary production in accordance with the definition in subsection 6(1) of the Act.

The major question that needs to be addressed is - 'Do the activities constitute the carrying on of a business?'.

What constitutes the carrying on of a business is often difficult to determine, particularly where the activities. Many cases have been before the court, the boards of review and the AAT on this issue. What emerges from these decisions is that a number of factors may be taken into account. These are:

1. the activities of the taxpayer must be conducted in such a way as to indicate clearly a commercial purpose or character to the activity;
2. the intention of the taxpayer to carry on a business;
3. whether the activities result in a profit or where no profit results, whether the taxpayer has a genuine belief that such activities will eventually be profitable;
4. the way the taxpayer conducts his or her activities;
5. the size and scale of the activities.

The information that has been provided satisfies all of these factors and therefore your activities are deemed to constitute the carrying on of a business of primary production for the purposes of the Income Tax Assessment Act.


## ABOUT THE PRIVATE RULING YOU'VE JUST RECEIVED....

The ruling you've just received has been issued by the Commissioner of Taxation under the laws in the Taxation Administration Act.

The laws in that Act say how and when this ruling will be legally binding on the Commissioner. This note is to give you some brief details about what that law says and about the rights the Taxation Administration Act gives you to have the ruling reviewed if you disagree with the ruling.

### How is the Ruling 'Binding'?

'Binding' basically means that if you have a ruling which says that the tax law applies to you one way and, in fact, that law should apply to you another way, you can't be charged any more than the tax that would have been payable under the ruling.

### When is the Ruling not Binding?

The ruling you've received states the Commissioner's view on the way the tax law applies to the particular arrangement you described in your application.

The ruling will not be binding on the Commissioner if the law is changed or if the arrangement you actually carried out was different to what you described in your application. Your ruling is also only binding on the Commissioner in respect of the people named in the ruling.

### What if the Commissioner Wants to Change the Ruling?

Even though the ruling you've received is binding on the Commissioner, the law allows the Commissioner to change that ruling in three situations:

(1) Where you give your consent to the ruling being changed;

(2) If your ruling is about an arrangement which you have not yet begun to carry out, the Commissioner may change the ruling at any time prior to you beginning to carry out the arrangement. This also means that if you have a ruling which covers a transaction you repeatedly carry out over time (eg buying and selling a particular item), the ruling may be changed for any of the transactions which occur after the date of the ruling change.

The Commissioner may change your ruling by issuing a public ruling which contradicts your private ruling. Lists of public rulings issued each year will appear in Taxpack from 1 July 1993 and it is recommended that you consult that list each of the years over which your private ruling operates. Your local Taxation Office also keeps this list and can supply copies of Public Rulings; and

(3) The Commissioner may change the ruling in one limited situation even after the transactions dealt with in the ruling have begun to be carried out. That situation is where the Commissioner believes that the private ruling is incorrect, is causing other taxpayers to be disadvantaged and that their disadvantage is greater than the disadvantage you would suffer if the ruling is changed.

In these circumstances the Commissioner may change the ruling on your arrangement only with respect to any income year which had not commenced or been completed at the time of the ruling change.

## If I Disagree with the Ruling, Do I Have To Follow It?

If you receive a ruling before you lodge your return for the year in which the arrangement takes place and you do not follow the ruling, you may be liable for the extra tax you would have paid under the ruling as well as a 25% penalty. If you have received your ruling after your return has been lodged, the Commissioner will amend your assessment to take the ruling into account.

## If I Disagree with the Ruling, How Can I Have it Reviewed?

The way you have a ruling reviewed is determined by whether or not an assessment has issued which deals with the arrangement covered by the ruling. If the assessment has issued, you should have the assessment reviewed. If no assessment has issued, you can have the ruling reviewed. Both of these avenues of review are briefly described below.

### Review of the Assessment

To have your assessment reviewed you need to lodge an objection. An objection is a letter in which you tell the Commissioner what assessment you want reviewed (giving the year and Tax File Number), which matter dealt with in the assessment you disagree with and why you believe the assessment should be amended.

An objection to an assessment must be lodged within 4 years of the date on which the assessment was served on you. There are no charges for lodging objections.

### Review of the Ruling

To have the ruling you have received reviewed by an officer of the Commissioner independent of the officer who dealt with your ruling application, you also need to lodge an objection. The objection is a letter in which you tell the Commissioner which ruling you want reviewed (giving the ruling number, office from which the ruling was sent and Tax File Number), what part of the ruling you disagreed with and why you believe the ruling should be changed.

An objection to a ruling must be lodged within 60 days of the date of service of the ruling or within 4 years of the last day allowed for lodging the tax return for the income year that the ruling is about - whichever is the later. There are no charges for lodging objections.

### Appeals Against Objection Decisions

If you remain dissatisfied with the decision made on your objection you may appeal against that decision to a court or to a tribunal independent of the Australian Taxation Office. Instructions on how to appeal would be supplied to you with the notice of decision on your objection. There are costs associated with appeals.

## Need More Information?

This note is intended only as a general summary. Please contact your local Australian Taxation Office for clarification of the above points or for further information.

Australian Taxation Office

Taxation Determination **TD 93/94**

**FOI Status: may be released** 

**This Determination, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the *Taxation Administration Act 1953*, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Determination is a public ruling and how it is binding on the Commissioner. Unless otherwise stated, this Determination applies to years commencing both before and after its date of issue. However, this Determination does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).**

# Taxation Determination

## Income tax: can land on which handling facilities and feedlots are used in a business of livesheep export be regarded as being used for the purposes of agricultural or pastoral pursuits so as to be eligible for the special primary production depreciation concessions in the *Income Tax Assessment Act 1936*?

1. No. The land upon which such facilities and improvements are erected is not used for the purposes of agricultural or pastoral pursuits.

2. The business of a livesheep exporter is not a business of primary production.

3. Even where the operations are conducted on part of a farming property, it is considered that the land in question is not used for the purpose of agricultural or pastoral pursuits, notwithstanding that the land had previously been used for such pursuits, i.e. for farming.

4. Livesheep exporters are not as a general rule engaged in normal farming operations, however where their activities are conducted concurrently with such operations, whether or not on the same farming property, the two businesses are to be treated as separate and the land upon which the structural improvements and facilities are erected regarded as not being land used for the purposes of agricultural and pastoral pursuits.

5. Consequently, handling facilities and feedlots on land used by livesheep exporters do not qualify for the special depreciation concessions normally available to primary producers. For example, depreciation on structural improvements (paragraph 54(2)(b), former section 57AE and former section 57AH) is not allowable.

**Commissioner of Taxation**
27/5/93

FOI INDEX DETAIL: Reference No. I 1214997 Previously issued as Draft 93/D57
Related Determinations: TD 93/95
Subject Ref: primary production; depreciation; live sheep export
Legislative Ref: ITAA 54(2)(b); 57AE; 57AH.
ATO Ref: NORB J36/355/4

ISSN 1038 - 8982

# APPENDIX 12


## THE TAXPAYER'S CHARTER

YOU ARE ENTITLED TO EXPECT THE INLAND REVENUE

TO BE FAIR

By settling your tax affairs impartially
By expecting you to pay only what is due under the law
By treating everyone with equal fairness

TO HELP YOU

To get your tax affairs right
To understand your rights and obligations
By providing clear leaflets and forms
By being courteous at all times

TO PROVIDE AN EFFICIENT SERVICE

By settling your affairs promptly and accurately
By keeping your private affairs strictly confidential
By using the information you give us only as allowed by the law
By keeping to a minimum your costs of complying with the law
By keeping our costs down

## TO BE ACCOUNTABLE FOR WHAT WE DO

By setting standards for ourselves
and publishing how well we live up to them

---

## IF YOU ARE NOT SATISFIED

We will tell you exactly how to complain
You can ask for tax affairs to be looked at again
You can appeal to an independent tribunal
Your MP can refer your complaint to the Ombudsman

## IN RETURN, WE NEED YOU

To be honest
To give us accurate information
To pay your tax on time

Minority Report

## "TAX IS INEVITABLE, INJUSTICE IS NOT"

### Preface

Absent from the final deliberations on the majority report, from which I dissent, is the majority of Members and Senators who comprised the Committee which took part in the hearings and shaping of the Inquiry. Only five of the original 15 remain and of those one is prevented from taking part due to illness.

The splendid work of my friend and colleague Senator John Watson who resigned from the Committee on 19 August 1993 is sorely missed. His contribution over fifteen years has been amongst the most valuable ever given to the Committee. The shape and context of the report was largely determined by people who did not take part in the Inquiry which was conducted prior to the March 13 Election.

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8.21 The case of Mr Paul Keating

8.22 The case of numerous Coalition Members of the State Government of New South Wales

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9. Australian Taxation Office Agreement with the Public Sector Union

10. Tax evasion and tax avoidance

10.1 'Tax gap' not estimated and published by the Australian Taxation Office since June 1985

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## 1. General

The fundamental aim of my report is to achieve justice and equity for the taxpayer. The contest between a taxpayer and the weight of the bureaucracy of the Australian Taxation Office (ATO) backed by an apparent unlimited public purse is an unequal struggle. No longer should the Commissioner of Taxation be allowed to label taxpayers, who struggle to survive and comply with ever increasing complex legislation, as cheats.

I concur with many of the recommendations of the majority report but found the need to supplement those recommendations where they did not completely maximise the sovereignty of the taxpayer.

The Commissioner of Taxation must learn that his responsibility is to administer the taxation laws in a fair and just way rather than be the instigator of harsher and more repressive taxation measures. The Parliament has an essential role in ensuring the laws it makes are administered fairly. Should the Commissioner of Taxation find that the laws are inadequate for effective administration he has a duty to bring it to the attention of the Parliament.

The lesson from events in Western Australia and the Report of the Royal Commission into Commercial Activities of the Western Australian Government (the WA Inc. Royal Commission) is the need for a rigorous scrutiny process to avoid the development of an unholy alliance between the Executive and the bureaucracy.

The Commission was damning of the WA Parliament for failing to provide proper scrutiny mechanisms in that State. It was found:

> ... the Parliament, the public's representative forum, has failed to provide an effective check on the executive arm of government. The Parliament, no less than the public was kept ignorant of many of the matters which led to the establishment of the Commission and which had such adverse consequences for every person in the State. It must bear some direct responsibility for this state of affairs.

The ATO should be a watchdog of our tax laws and not a bloodhound.

## 2. Summary of Report and Recommendations

### 2.1 Recommendations

#### Self Assessment

(1) That the extension of the self assessment system be deferred until the completion of the evaluation of the impact on the revenue of-

.. the potential for income to be understated and expenses to be overstated because of taxpayer assessment; and

.. the public perception that the opportunity to evade tax has increased because of self assessment and the capability of the tax administration to deal with such evasion;

(2) That the above evaluation be undertaken by an Independent External Review using Task Forces, independent of the Treasury and the Australian Taxation Office.

#### Rulings

That the relevant Commonwealth tax Acts be amended -

(3) . to provide that General (Public) Rulings be issued as regulations under the taxation laws and subject to tabling and disallowance in the Parliament.

(4) . to enable persons dissatisfied with a General (Public) Taxation Ruling to object to it in the same manner that the legislation now provides for persons to object to a private Ruling;

(5) . to provide that, where a private Ruling applies to more than one year, the acceptance of the private Ruling by the person to whom it was issued trigger off the appeal procedure.

Australian Board of Taxation

(6) That an Australian Board of Taxation accountable to Parliament be established by legislation to have an overview of -

- the exercise of the various discretionary powers conferred on the Commissioner of Taxation under taxation laws;
- the preparation of public and private Rulings under the taxation laws administered by the Commissioner;
- the formulation and execution of prosecutions policy of the Australian Taxation Office;
- such other matters as the Minister may direct the Australian Board of Taxation be accountable from time to time; and
- further provision be made for directions issued by the Minister to be tabled in both Houses of Parliament within 15 sitting days of the issue of such directions.

Taxpayers' Rights

(7) That a Charter of Rights along the lines of the US 'Omnibus Taxpayer Bill of Rights', containing more than platitudes and intentions, be developed by the Australian Taxation Law Reform Commission.

The Charter should include but not be limited to the following:

a. the rights of a taxpayer and the obligations of the Australian Taxation Office during the conduct of an audit;

b. the procedures by which a taxpayer may appeal an adverse finding of the Australian Taxation Office; and

c. the procedures the Australian Taxation Office may use to enforce the taxation laws.

The majority report listed the basic entitlements which could be expressed in such a Charter. I concur with these points but stress that they do not constitute a comprehensive list of the necessary rights to be recognised.

That in the meantime -

(8) . section 263 of the *Income Tax Assessment Act 1936* and similar provisions in other taxation laws be amended to provide that:

.. the powers of entry and search only be permitted with a warrant issued by a judicial officer; and

.. that the written authorisation, carried by the officers of the Commissioner of Taxation attempting to gain entry under section 263, show on its face the premises to be searched and the books, documents and other papers or classes thereof which are the subject of the search;

(9) . the Guidelines issued by the Commissioner of Taxation, in July 1991, which were concerned with the exercise of access powers under section 263 to documents held on lawyers premises in circumstances where a claim for legal professional privilege is made be included in taxation Acts of the Commonwealth or in regulations.

Auditing - Deficiency Notice

(10) That amendments be made to the tax Acts of the Commonwealth so as to introduce a deficiency notice system and the changes include a provision for amended assessments to be suspended until such time as -

.. a court decision is obtained; or

.. the company goes into liquidation; or

.. 3 months has transpired from the date of the amended assessment

whichever event occurs earlier.

**That to ensure proper accountability of the taxation administration to Parliament -**

**(11) . the Australian Taxation Office develop a means for measuring the revenue impact of the Income Tax Compliance/Enforcement strategy and report to the Parliament at the earliest opportunity;**

**(12) . the Australian Taxation Office prepare estimates of possible revenue gains relating to all systems redevelopment proposals which pertain to modernisation developments, including changes to administrative practices and procedures and advise Parliament of those estimates;**

**(13) . an Independent External Review examine the revenue impact study of the Australian Taxation Office relating to the Income Tax Compliance/Enforcement strategy, the estimates of revenue gains from various initiatives, and the techniques that could be developed for measuring or setting parameters for estimating the 'tax gap'; and**

**(14) . an Australian Board of Taxation monitor the progress made by the Australian Taxation Office in developing and updating techniques for measuring revenue gains from various initiatives and to update the ' tax gap' so that figures are published annually along the lines of those published, prior to the Tax Summit in 1985, in the Draft White Paper *Reform of the Australian Taxation System.*[1]**

**That to ensure the independence of small business -**

**(15) . the push by the Australian Taxation Office to include independent contractors and sub-contractors within the PAYE scheme be resisted on the basis of fairness and equity.**

---

1. *Reform of the Australian Tax System - Draft White Paper*, AGPS, Canberra, June 1985

(16) That an Australian Taxation Law Reform Commission Act be enacted to establish an Australian Taxation Law Reform Commission.

(17) That the taxation of capital gains under Part 111A of the *Income Tax Assessment Act 1936* be abolished by the repeal of Part 111A and after due consideration by the Australian Taxation Law Reform Commission, a Speculative Gains Tax Assessment Act be enacted for the taxation of speculative gains.

(18) That an Employees (Income Tax) Assessment Act be enacted which will deal with the law relating to the assessment of employment income and those sources of income in the first part of the Tax Pack.

(19) That a General (Income Tax) Assessment Act be enacted to deal with the other sources of income and the assessment of companies, trusts and partnerships.

(20) That a general provision covering tax avoidance on the lines of Part 1VA of the *Income Tax Assessment Act 1936* be included in the *Employees (Income Tax) Assessment Act* as well as the General (Income Tax) Assessment Act and there be a move towards reliance on the general anti-avoidance provisions rather than on a multitude of specific provisions to cover every conceivable or unlikely situation.

(21) That the provisions of the *Income Tax Assessment Act 1936* dealing with specific measures against tax avoidance be placed in a separate Income Tax (Anti-Avoidance) Act and only cover measures intended to close loopholes in the assessment of income of persons under the General (Income Tax) Assessment Act.

(22) That the Australian Taxation Law Reform Commission examine, as a matter of urgency, the simplification of the law relating to the taxation of fringe benefits and the taxation of foreign source income.

## 2.2 Summary

### 2.2.1 Self Assessment

The Australian taxation system has been subject to unprecedented changes in the last ten years adding to the complexities of the taxes and the legislation. On the basis of the evidence before this Committee, the self assessment system was introduced without due consideration to the cost of compliance to taxpayers, a narrow perception of the impact on taxpayers, with limited examination of overseas experience and without the ATO appreciating the role of advising taxpayers.

In short, the burden of interpreting complex tax laws was passed onto taxpayers by the taxation administration without the consideration that is required in the interest of its clients. Consequently the efficiency and effectiveness of the self assessment system has become questionable.

The changes introduced to the tax system over the last ten years have been based on ad hoc ATO/Treasury internal and consultancy reviews. It has now become necessary for the tax system to be reviewed by an Independent External Review to which the public will have an input.

Recommendations

- **That the extension of the self assessment system be deferred until the completion of the evaluation of the impact on the revenue of -**
  - **the potential for income to be understated and expenses to be overstated because of taxpayer assessment; and**
  - **the public perception that the opportunity to evade tax has increased because of self assessment and the capability of the tax administration to deal with such evasion;**
- **That the above evaluation be undertaken by an Independent External Review using Task Forces, independent of the Treasury and the Australian Taxation Office.**

2.2.2 Rulings

The measures which are recommended here are intended to eliminate the emergence of a favoured class of taxpayer and to assist the tax administrator with the burden of issuing private Rulings, which will be judged against the benchmarks of subsequent interpretation by a court of law.

Recommendations

**It is therefore recommended that the relevant Commonwealth tax Acts be amended -**

- **to provide that General (Public) Rulings be issued as regulations under the taxation laws and subject to tabling and disallowance in the Parliament.**

- **to enable persons dissatisfied with a General (Public) Taxation Ruling to object to it in the same manner that the legislation now provides for persons to object to a private Ruling;**

- **to provide that, where a private Ruling applies to more than one year, the acceptance of the private Ruling by the person to whom it was issued trigger off the appeal procedure.**

2.2.3 Australian Board of Taxation

Under no circumstances should there be created an Australian Taxation Commission which would lessen the direct responsibility of the ATO to the Parliament. The recommendations in the majority report are insufficient to cover this important point.

There is however justification for the establishment of an Australian Board of Taxation (ABT), if the Commissioner of Taxation, apart from being directly accountable to Parliament, is also accountable to the Board of Directors in relation to certain matters. Such matters would include the exercise of various discretionary powers, the issue of public and private Rulings, the prosecution policy and such other matters which the Minister in charge may direct, from time to time, that the Commissioner is accountable to the ABT.

Recommendations

**It is therefore recommended that an Australian Board of Taxation accountable to Parliament be established by legislation to have an overview of -**

- **the exercise of the various discretionary powers conferred on the Commissioner of Taxation under taxation laws;**
- **the preparation of public and private Rulings under the taxation laws administered by the Commissioner;**
- **the formulation and execution of prosecutions policy of the Australian Taxation Office;**
- **such other matters as the Minister may direct the Australian Board of Taxation be accountable from time to time; and**
- **further provision be made for directions issued by the Minister to be tabled in both Houses of Parliament within 15 sitting days of the issue of such directions.**

### 2.2.4 Taxpayers' Rights

A Charter of Rights along the lines of the US 'Omnibus Taxpayer Bill of Rights' is highly desirable. It should not be a mere statement of platitudes or intentions. It should serve to focus on the discretionary powers vested in the taxation administration and the remedies and safeguards that have been in-built in tax legislation to prevent the unauthorised use of such powers. It should also set out the procedures for seeking such remedies.

A fundamental prerequisite is that taxpayers whose affairs are being investigated by the ATO, their advisers and the persons with whom they have conducted business transactions should have at least the same legal protection that persons, whose activities are being investigated for organised crime, have under the *National Crime Authority Act 1984* (NCA Act). Thus section 22 of the NCA Act provides for the NCA to apply to a judge for the issue of a search warrant in respect of matters connected with the NCA's investigations under certain limited circumstances.

Recommendations

A Charter of Rights along the lines of the US 'Omnibus Taxpayer Bill of Rights', containing more than platitudes and intentions, be developed by the Australian Taxation Law Reform Commission.

The Charter should include but not be limited to the following:

a. the rights of a taxpayer and the obligations of the Australian Taxation Office during the conduct of an audit;

b. the procedures by which a taxpayer may appeal an adverse finding of the Australian Taxation Office; and

c. the procedures the Australian Taxation Office may use to enforce the taxation laws.

The majority report listed the basic entitlements which could be expressed in such a Charter. I concur with these points but stress that they do not constitute a comprehensive list of the necessary rights to be recognised.

In the meantime -

- section 263 of the *Income Tax Assessment Act 1936* and similar provisions in other taxation laws be amended to provide that:

  - the powers of entry and search only be permitted with a warrant issued by a judicial officer; and

  - that the written authorisation, carried by the officers of the Commissioner of Taxation attempting to gain entry under section 263, show on its face the premises to be searched and the books, documents and other papers or classes thereof which are the subject of the search;

- the Guidelines issued by the Commissioner of Taxation, in July 1991, which were concerned with the exercise of access powers under section 263 to documents held on lawyers premises in circumstances where a claim for legal professional privilege is made be included in taxation Acts of the Commonwealth or in regulations.

2.2.5 Auditing - Deficiency Notice

The majority report has recommended that the law be amended so as to allow a system of deficiency notices to be introduced to affect taxpayers who would be technically insolvent on the issue of an amended taxation assessment following an audit. For a deficiency notice to be effective it must result in the suspension of the amended assessment for a reasonable period to enable the taxpayer to take the action necessary to avoid the consequences of becoming insolvent.

Recommendation

- **That amendments be made to the tax Acts of the Commonwealth so as to introduce a deficiency notice system and the changes include a provision for amended assessments to be suspended until such time as -**
  - **a court decision is obtained; or**
  - **the company goes into liquidation; or**
  - **3 months has transpired from the date of the amended assessment**

**whichever event occurs earlier.**

2.2.6 Qualification relating to the 'tax gap' of the Financial Statements of the Australian Taxation Office by the Auditor-General

The qualification arises from the inability of the ATO to provide an estimate of the impact on revenue of non-compliance and breaches of taxation laws administered by the Commissioner of Taxation. This estimate is a matter of the utmost significance as it reflects on the efficacy of the Tax Reform measures of the last 10 years which were introduced primarily to curb tax evasion and tax avoidance and is a key indicator of performance and accountability of the organisation charged with the administration of the ATO. The vast majority of Australians, who are honest taxpayers and who have had to carry the burden of the tax reform measures of the last 10 years, have a right to know what impact these measures have had on tax evasion and tax avoidance. It is a cost to the community which should be measured as far as practicable and disclosed annually in Parliament, in the interests of open government.

The apparent ability of the ATO to estimate the extent of tax evasion and tax avoidance in 1984-85, in preparation for the Tax Summit in 1985, contrasts with its inability to refine the technique of estimating this key indicator over

the last seven years and casts a shadow on the efficiency and/ or the independence of the management of the organisation.

Recommendation

**That to ensure proper accountability of the taxation administration to Parliament -**

- **the Australian Taxation Office develop a means for measuring the revenue impact of the Income Tax Compliance/Enforcement strategy and report to the Parliament at the earliest opportunity;**

- **the Australian Taxation Office prepare estimates of possible revenue gains relating to all systems redevelopment proposals which pertain to modernisation developments, including changes to administrative practices and procedures and advise Parliament of those estimates;**

- **an Independent External Review examine the revenue impact study of the Australian Taxation Office relating to the Income Tax Compliance/Enforcement strategy, the estimates of revenue gains from various initiatives, and the techniques that could be developed for measuring or setting parameters for estimating the 'tax gap'; and**

- **an Australian Board of Taxation should monitor the progress made by the Australian Taxation Office in developing and updating techniques for measuring revenue gains from various initiatives and to update the ' tax gap' so that figures are published annually along the lines of those published, prior to the Tax Summit in 1985, in the Draft White Paper[2] *Reform of the Australian Taxation System.***

**That to ensure the independence of small business -**

- **the push by the Australian Taxation Office to include independent contractors and sub-contractors within the PAYE scheme be resisted on the basis of fairness and equity.**

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2. *Reform of the Australian Tax System - Draft White Paper*, AGPS, Canberra, June 1985

## 2.2.7 Tax Reform and Tax Law Simplification

### General

The Government, whose policy objectives over the last ten years have been driven by the need to counter tax evasion and tax avoidance, cannot be expected to show the commitment to re-examine the need and relevance of some of the taxes or the form in which they have been enacted to bring about the simplification that is so urgently required. The ATO has so far failed to provide figures of tax evasion and tax avoidance comparable to those it produced for the Tax Summit in 1985, to let the public know whether the burdensome tax reform measures of the last ten years have had the desired effect.

The main difficulty in actively pursuing the simplification of the tax laws lies in an unwillingness to examine the need for the complex of taxes such as the capital gains tax, the fringe benefits tax and the tax on foreign source income. Unless both questions are considered simultaneously real simplification of the tax laws is unlikely to be realised.

### Repeal provisions relating to the taxation of capital gains

The major impact of the taxation of capital gains, in the present recession and unacceptable levels of unemployment, is that it is a disincentive to enterprise. In the interests of rewarding the risk takers who are urgently required to get the economy moving and create real growth and employment, it is recommended that the taxation of capital gains in its present form be abandoned. It is appropriate to consider the implementation of a speculative gains tax, which is simpler to administer and which would not have the hidden features of an inheritance tax and a discriminatory wealth tax. The acceptance of this recommendation will increase the possibility of simplifying the tax system by removing this multi faceted tax and the accompanying complex legislation.

#### Recommendation

. **That the taxation of capital gains under Part 111A of the *Income Tax Assessment Act 1936* be abolished by the repeal of Part 111A and, after due consideration by the Australian Taxation Law Reform Commission, a Speculative Gains Tax Assessment Act be enacted for the taxation of speculative gains.**

- **That the Australian Taxation Law Reform Commission when established examine, as a matter of urgency, the simplification of the law relating to the taxation of *fringe benefits and the taxation of foreign source* income.**

Australian Taxation Law Reform Commission

The ATO and the Treasury are too close to the scene of day to day tax administration and tax policy formulation. An independent approach is required to bring about real simplification and cannot be expected from those quarters. It is therefore recommended that an Australian Taxation Law Reform Commission be established to undertake and complete over a seven year period, the progressive simplification of the taxation laws generally on the lines suggested in this report.

Recommendations

**It is therefore recommended that there be enacted:**

- **an Australian Taxation Law Reform Commission Act to establish an Australian Taxation Law Reform Commission.**

- **an Employees (Income Tax) Assessment Act which will deal with the law relating to the assessment of employment income and those sources of income in the first part of the Tax Pack.**

- **a General (Income Tax) Assessment Act to deal with the other sources of income and the assessment of companies, trusts and partnerships.**

- **a general provision covering tax avoidance on the lines of Part IVA of the *Income Tax Assessment Act 1936* be included in the Employees (Income Tax) Assessment Act as well as the General (Income Tax) Assessment Act and there be a move towards reliance on the general anti-avoidance provisions rather than on a multitude of specific provisions to cover every conceivable or unlikely situation.**

- **the provisions of the *Income Tax Assessment Act 1936* dealing with specific measures against tax avoidance be placed in a separate Income Tax (Anti-Avoidance) Act and only cover measures intended to close loopholes in the assessment of income of persons under the General (Income Tax) Assessment Act.**

## 3. Self Assessment

The evidence before the Committee was that between 1983 and 1985 the ATO commenced a review of the method of taxation assessment and conducted a limited examination of the overseas experience.[3] In 1985, an Assessing Review Group of the ATO was established to consider whether the existing system of assessment should be retained or replaced by a self assessment system.[4] According to the evidence before the Committee, the Assessing Review Group had not considered or completely appreciated the impact on taxpayers and the revenue base of the change to self assessment.

### 3.1 Cost of compliance to taxpayers not considered

The Committee noted that the cost of a change to taxpayers was not included in the factors that might influence a change to self assessment.[5]

### 3.2 Shift of responsibility to taxpayers

'In the Committee's view this narrow perception of the impact of self assessment on taxpayers failed to grasp the importance in shift of responsibility for assessing as a fundamental step in the administrative process. The removal of the 'check step' of ATO assessment, whether adequately performed or otherwise, placed added responsibility on taxpayers'.[6]

### 3.3 Role of advising taxpayers on self assessment not appreciated by ATO

'Furthermore, the importance of the advising function in a self assessment system was grossly underestimated by the ATO. This was most dramatically evidenced by the resources allocated to advising from the freed assessing function after the second stage of self assessment had been introduced'.[7]

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3. Paragraph 4.2 of the majority report
4. Paragraph 4.6 of the majority report
5. Paragraph 4.8 of the majority report
6. Paragraph 4.11 of the majority report
7. Paragraph 4.11 of the majority report

3.4 Efficiency and effectiveness of self assessment system questionable

'In a Government information paper issued in August 1991, it was claimed that self assessment was a more efficient method of collecting tax because it enabled the ATO to shift " ... its primary focus from processing returns and issuing assessments, to helping taxpayers to meet their obligations, and taking enforcement action against those who [do not]".'[8]

3.5 Further evaluation of self assessment system required

'Nevertheless, on this basis of cost efficiency alone the Committee concluded that it was unlikely that a return to a system of ATO assessment could be justified in terms of the consequences for revenue. However, the Committee considered that two principal aspects of the self assessment taxation system needed to be evaluated. They were:

- the potential for income to be understated and expenses to be overstated because of taxpayer assessment; and

- the public perception that the opportunity to evade tax was increased because of self assessment.'[9]

3.6 *Extension of self assessment system be deferred*

The Committee had serious doubts of the claimed efficiency and effectiveness of the self assessment system and concluded that its further extension be deferred pending the development of a comprehensive supporting legislative framework. The majority report has also recommended that, in the meantime, the ATO should 'develop and simplify appropriate publicly available information on tax legislation to increase taxpayer compliance and decrease taxpayer compliance costs'.[10]

3.7 Problems underlying complexities of tax legislation

The recommendations in the majority report do not address adequately the serious underlying problems of the present tax system focussed in the implementation of the self assessment system. The self assessment system, and the accompanying Rulings regime have highlighted the complexities of tax legislation, as the main barrier to its effective and efficient implementation. What is required is not merely explaining the existing legislation but rewriting the legislation in the manner recommended in this report and removing complex provisions which attempt to catch every conceivable (and inconceivable) situation and placing reliance on the general

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8. Paragraph 4.13 of the majority report
9. Paragraph 4.19 of the majority report
10. Paragraph 4.44 of the majority report

anti-avoidance provisions which are intended to meet such situations. The medium and long term solutions to simplification of the income tax laws are considered in section 11 of this report, to be implemented after examination by the proposed Australian Taxation Law Reform Commission.

3.8 Unacceptable trade off of taxpayers' rights for questionable cost efficiency of self assessment system

If the self assessment system is to proceed, it cannot be at the expense of taxpayers' rights. A self assessment system and the accompanying Rulings regime that compromise taxpayer rights, and possibly constitutional safeguards, will not be fair and equitable.

3.9 Independent External Review

The taxation system has been subject to unprecedented changes in the last ten years and these changes, on the basis of the evidence before this Committee as indicated above, have been made without proper consideration. The changes introduced to the tax system over the last ten years have been based on internal reviews and consultancy reports. It is now appropriate that the tax system was reviewed by an Independent External Review.

3.10 Recommendations

**It is therefore recommended:**

- **that the extension of the self assessment system be deferred until the completion of the evaluation of the impact on the revenue of-**
  - **the potential for income to be understated and expenses to be overstated because of taxpayer assessment; and**
  - **the public perception that the opportunity to evade tax was increased because of self assessment and the questionable capacity of the tax administration to deal with such evasion;**
- **that the above evaluation be undertaken by an Independent External Review using Task Forces, independent of the Treasury and the Australian Taxation Office.**

## 4. Rulings

### 4.1 Rulings regime may create favoured class of taxpayers

The new private and public taxation Rulings regime, that has been in operation since 1 July 1992, has entrenched a new concept of finality of interpretations of taxation law. This has had serious implications for the rule of law, accountability of public officials and the fairness of the tax system.

### 4.2 Rulings regime as 'ambit claims'

In evidence before the Committee it was claimed that Rulings were being issued as 'ambit claims' rather than as 'correct and proper interpretations' of the law.[11] The scope which the Rulings regime offers for 'ambit claims' and other undesirable features referred to in this section, may place a further burden on the tax administration which may return it to a defacto ATO assessment system by virtue of the numbers of such requests.

### 4.3 'Rule of law' and Rulings regime not compatible

The principle of the 'rule of law', which underpins our democratic traditions, requires that the Courts of law be the final authorities to make pronouncements on questions of law. Any departure from this principle will result in the erosion of the checks and balances that are provided in our Constitution for preventing the Executive Government from acting in excess of or in abuse of its executive powers. The taxation power in s. 51(ii) and the incidental power s. 51(xxxix) of the Constitution, under which the taxation laws of the Commonwealth are based, may not reach out to support legislation that confers power on the tax administration to interpret the law with finality even in isolated circumstances. Such a conferring of power on the Commissioner of Taxation may in addition contravene the provisions of s. 71 of the Constitution, as it vests in the Commissioner of Taxation with functions intended for the courts.

### 4.4 Provision in Rulings regime for finality of legal interpretation by taxation officers, in certain circumstances, may be unconstitutional

It is claimed that the reasons for this concession to taxpayers favoured by private Rulings is the need for certainty and finality of self assessments made on the basis of Rulings. The *Information Paper* of August 1991 stated:

Although Taxation Rulings will be binding in law, they will not have the status of law. A Ruling gives the Commissioner's interpretation of the law. Even if the interpretation is later found to be incorrect, the Commissioner

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11. Evidence, vol. 5, p. S743

will be estopped from increasing a taxpayer's liability where it has been calculated in accordance with the Ruling. This is similar to the form of estoppel which operated before 1986 to prevent the Commissioner from increasing a tax liability where there has been a full and true disclosure. There have been some representations that Rulings should not be able to take the place of the law nor override the decisions of the courts. However there is strong support on certainty grounds, for the notion that if the Tax Office has all the facts it should be able to say what the tax liability is and the taxpayer should be able to rely on that advice.[12] (emphasis added)

It must be noted that it is a strain on the principle of estoppel to equate it with statutory finality to legal interpretation by administrative officers given in private Rulings. An unacceptable consequence of this concept of granting finality to discretionary interpretations of the law by public officials, who have the protection of the secrecy provisions in taxation laws, is for the executive government to be sheltered from the normal judicial process. If the implementation of the self assessment taxation regime is not compatible with the rule of law then serious consideration needs to be given to abandon it and to revert to direct ATO assessment.

In seeking a review of the self assessment system the tensions between two competing public interests need to be reconciled. They are the public interest in giving certainty to a minority of assessments based on private Rulings as well as containing the costs of tax administration on the one hand and on the other the public interest of ensuring the dominance of the rule of law which would be of concern to the vast majority of citizens whether they are taxpayers or not. In resolving the conflict between the two competing public interests it is imperative to err on the side of favouring the public interest of upholding the rule of law.

12. *Improvements to Self Assessment- Priority Tasks*, paper circulated by the Treasurer for the information of Members on 20 August 1991, p. 44, para 8.3

## 4.5 Other weaknesses in the Rulings regime

The unfairness in the tax Rulings regime will be further exacerbated by the following weaknesses which are not addressed by the recommendations made in the majority report.

- The provisions dealing with the resolution of conflict in relevant binding public Rulings on the interpretation of taxation laws raise the important question of whether the Commissioner has been vested with functions intended for the Courts under s. 71 of the Constitution. To this extent, certain aspects of the Rulings provisions may be unconstitutional.

- The Commissioner may decline to make a private Ruling on grounds of limited resources or on the basis of any other reasons the Commissioner considers relevant. A taxpayer may therefore be denied an important avenue for seeking relief from the burden of interpreting complex tax law.

- The Commissioner is entitled to withdraw a private Ruling, without the consent of the rulee, on his opinion of the relative disadvantages that would be suffered by other persons if the Ruling were to remain effective. The legislation does not define 'disadvantage' and does not clarify who are the persons whose relative positions are to be considered by the Commissioner. The Commissioner is thus vested with authority to withdraw a Ruling or to determine the tax payable by a person on the basis of relative disadvantages to another person or persons. This is a new concept in imposing taxation which may be beyond the reach of the taxation power in s. 51(ii) and the incidental power in s. 51(xxxix) of the Constitution.

- There is no provision for directly seeking a review of a public Ruling by a taxpayer or a potential taxpayer who may be affected by a public Ruling.

- It is necessary to have a precise definition of a general or public Ruling given and for General (Public) Rulings to be tabled and approved by both Houses of Parliament. It would be appropriate and less confusing to the public if the procedure for their enactment does not differ from that for other regulations under the *Income Tax Assessment Act 1936* and other taxation laws administered by the ATO; that is, that they be subject to tabling and disallowance.

4.6 Taxpayers must be given the opportunity to contest public Rulings in the Administrative Appeals Tribunal or a court of law

A taxpayer or a potential taxpayer dissatisfied with the interpretation of law in a public Ruling must be given the opportunity to have a final pronouncement by a court of law or tribunal at the earliest opportunity. A person aggrieved by a public Ruling should be given the opportunity to seek a review in the same manner that a taxpayer could seek a review of a private Ruling under existing legislation.

4.7 Private Ruling for more than one year to be referred to Administrative Appeals Tribunal or a court of law

A private Ruling which applies to more than one year offers scope for abuse of the private Rulings system. The options available are either to withdraw the power given to the Commissioner of Taxation to issue private Rulings for more than one year, or to provide for a tribunal or a court to make an early pronouncement on the interpretation given in private Rulings that extends to more than one year. The balance of the competing public interests involved weigh in favour of the latter course.

The measures which are recommended are intended to eliminate the emergence of a favoured class of taxpayer and to relieve the tax administrator from the burdens of issuing private Rulings, which will be judged against the benchmark of a subsequent interpretation by a court of law.

4.8 Recommendations

**It is therefore recommended that the relevant Commonwealth tax Acts be amended:**

- **to provide that General (Public) Rulings be issued as regulations under the taxation laws and subject to tabling and disallowance in both Houses of Parliament.**

- **to enable a person dissatisfied with a General (Public) Taxation Ruling to object to it in the same manner as legislation now provides for a person to object to a private Ruling;**

- **to provide that, where a private Ruling applies to more than one year, the acceptance of the private Ruling by the person to whom it was issued should trigger off the appeal procedure, for review by a court of law or tribunal.**

Recommendations in majority report for functions of the proposed Australian Taxation Commission inadequate

5.1 The majority report recommended the establishment of an Australian Taxation Commission (the ATC)[13] but did not clearly define its role and that of its Chairman nor the responsibilities of the ATC to Parliament and the responsibilities of the proposed Chief Commissioner to the ATC.

5.2 The recommendations in the majority report provide for the Minister responsible for taxation matters to issue directions to the Chief Commissioner concerning the manner in which the Chief Commissioner exercises the general power of administration conferred on him by various taxation laws.[14]

5.3 It is also proposed by the majority report that the role of advisory bodies be formalised and strengthened within the ATC.[15]

5.4 The proposal for an independent Commonwealth Taxation Ombudsman to inquire into complaints by persons against taxation officers includes the proposal for the Ombudsman to report generically to Parliament and to provide reports of his investigations to the Chairperson of the Australian Taxation Commission.[16]

5.5 It will be seen from the proposed structure that, while the Minister will give directions on matters of general administration to the Chief Commissioner and the Commonwealth Taxation Ombudsman will be responsible for investigating complaints by persons against taxation officers, there is no provision for inquiring into the abuse or misuse of discretions under taxation laws which are vested in the Chief Commissioner.

5.6 Justification for an Australian Board of Taxation responsible to the Parliament for an overview of the Commissioner's use of discretionary powers, issue of taxation Rulings and prosecutions policy

There is justification for the establishment of an Australian Board of Taxation (the Board) rather than an ATC as recommended in the majority report. In relation to matters such as the exercise of various discretionary powers, the issue of public and private Rulings, the prosecutions policy and such other matters which the responsible Minister may direct, the

13. Paragraph 3.52 of the majority report
14. Paragraph 3.80 of the majority report
15. Paragraph 3.131 of the majority report
16. Paragraph 13.42 of the majority report

Commissioner of Taxation is accountable to the Board and the Parliament. The Board must also be accountable to Parliament in respect of those matters for which the Commissioner of Taxation reports to the Board.

It would be appropriate for the Board to be the body to oversight the exercise of these discretions and in particular the exercise of the unfettered discretion to use the access powers conferred under s. 263 of the *Income Tax Assessment Act 1936* (the Assessment Act) and similar provisions in other taxation laws.

5.7 Recommendations

**It is therefore recommended:**

**that an Australian Board of Taxation accountable to Parliament be established by legislation. The responsibilities of the Board will be to oversight -**

- **the exercise of the various discretionary powers conferred on the Commissioner of Taxation under taxation laws;**
- **the preparation of public and private Rulings under the taxation laws administered by the Commissioner;**
- **the formulation and execution of prosecutions policy of the Australian Taxation policy;**
- **such other matters that the Minister may direct the Commissioner from time to time; and**
- **provision be made for directions issued by the Minister to be tabled in both Houses of Parliament within 15 sitting days of the issue of such directions.**

## 6. Taxpayers' Rights

### 6.1 Charter of Taxpayers' rights

The majority report sets out adequately a summary of other Nations' provisions for taxpayers' rights. I also agree with recommendation in paragraph 13.28 that -

> . *the Government consider establishing a Taxpayers'* Charter based on a review of the various models available.

However I believe that there is scope for additional protection as set out below.

### 6.2 Commissioner's wide powers to access information

Sections 263 and 264 of the *Income Tax Assessment Act 1936* set out the Commissioner's powers to obtain information. In addition to these powers, the Commissioner may secure the issue of a search warrant under s. 10 of the *Crimes Act 1910 (Cth).* Whilst s. 264 casts a positive obligation on persons to whom the Commissioner gives the necessary written notification of his requirements, s. 263 is a general provision giving the Commissioner the right of access by way of entry of premises and search without warrant. It is a widely held view that ss. 263 and 264 confer excessive powers on the Commissioner. There is justification for this conclusion having regard to the judicial pronouncements on the width of the access powers. It is a generally accepted view that the powers conferred on the Commissioner under s. 263 are wider than those that can be found in the taxation jurisdictions of any Western democracy.

### 6.3 'Fishing expeditions' to be avoided

The main thrust of the concerns on the powers conferred on the Commissioner by s. 263 is that it promotes 'fishing expeditions' by the Commissioner's officers. To that extent it is an improper exercise of the power. The term *'fishing expedition' in this context refers to a visit by the* Commissioner's officers, not for the purpose of inspecting specific and identified documents or records, but to ascertain what documents or records are available about:

- a certain client or customer;
- a group of clients or customers engaged in a particular transaction; or
- any person on whom there is information.

6.4 Written authorisation to indicate matters to be searched

In *Citibank Limited v Federal Commissioner of Taxation,*[17] Lockhart J. held that the written authorisation carried by the officers of the Commissioner attempting to gain entry under s. 263, should show on its face the premises to be searched and the books, documents and other papers or classes there of which are the subject of the search. The authorisations in question, which were couched in general terms, were found in that particular case to be wanting in particularity.

His Honour further held that the conduct of the search also rendered it invalid because:

a) the search was conducted in such a manner as to prevent Citibank from obtaining legal advice or from approaching the Court for an injunction;

b) a request to delay the search for the purposes of obtaining legal advice was refused when the circumstances were such that it was justified; and

c) the taxation officers failed to establish a sufficient mechanism to allow Citibank to assert a claim for legal professional privilege.

On appeal, the Full Federal Court took the view that on the construction which they placed on s. 263, the matters referred to by Lockhart J, however desirable, were not required to be disclosed on the face of the authority.[18] The Full Federal Court confirmed, however, that the power to search and make copies of documents under s. 263 should not be read as referring to documents to which legal professional privilege attaches.

Another cause for concern is that the Commissioner's powers under s. 263 are far in excess of those conferred on other revenue collecting authorities in respect of obtaining information and documents.

6.5 Search warrants from judicial officers

Taxpayers whose affairs are being investigated by the ATO, their advisers and the persons with whom they have conducted business transactions do not have access to the legal protection that persons, whose activities are being investigated for organised crime, have under the *National Crime Authority Act 1984* (NCA Act). Section 22 of the NCA Act provides for the NCA to apply to a judge for the issue of a search warrant in respect of things connected with the NCA's investigations under certain limited circumstances.

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17. 19 ATR 1479 at p. 1491
18. *FCT V Citibank Ltd,* (1988-89) 20 ATR 292 at p. 297

Section 23 of the NCA Act provides for the issue by a Judge of search warrants upon application by telephone in urgent cases. Section 30 recognises legal professional privilege as an excuse for not answering questions or producing documents. Section 32 provides for application to the Federal Court by persons claiming entitlement to resist the production of information or documents, or to answer questions at a NCA hearing or under other procedures for production, to review decisions of the NCA in that regard. Section 32A provides for similar application to the Supreme Court of a State.

6.6 Commissioner's present data-matching electronic facilities

The introduction of the Cash Transactions Reports legislation in 1987, the Tax File Numbers legislation in 1988, the Data-Matching Program legislation in 1990, and the Law Enforcement Access Network in 1990 have given the Commissioner of Taxation extensive powers of matching information in tax returns. The access powers in the *Income Tax Assessment Act 1936* in respect of information and documents were granted in an era when facilities for electronic data-matching were not available to the ATO. This is another valid reason for limiting the access powers of the Commissioner of Taxation to promote taxpayers' rights.

6.7 Commissioner's Guidelines for the exercise of access powers

The ATO guidelines for the conduct of taxpayers and taxation auditors in large cases and complex audits, which is a response to community concerns following the Citibank raid, indicate that there is scope to limit the information and evidence gathering powers of the Commissioner of Taxation. The appropriate attitude to taxation will be enhanced by legislatively defining these powers to correlate with the gravity of a suspected tax offence. It will then be clear to the vast majority of complying taxpayers that their privacy and liberties are not diminished by legislative measures applicable only to a minority of taxpayers who do not comply.

6.8 Recommendations

**It is therefore recommended:**

**That a Charter of Rights along the lines of the US 'Omnibus Taxpayer Bill of Rights', containing more than platitudes and intentions, be developed by the Australian Taxation Law Reform Commission.**

The Charter include but not be limited to the following:

a. the rights of a taxpayer and the obligations of the ATO during the conduct of an audit;

b. the procedures by which a taxpayer may appeal an adverse finding of the ATO; and

c. the procedures the ATO may use to enforce the taxation laws.

The majority report listed the basic entitlements which could be expressed in such a Charter. I concur with these points but stress that they do not constitute a comprehensive list of the necessary rights to be recognised.

That in the meantime -

- section 263 of the *Income Tax Assessment Act 1936* and similar provisions in other taxation laws be amended to provide that:

  .. the powers of entry and search only be permitted with a warrant issued by a judicial officer; and

  .. that the written authorisation carried by the officers of the Commissioner of Taxation attempting to gain entry under section 263, show on its face the premises to be searched and the books, documents and other papers or classes thereof which are the subject of the search;

- the Guidelines issued by the Commissioner of Taxation, in July 1991, which were concerned with the exercise of access powers under section 263 to documents held on lawyers premises in circumstances where a claim for legal professional privilege is made be included in taxation Acts of the Commonwealth or in regulations.

7. Auditing - Deficiency Notice

The majority report has recommended that the law be amended so as to allow a system of deficiency notices to be introduced to taxpayers who would be technically insolvent on the issue of an amended taxation assessment following an audit. For a deficiency notice to be effective it must suspend the amended assessment, so that technically no debt is due on the issue of the amended assessment.

The law must provide that the deficiency notice will be valid until such time as the Federal Court decides whether there was a reasonably arguable case for the taxpayer to continue to trade, to avoid the taxpayer, if it was a company, being in breach of the corporate law.

The period of time for which the amended assessment will be in suspense must be determined by balancing the interests of the taxpayer, its creditors and employees on the one hand and the interests of the revenue on the other. If provision is made for the suspension to cease on the taxpayer company going into liquidation, the interests of revenue will be partially protected. However, as indefinite deferral of the tax will not be in the interests of revenue or the taxpayer, a limit of 3 months might be reasonable for the taxpayer to seek a court Ruling on the matter.

7.1 Recommendations

**It is therefore recommended that**

**amendments be made to the tax Acts of the Commonwealth so as to introduce a deficiency notice system and the changes include a provision for amended assessment to be suspended until such time as -**

.. **a court decision is obtained; or**

.. **the company goes into liquidation; or**

.. **3 months from the date of the amended assessment**

**whichever event occurs earlier.**

8. Professionalism in the Public Service

The seeds were sown in the Whitlam years for the public sector to become politicised. That is, to move away from its tradition of serving the Government of the day in a totally professional way, to serving in a politicised way. Although generally, following the code of professional service is preferred by those seeking a career in public service, the evidence of the politicisation nonetheless exists.

The WA Inc. Royal Commission found that the public service in that state had been severely compromised. The Commission's report stated:

> The Public Service lost, if not its way, then some of its role and character in the political and government environment into which we have inquired. Denied an effective advisory

> role .... it was reduced to impotence in circumstances where ministerial advisers, favoured appointees to the Public Service and others captured the advisory role which traditionally has been seen as a raison d'etre of an experienced Public Service.

For our system to work, we need a totally professional public service.

Evidence before this Inquiry and Senate Estimates Committees have demonstrated that this is not always evident.

8.1 The case of Mr Charles Wright

In the recent hearings of Estimates Committee D, officials of the ATO failed to properly answer questions about the taxation affairs of a recent Labor appointee to head the ACT Tourism Commission, one Charles Wright.

Mr Wright was named in the 'Report of the Royal Commission into Commercial Activities of Government and Other Matters' in Western Australia in the following terms:

> The other payments of particular concern were made to Mr Charles Wright, who operated a fundraising and business relations consultancy. He had done work for the ALP since 1976 in assisting with fundraising at a Federal level ... Subsequently, Mr Wright made payments to Mrs Brush for which he was recompensed from the No. 1 account. In essence, Mr Wright was a conduit for $80 000 that was paid from the No. 1 Account to Mrs Brush. Mr Burke gave a similar explanation.

A company of which Mr Wright was the principal is currently subject to investigations by the Australian Securities Commission and records of the Commission indicate that the ATO has submitted a preferential claim in relation to the liquidated concern for $176 960.55 in unremitted group tax and an unsecured claim for penalties of $75 853.29.

The question which remains unanswered is why the ATO failed to collect from a 'conduit' of funds to the Labor Party an amount of over $250 000 over a period of up to three years. The onus also remains on the ATO to explain its conduct in failing to collect the outstanding tax and justify why other taxpayers are not afforded the same apparent latitude.

8.2 The Treatment of Politicians by the Australian Taxation Office

An encounter with the former Commissioner of Taxation, Mr Trevor Boucher, during the course of this Inquiry, highlighted the evidence on the public record which can lead to the conclusion that the ATO has been far from even-

handed in its treatment of the tax affairs of Coalition and Labor members of Parliament.

8.2.1 The case of Mr Paul Keating

It is important to note that, with the secrecy provisions of tax legislation in operation, conclusions can only be drawn from information on the public record. Quite by chance, a letter which was not meant to get onto the public record, did so.

This letter was written to Mr Paul Keating, the then Treasurer at his private address, gently reminding him he had forgotten to lodge his 1985 and 1986 tax returns.

The letter stated:

> Dear Mr Keating,
>
> The purpose of this letter is to draw your attention to the need for you to file your 1986 income tax return which is now outstanding.
>
> As recently discussed your 1985 return is also well overdue.
>
> I appreciate how busy you have been but I ask that you now give urgent attention to the filing of your returns, especially that for the 1985 year.
>
> Should you wish, your return can be posted marked for attention: Ms Yvonne Ellis, Liaison Officer, Priority Control Section, GPO Box 3523, SYDNEY NSW 2000.
>
> If you wish to deliver your return, you could contact Ms Ellis on 236 7341 or 236 7610 or myself.
>
> Your co-operation and early response would be appreciated.
>
> Yours faithfully,
>
> (D J Cortese)
> DEPUTY COMMISSIONER OF TAXATION

During Estimates hearings, the ATO was requested to provide the number of prosecutions undertaken by the ATO of ordinary Australians who had similarly failed to lodge tax returns.

The answer provided was that the ATO had obtained 10 794 convictions for non-lodgement of returns in the 1990-91 financial year.

8.2.2 The case of numerous Coalition Members of the State Government of New South Wales

The case above is to be contrasted with the conduct of the ATO in relation to the prosecution of the former NSW Assistant Treasurer, Mr Phillip Smiles.

The significance of the Smiles case was that the prosecution was made under the *Crimes Act 1914*.

During Estimates hearings ATO officers were questioned as to how many other prosecutions involving an apportionment matter had been taken against taxpayers, under the *Crimes Act 1914*, instead of the *Taxation Administration Act 1953*. The Committee was informed that the answer was nil.

There was considerable publicity surrounding the Smiles case, and much of it was centred upon information that was so obviously leaked from within the ATO. This alone may raise a presumption of bias, but at least it was gratifying to note that the Tax Office initiated an inquiry to find the source of the leak. That inquiry apparently found no culprit and the information was passed onto the Federal Police.

This gratification was short lived with the revelation that the responsible officer within the ATO who initiated the leak inquiry never bothered to read the report. The lack of care taken by the ATO, in discharging its duties was a serious breach of privacy involving a public figure and was quite unsatisfactory. The action taken does not absolve the ATO of responsibility.

The Smiles matter does not seem to be an isolated case. During the course of the Inquiry it was revealed that within a short period of being sworn into office, numerous ministers in the NSW Coalition Government were subject to desk audit by the ATO. This is more than mere coincidence, because letters addressed to the taxpayer in question were addressed 'Dear Minister'.

Mr Boucher went away to provide evidence of these cases and, indeed, did so before the hearing. I frankly did not believe the completeness of the evidence he adduced. It would seem that my stand was vindicated, because Mr Boucher returned and told the Committee that his information was, in fact, incomplete and more Coalition MP's had been audited than he first professed.

The public record therefore does not sustain Mr Boucher's claim made before the Committee that 'our impartiality is a treasured virtue.'

With great histrionics Mr Boucher stated, 'I find any proposition that our internal decision making is in any way politically slanted to be unwarranted slur'.

Let the public record, not rhetoric, be the test.

8.3 The Black Hole in the 1992-93 Budget

This refers to the ATO involvement in the furore over the deficit of approximately $2.0 billion being discovered in the pre-election Budget of 1992-93. The gap was closed when Mr Boucher confirmed to the Treasurer that a sum of $1.7 billion could be collected in aggregate over the two years 1994-95 and 1995-96 if the ATO was given $44.5 million in 1993-94 and $35 million in each of the years 1994-95 and 1995-96 for the implementation of a new Compliance/Enforcement strategy. This estimate of additional revenue was given within three weeks of the discovery of the black hole.

In the Estimates Committee there was considerable hesitation by officers of the ATO in answering questions as to when they had done the estimates for the Treasurer and who was responsible for it. After much hesitation and questioning, the now Second Commissioner, Mr Richard Highfield admitted that he was responsible for arranging for these calculations to be done and that work on it commenced after the Budget. The question arises as to why the ATO did not identify this avenue of additional revenue until the crisis over the black hole in the Budget had arisen. It will probably never be known whether it was a reflection on the efficiency of the ATO to explore in a timely manner how the revenue base could be increased with the existing tax system, or whether it was a reflection on its credibility to forecast revenue without bias. This matter is considered in greater detail in section 10 of this report.

Evidence was given that the Commissioner favoured the introduction of further withholding taxes, as indicated by his Confidential Minute to the Treasurer of 15 September 1992. Questions were asked why the Commissioner changed his mind on this matter and when the hurried $1.7 billion strategy replaced the option of withholding taxes. Mr Boucher gave no answers as to how or why he changed his views, which occurred subsequently to the hole being found in the Budget.

9. Australian Taxation Office Agreement with the Public Sector Union

A number of questions were raised in relation to the ATO Modernisation Agreement between the Public Sector Union (PSU) and the ATO.

The Agreement was intended to commit the PSU to the ATO's ten year modernisation program aimed to improve the efficiency and productivity of the ATO.

But it was reported subsequently that the ATO had been forced to cut operations to pay the salaries of redundant staff who could not be retrenched because of the Agreement.

If the Commonwealth had not bailed out the ATO with an additional $114 million three weeks after the Budget, it would have been unlikely that the ATO would have been able to meet its wages bill in the years 1993-94, 1994-95 and 1995-96.

The ATO made an attempt to refute this claim in the hearings, only to admit subsequently that the figures they were using were wrong and misleading to the Committee.

The previously numerically dominant Union in the ATO, the Tax Branch of the Federated Clerks Union (FCU), was bypassed and the Agreement entered into with the Public Sector Union. Far from achieving gains in productivity, the Agreement, at least on the face of it, appears to guarantee the Union privileges to which it should not otherwise be entitled.

A PSU official gave evidence to the Committee that the Department of Finance gave its imprimatur for the deal, but it seems that this could not be further from the truth. According to the Department of Finance, which sent observers to the hearing, it was not a party to the Modernisation Agreement. On the contrary, the Department originally made comments on the Agreement, held reservations on a number of issues, and certainly did not endorse it.

On any thorough reading of the agreement, the Union was given some outrageous concessions.

From the outset, the Union was promised no compulsory retrenchments as a result of modernisation and no reduction in the classification of positions, despite the commitment to the Department of Finance when seeking approval for the expenditure of $1.2 billion for the modernisation program, that the staffing level would reduce by 3 000 employees.

The rigidities within the current workplace were to be retained with a bar to the use of temporary employees, consultants and contractors if such engagement would disadvantage permanent staff in terms of job satisfaction, career and skills development.

To say some of the terms reached in relation to the work environment were overgenerous is an understatement. For instance, no staff member is to be required to work for more than four hours on any one day on keyboard duties. Officers who are required to use screen-based equipment will be entitled to free eyesight tests, and where spectacles are required for such work, the ATO will be required to reimburse the cost of standard frames and monofocal lenses.

There are also statements made on recruitment mix which might reflect on the ability of the ATO to give full scope to merit as the basis of for staff promotions.

Section 12.4 of the Agreement states:

Recruitment of officers with higher qualifications will not disadvantage groups who are the subject of specific Government policies or the EEO program (eg. Youth Trainees, Aboriginal and Torres Strait Islanders).

On the other hand, overgenerous concessions are made for those staff undertaking studies. An ATO scholarship scheme has been established to allow for three hours per week for attendance at classes, five working days per semester for other study requirements and the reimbursement of administrative fees. In addition, the Agreement commits the ATO to annually reimburse the HECS contribution to those who complete courses, as well as reimbursing the HECS charge for new graduate recruits.

Compulsory relocation of staff is only to occur where there is minimal disruption to the staff's expenses, travel arrangements and domestic circumstances and, where the offices are within close proximity to each other, meaning within the same CBD or within the same or adjoining suburb.

Perhaps the greatest concession to the PSU is in the area of union involvement in the modernisation program. Besides being given one senior level representative on the overall steering committee for modernisation, the PSU will be entitled to representation on all steering committees, project teams and working parties.

The ATO will also be required to fund for up to six weeks at least two PSU teams each year to generate ideas and evaluate project team options.

The absurdities of the lengths to which industrial democracy can be carried is seen where the ATO is to fund a Union Advisory Unit to carry out research and provide advice on Modernisation for the PSU. This amounts to direct taxpayer funding of the PSU, as the ATO is to fully fund this unit which is to consist of three researchers funded to the salary equivalent of ASO 8 officers and one support staff member funded to the salary equivalent of an ASO 3 officer.

In addition, the Unit was to be provided with an annual budget for travel and for the engagement of consultants as well as office accommodation and facilities.

The Agreement conferred considerable benefits upon the PSU to the exclusion of other unions who may have members within the workplace, and certainly against the interest of those ATO officers who may have a conscientious objection to the PSU, or remained in the FCU.

For instance, ATO staff will only be represented on steering committees, working groups and other similar bodies by nominees appointed by the PSU. Besides agreeing to encourage ATO staff to become union members, the ATO has also agreed to provide the PSU with the names of new staff 'except where individual officers lodge objections'. The FCU are not extended the same facility.

It is not clear what steps officers have to take to lodge objections, and indeed whether they are made aware that they can do so when they join the ATO.

Union representatives are also to be given considerable resources by the ATO at taxpayers' expense. Generous provision is made for PSU representatives to be granted time during normal working hours to undertake union business, the definition of which is extremely broad. PSU delegates will also be entitled to 'special leave' to attend Executive meetings and National Delegates Committee meetings.

Each branch office of the ATO is to provide, again at taxpayers' expense, an office for the PSU including a desk, lockable cabinet and an unbarred telephone.

Further, the ATO has agreed to fund the production of a video providing the PSU with the opportunity to set out its position on the Modernisation program, and the application of the Agreement itself between the PSU and the ATO.

At no point does the Agreement state how much these privileges for the PSU will cost the Australian taxpayer.

It is important to note that nowhere in the Agreement is any consideration provided, that is something conceded, by the Union, in return for this overgenerous deal.

## 10. Tax evasion and tax avoidance

### 10.1 'Tax gap' not estimated and published by the Australian Taxation Office since June 1985

The Financial Statements of the ATO for the year ended 30 June 1992 were qualified by the Auditor-General on the grounds that, due to tax evasion and other breaches of taxation laws by individuals and entities, an undetermined proportion of taxation revenue legally due to the Commonwealth, referred to as the 'tax gap', has not been brought to account.

The Auditor-General has also, in accordance with s. 51(1)(d) of the *Audit Act 1901*, in the Audit Reports for the years ended 30 June 1989, 30 June 1990 and 30 June 1991 drawn attention to the failure of the ATO to estimate the 'tax gap' and bring it to account or disclose it by way of a note to its Financial Statements

10.2 Significance of the qualification relating to the 'tax gap' of the Financial Statements of the Australian Taxation Office by the Auditor-General

The qualification arises from the inability of the ATO to provide an estimate of the impact on revenue of non-compliance and breaches of taxation laws administered by the Commissioner of Taxation. This estimate is a matter of utmost significance as it reflects on the efficacy of the tax reform measures of the last ten years which were introduced primarily to curb tax evasion and tax avoidance, and is a key indicator of performance and accountability of the organisation charged with the administration of the taxation laws of the Commonwealth. It is fundamentally the bottom line figure that is missing from the Financial Statements of the ATO. The vast majority of Australians, who are honest taxpayers and who have had to carry the burden of the tax reform measures of the last ten years, have a right to know what impact these measures have had on tax evasion and tax avoidance. It is a cost to the community which should be measured as far as practicably possible and disclosed, annually in Parliament, in the interests of open government.

The independent Audit Report of the Australian National Audit Office dated 20 November 1992 states as follows:

> **Qualification**
>
> As indicated in Note 2 of the statement, taxation revenue is affected by the incidence of tax evasion and other breaches of the taxation laws by individuals and entities. Although the ATO has various service and enforcement activities designed to promote voluntary compliance with the legislative requirements and to bring to account those persons and entities that do not comply with the requirements, the ATO accepts that a proportion of non-compliance is undetected and therefore that a corresponding proportion of taxation revenue legally due to the Commonwealth is not brought to account; however, the ATO has not estimated the amount of taxation revenue not brought to account.
>
> I am unable to form an opinion on the extent to which tax evasion and other breaches of taxation laws by individuals and entities affect taxation revenue. I am therefore unable to form an opinion on whether the total amount of taxation revenue brought to account in the financial statement (that is 'Taxation Revenue' in the Detailed Statement of Transactions by Fund' and 'Receivables – Taxation' in the Statement of Supplementary Financial Information) differs to

a material extent from the total amount of taxation revenue legally due to the Commonwealth.[19]

10.3 Estimates of 'tax gap' made by the ATO for the Tax Summit in 1985

The ability of the ATO to estimate the extent of tax evasion and tax avoidance in 1984-85, in preparation for the Tax Summit in 1985, contrasts with its apparent inability to refine the technique of estimating this key indicator over the last seven years and casts a shadow on the independence of the management of the organisation. This was compounded when the Commissioner of Taxation confirmed in writing to the Treasurer in September 1992 that if given a sum of $114.5 million he would be able to collect additional revenue of $1.7 billion to fill the black hole discovered in the pre-election Budget of 1992-93, which is referred to in greater detail in a subsequent paragraph.

The figures estimated by the ATO of tax evasion and tax avoidance, in the Draft White Paper titled *Reform of the Australian Tax System* (June 1985),[20] suggest that income tax evasion for 1984-85 may involve a revenue loss of at least $3 billion per annum. Tax evasion refers to practices that are clearly contrary to law and may take the form of the failure to lodge income tax returns, the omission of assessable income or the overclaiming of deductions or rebates.

Apart from the loss of revenue by tax evasion, the revenue lost through tax avoidance by certain specified minimisation schemes was estimated in the Draft White Paper at $1.48 billion. The term 'tax avoidance' is applied generally to all of the tax minimisation practices which the law allows.

In addition the forecasts of tax evasion and tax avoidance made in 1985 indicated that tax evasion and tax avoidance was set to increase from an aggregate of $4.5 billion to $7 billion (in 1984-85 prices) unless corrective action was taken.

> In aggregate, revenue losses through the forms of avoidance and evasion which are discussed in this paper could increase from the estimated existing level of around $4.5 billion to around $7 billion (in 1984-85 prices) over the next three years unless a concerted attack is made in these areas.[21]

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19. Commissioner of Taxation - Annual Report 1991-92, *Towards a World Class Tax Administration*, AGPS, Canberra, p. 282
20. *Reform of the Australian Tax System - Draft White Paper*, AGPS, Canberra, June 1985, paragraphs 3.7, 3.8
21. ibid., p. 38, paragraph 3.12

10.4 Estimates made by the Australian Taxation Office in September 1992 of additional revenue of $1.7 billion on new Compliance/Enforcement Strategy

The 18 August 1992 Budget Paper No. 1, of the pre-election Budget of 1992-93, indicated that the maintenance of the revenue base and reduction of the budget deficit for the year 1995-96 may require the introduction of new taxes including the domestic withholding tax on interest. Such tax measures were estimated to yield between $2 billion and $3 billion.

> The revenue to GDP ratio is estimated to decline slightly on a no policy change basis over the coming years and on the basis of current projections, the budget deficit in 1995-96 would be around 1¼ percent of GDP.
>
> However, to maintain the structure of the revenue base and reduce the prospective deficit for 1995-96 the Government is prepared to consider reforms to the interest domestic withholding tax, the scope of the PPS arrangements and the FBT system (to make more neutral the taxation of remuneration in cash and kind), if nearer to the time the prospective deficit is as now projected.
>
> Adoption of such measures could yield between $2 billion and $3 billion, which would point to a budget deficit of between ½ and 1 per cent of GDP.[22]

The political furore that followed this revelation brought, at the request of the Treasurer, a quick response from the Commissioner of Taxation of a new Income Tax Compliance/Enforcement Strategy, which made it unnecessary to consider the implementation of new tax measures. The new initiatives of the ATO would bring in some of the tax currently evaded or avoided and likely to be evaded or avoided in the years 1994-95 and 1995-96 totalling $1.7 billion.

Confidential Minute No. 221 to the Treasurer, dated 15 September 1992, which was tabled in the House of Representatives on 16 September 1992 stated as follows:

> Treasurer
>
> 1. You have asked for my advice about the extent to which there might be enhancement or improvement in measures to achieve better compliance with the income tax laws.

---

22. *Budget Statements 1992-93 Budget Paper No. 1*, AGPS, Canberra, 1992, p. 4.41

2. As you know, the income tax system is founded on voluntary compliance principles and is administered on a self assessment basis. Supporting mechanisms are found in systematic approaches (principally the PAYE and TFN systems), and a variety of help and enforcement techniques.

3. I have had the matter examined in this context, and propose a number of new and enhanced initiatives.

4. Earlier this year, when addressing the question of a domestic withholding tax on interest I made the general point that it is a tenet of income tax administration that the most efficient and effective means of gathering tax is to have it deducted at source. I indicated that in moving from the general to the particular a range of matters need to be worked through. Solutions to them involve varying degrees of difficulty, of administration and otherwise.

5. I now do not recommend any extension of deduction-at-source systems, either by way of domestic interest withholding tax or extension of the prescribed payments system. Alternative information reporting procedures, such as the highly successful TFN arrangements, can be very valuable in securing compliance and can obviate the need for further deduction at source arrangements. I am therefore recommending some extension of TFN reporting processes.

6. My report on the situation and my recommendations for action, including also our estimates of the resulting gains in revenue, additional to what has been factored into current estimates of revenue receipts, is attached.

(T. P. Boucher)
Commissioner of Taxation
15 September 1992

This Minute shows that Mr Boucher abandoned his previously held views on the efficiency of the withholding tax on domestic interest. As stated earlier Mr Boucher gave no answers as to when, how or why he jettisoned his convictions. The reason for Mr Boucher's change of mind remains a mystery.

The ATO estimated that additional gains to revenue of $1.7 billion over two years in 1994-95 and 1995-96 would be achieved, provided there was additional funding for the ATO of $114.5 million over three years

commencing in the financial year 1993-94. It was estimated that these additional resources would allow the employment of approximately 630 full time staff.[23]

The details of the additional revenue estimates are considered in paragraphs 8.100 to 8.139 of the majority report. The observations in those paragraphs that reflect upon the credibility of ATO estimates, as well as the further administrative and record keeping burdens on all taxpayer segments, envisaged in the new Income Tax Compliance /Enforcement Strategy are highlighted below. I concur with the findings of the majority report.

10.4.1 Broad outlines of compliance strategy for collection of additional revenue of $1.7 billion developed in three weeks

8.102 The Strategy was developed by the ATO within a three week period and presented to the Government on 15 September 1992.[24] Four taxpayer segments were identified in the Strategy;

- Large/Medium Business;
- Small Business;
- Non-business Individuals; and
- Special Audit (Criminal Activities)

8.103 For each segment, the Strategy provides a description of the:

- taxpayer segment;
- broad approaches to compliance in that strategy;
- areas of emphasis for 1992-1995; and
- proposed enhancement measures.

10.4.2 Guesstimates of Additional Revenue

9.28 The second measure of revenue efficiency proposed by the ATO relates to what is commonly known as the 'tax gap', that is, the difference between the legally due level of revenue and the actual level collected. As the ATO was not able to calculate a number of the elements of the theoretical tax pool and instead preferred to obtain reliable, timely estimates of taxpayer compliance with respect to key

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23. Australian Taxation Office, *Income Tax Compliance/Enforcement Strategy*, Canberra, 15 September 1992.
24. ibid.

income streams, industries and occupations, the Committee was unable to evaluate the ATO's performance against this criteria.

9.29 ... As mentioned in Chapter 8, the Committee considered as 'guesstimates' proposed additional revenue collections based on improved compliance behaviour by taxpayers where no evidence of the level of actual or existing behaviour was provided. The Committee has concluded that the ATO should not make assertions concerning increases in revenue from increased compliance if it can not substantiate current compliance percentages.

(emphasis added)

10.4.3 Potential for overlap between revenue projections of Compliance/Enforcement Strategy and Modernisation Program

**Large/Medium Business Segment**

8.107 The Committee recognised that several of the functions identified as relevant to this taxpayer segment had been foreshadowed publicly prior to the formal release of the Strategy or derived from recommendations of the Pappas, Carter, Evans and Koop Report into the Large Case Audit Program.[25] These recommendations included:

- implementation of a series of auditing arrangements for the top 600 companies; and
- increasing the level of resources committed to the writing of Income Tax Rulings and Determinations.

(emphasis added)

8.108 As several of these functions had already been identified, and in some instances already commenced, the Committee was concerned at the potential for overlap in the provision of revenue projections arising from the Strategy and the modernisation program. The Committee has concluded that there is a need for the ATO to quantify additional revenue anticipated from its modernisation program. Recommendations in respect of the revenue, cost and service implications of the Collection Systems Modernisation project are contained in Chapter 7. (emphasis added)

25. Evidence, vol. 4, p. 1195

10.4.4 No evidence of current voluntary compliance levels presented by the Australian Taxation Office

8.124 No explanation of the basis of the revenue estimates were provided in the Strategy. The assumption contained in the Strategy was that an increase in voluntary compliance would produce increases in revenue.[26] No evidence of current voluntary compliance levels were presented by the ATO. The basis of the estimates was said to be from audits in these areas.[27]

10.4.5 Variations in revenue gains from the Income Tax Compliance/Enforcement Strategy given to Parliament and to the Senate Estimates Committee B

8.121 The estimated revenue gains were detailed both in the formal Strategy document given to the Government[28] and in Additional Information provided to the Senate Estimates Committee B on 10 November 1992.[29] The estimates were not identical despite the fact that the November estimates were suppose to have been prepared prior to the Strategy's release. Table 8.5 demonstrates the differences:

**Table 8.5: Estimated Revenue Returns from Compliance Strategy**

| | 1994-95 ($m) | | 1995-96 ($m) | |
|---|---|---|---|---|
| Business Segment | 16.9.1992 Strategy | 10.11.1992 Estimates | 16.9.1992 Strategy | 10.11.1992 Estimates |
| Large/ Medium | 250 | 300 | 250 | 300 |
| Small | 250 | 230 | 350 | 285 |
| Non-Business | 250 | 280 | 350 | 340 |
| Total | 750 | 810 | 950 | 925 |

Sources: Statement on Tax Policy, circulated by the Hon John Dawkins, MP, Treasurer of the Commonwealth of Australia, Canberra, 16 September 1992; Australian Senate Estimates Committee B, *Additional Information*, vol. 5, 10 November 1992, p. 51.

26. Australian Senate Estimates Committee B, *Additional Information*, 10 November 1992, vol. 5, p. 51
27. Senate Estimates Committee B, op. cit.
28. Australian Taxation Office, op. cit., p. 21
29. Australian Senate Estimates Committee B, op. cit., p. 51

8.122 The ATO explained these variations as a matter of simple rounding.[30] However, as can be seen from Table 8.5, there was a significant change in the bottomline estimate of revenue to be collected.

8.123 As the information contained in the statement to the Parliament and the Additional Information provided to the Senate Estimates Committee were not equivalent, the Committee could not satisfy itself of which estimates of revenue were correct. The Committee determined that the differences in the estimates reflected the amount of time which had been available to the ATO to prepare its estimates in September 1992.

(emphasis added)

10.4.6 No evidence on the basis on which revenue estimates were prepared - Australian Taxation Office had yet to complete a Request for Tender Document giving specifications of computer hardware required for enhanced income matching

8.127 Tables 8.6, 8.7 and 8.8 demonstrate the estimates of increased revenue forecast in the strategy from the various strategies detailed.

**Table 8.6: Large Business Segment - Estimates of Increased Revenue**

| Large/Medium Business (Turnover > $5m) | 1994-95 ($m) | 1995-96 ($m) |
|---|---|---|
| Enhanced Rulings | 200 | 200 |
| Expanded Complex Audit activity | 50 | 50 |
| Expanded 'Business Audit' activity | 50 | 50 |

Source: Australian Senate Estimates Committee B, *Additional Information*, vol. 5, 10 November 1992, p. 51.

30. Evidence, vol. 5, p. 1543

**Table 8.7: Small Business Segment - Estimates of Increased Revenue**

| Small Business (Turnover < $5m) | 1994-95 ($m) | 1995-96 ($m) |
|---|---|---|
| Record Keeping reviews | 115 | 170 |
| New Information reporting | 100 | 100 |
| Expanded Business Audit | 15 | 15 |

Source: Australian Senate Estimates Committee B, *Additional Information*, vol. 5, 10 November 1992, p. 51.

**Table 8.8: Non-Business Individuals - Estimates of Increased Revenue**

| Non-business Individuals | 1994-95 ($m) | 1995-96 ($m) |
|---|---|---|
| Enhanced Income Matching System | 180 | 240 |
| PAYE leakage enforcement | 100 | 100 |

Source: Australian Senate Estimates Committee B, *Additional Information*, vol. 5, 10 November 1992, p. 51.

8.128 In both 1994-95 and 1995-96 in excess of 50% of the estimated increased revenue is expected to be raised as a result of improved taxpayer compliance. In respect of non-business individuals, additional revenue is anticipated to flow from an increase in cases of income understatement identified by the income matching system. The ATO indicated that, while it had identified a functional requirement for better income matching, it was not certain how to actually achieve that goal.

8.129 Given that the full extent of the functionality requirements had not been completed when the strategy was announced, it was surprising that the ATO had been able to determine potential revenue increases. No evidence concerning how the revenue estimates were prepared was available as the ATO had yet to complete a Request for Tender document in which the specifications for the computer hardware would be provided.[31] In the absence of details allowing the preparation of such a document, the Committee concluded that the full extent of the potential revenue increases could not be reasonably determined. Moreover,

31. Senate Estimates Committee B, *Hansard*, op. cit., p. B680

the Committee could not determine, on the evidence available, why there was a projected $60 million increase in revenue from this measure in 1995/96.

(emphasis added)

10.4.5 More legislation prescribing records for small business and increased compliance costs

**Small Business**

8.110 In the area of small business, the Committee noted that the Strategy foreshadowed increased revenue returns from improvements in record keeping and information reporting.[32]

8.114 The second limb of the Strategy in respect of small business involved an expanded program of information reporting. Implementation of this limb would require legislative change. Legislation specifying the records businesses should keep in order to prepare income tax returns was proposed. Such a prescriptive action is premised upon extensive consultation with the accounting profession and small business organisations.

8.115 Information reporting requirements are expected to extend to areas in which arrangements include:

- income paid through specified marketing agencies (covering areas of primary production);
- income for specified services rendered by professionals and other consultants;
- income of specified commission agents and independent contractors not subject to the Prescribed Payments System; and
- Business Licence arrangements.

(emphasis added)

32. Australian Taxation Office, op. cit., p. 9

10.4.6 No discernible strategy for utilisation of data resulting from record keeping imposed on small business obtained by further legislation

8.111 Evidence in respect of the record keeping review program failed to explain entirely the technique that this program would adopt. Described as both a 'new, educative strategy' and a 'program of record-keeping audits',[33] there appeared to be some confusion about the extent to which the Strategy would seek to assist and advise taxpayers and the extent to which audit procedures would be utilised.

10.4.7 Extension of PAYE to 'independent contractors'

8.118 Other areas of concern identified by the ATO for this segment included:

- use of 'independent' contractors to avoid the PAYE provisions;
- casual/itinerant workers; and
- substantiation of work-related expenses.[34]

10.4.8 Non-business individuals subject to more income matching schemes with uncertain outcomes

8.117 The Non-business Individuals taxpayer segment covers the vast majority of taxpayers. The ATO recognised that compliance in this segment was generally very high, principally as a result of the systematic approach that has been adopted to collect tax in this segment.[35] The use of withholding taxes and income matching systems has vastly decreased the opportunities for evasion.

8.119 Strategies identified by the ATO to improve compliance in this segment included the development of an improved income matching system utilising more advanced technology for the processing and analysis of information obtained from relevant sources. Also the ATO planned to step up activity to prevent further leakage from the PAYE system occurring as a result of artificial employment arrangements. In this regard the ATO signalled its strong intention to push for legislative change to enable the PAYE system to be extended to independent contractor employment arrangements.(emphasis added)

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33. Senate Estimates Committee B, *Hansard*, op. cit., vol. 4, p. B687; Australian Taxation Office, op. cit., p. 11
34. Australian Taxation Office, op. cit., p. 13
35. ibid.

10.4.9 Capital gains non-compliance attributable to ignorance of complex laws

8.118 Capital gains tax was recognised by the ATO as a potential risk area for the revenue. Through ignorance of the law, rather than deliberate evasion, loss of revenue from the Capital gains tax was considered a major problem.[36] (emphasis added)

10.5 Urgent requirement for an Independent External Review to examine the basis of revenue estimating and to set parameters for measuring the 'tax gap'

The only conclusion that can be drawn from the foregoing observations is that ATO revenue estimates are not only incapable of being independently verified but are not based on any tested formula for measuring additional revenue from increased compliance. The Commissioner of Taxation should have avoided being drawn into the political arena by providing a set of estimates of additional revenue on the basis of 'guesstimates'. The fact that the Commissioner of Taxation was prepared to stake the his credibility and that of the ATO, in what was essentially a political debate, speaks for itself as to the extent of the politicisation of his office.

In view of the importance of measuring the revenue impact of the Income Tax Compliance/Enforcement Strategy for the operations of the ATO generally, and the integrity of the tax system in particular, it will be necessary for Parliament to be informed at an early date whether the appropriations which it is called upon to authorise for implementing such strategies including the Modernisation Program of the ATO are warranted. Such estimates must be subject to review by an Independent External Review, to be conducted in public.

The recommendation made in the majority report does not appreciate the need for urgency in restoring integrity to the Australian tax system by ensuring that revenue estimates are prepared on an acceptable basis. Nor does it recognise that the best techniques available at any given time are applied to set parameters for measuring the 'tax gap'. This matter cannot be left to the ATO alone, to be reported to Parliament in its Annual Reports for 1994-95 and 1995-96, as suggested in the majority report, and must be subject to scrutiny by an Independent External Review.

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36. ibid.

8.130 The Committee has concluded that the revenue estimates contained in the Strategy can not be verified independently. The Committee further concluded that the ATO should seek to measure the impact of the compliance Strategy on taxpayer behaviour and revenue outcomes and report to the Parliament the outcome of the Strategy in its 1994-95 and 1995-96 Annual Reports.

(emphasis added)

Efficiency Audit Reports of the Auditor-General have, at various times in the past decade, drawn the attention of the ATO to the need to measure the impact of the compliance strategy on taxpayer behaviour and revenue outcomes. However, it would appear, on the findings of this Committee, that no progress has been made by the ATO to refine its techniques of estimating revenue and the 'tax gap'. Thus in the Auditor-General's **Efficiency Audit Report**, titled *Australian Taxation Office: Taxpayers in unincorporated businesses,* the Auditor-General stated explicitly that without knowing the relative size of non-compliance the ATO cannot allocate its resources for greatest effectiveness and efficiency.[37] He referred to the previous **Efficiency Audit Reports** of the Australian Audit Office (AAO), now the Australian National Audit Office (ANAO), and drew attention to the estimates of tax evasion and tax avoidance in the Draft White Paper of June 1985 which, when updated, could be the benchmark for measuring the 'tax gap.

4.1 Measurement of tax evasion

4.1.1 It is fundamental to the ATO's compliance activities that it know the relative size of non-compliance in the various areas of taxation. Without this knowledge the ATO cannot allocate its resources for greatest effectiveness and efficiency. Estimates of tax evasion for 1984-85 were published in the Draft White Paper Reform of the Australian Taxation System:

| | $m |
|---|---|
| Understatement of business income (b) | |
| - unincorporated enterprises | 1,000 |
| - companies | 500 |
| Non-declaration of fringe benefits received in kind | 700 |
| Overclaimed employee expenses | 150 |
| Unreported wage and salary income | 100 |
| Non-declaration of dividend and interest income | 300-500 |
| Non-declaration of rental income | 300 |

37. Auditor-General, *Australian Taxation Office: Taxpayers in Unincorporated Businesses*, AGPS, Canberra, November 1987

4.1.2 The AAO has previously expressed concern about the accuracy of ATO estimates (in the efficiency audit reports on unpresented group certificates[38] and the Prescribed Payments System[39] tabled in Parliament in August and September 1986 respectively).

4.1.3 In August 1986, in Compliance Strategy--1986, the ATO documented its concern about the lack of information about non-compliance:

... at the present time the ATO does not have sufficient data on the extent and nature of non-compliance with the income tax laws. As a consequence it is not possible to measure or predict the impact of the various compliance activities on voluntary compliance as an aid to, among other things, decision making on how resources might best be allocated across the various audit programs.

4.1.4 The Projected Staff Usage Plan-1985-86 for the Enforcement Co-ordination Branch Research and Surveys Unit allocated only one staff-year for measurement studies. The ATO advised that measurement studies were pushed into the background because the Unit was co-ordinating the development of computer applications. In 1986-87 it was expected that three measurement projects would be completed. In January 1987, as part of the re-organisation of the National Office Compliance Directorate, an Audit Strategies Branch was established with four positions dedicated almost exclusively to measurement research. Work has commenced in that branch on three new measurement projects.

4.1.5 The AAO examined the three measurement studies underway during 1986: rental income, Australian Wheat Board payments and unapplied PPS credit.[40]

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Auditor-General, *Australian Taxation Office, unpresented group certificates*, AGPS, Canberra, 1986

Auditor-General, *Australian Taxation Office: Prescribed Payments System*, AGPS, Canberra, 1986

Auditor-General, *Australian Taxation Office: Taxpayers in unincorporated businesses*, AGPS, Canberra, November 1987

The conclusion reached by the ANAO after reviewing the three measurement studies was that they were not carried through to a point where conclusions could be drawn, as would be seen from the following comments and recommendation.

> 4.1.16 The AAO considers that measurement projects undertaken by the ATO in the past have not been true measurement studies in that they have been discontinued at any stage where it appeared that they would not produce much revenue. This has meant that the ATO has not been able to draw any firm conclusions about the level of evasion in the areas examined. Projects could be discontinued for a number of reasons:
>
> · there was no apparent evasion in the area under investigation
>
> · it was considered that taxpayers could not pay any debits raised, or
>
> · audit procedures were not effective in obtaining adequate evidence at a sufficiently low cost.
>
> Recommendation 1
>
> The AAO supports the initiative and recommends that:
>
> (a) the ATO carry through its measurement studies to completion to provide valid measurements of tax evasion
>
> (b) the importance of the ATO initiative to develop and implement a comprehensive plan of measurement research be made clear to ATO staff in the States and the necessary monitoring and reporting machinery be implemented to ensure the achievement of targets for individual measurement projects, and
>
> (c) the importance of the initiative be reflected in the resources, debit targets and coverage targets set for the branch offices.[41]

It is a reflection on the management of the tax administration that, six years after this recommendation was made, this Committee finds it necessary to reiterate this recommendation. However taxpayers would not be satisfied by periodic recommendations in Efficiency Audit Reports and Reports of Parliamentary Committees which fail to produce the desired results. This is one of those tasks that the Australian Board of Taxation, proposed earlier in this report, should be responsible for monitoring and

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41. ibid., pp. 17, 18

reporting to Parliament annually, independently of the Commissioner of Taxation.

10.6 Recommendations

**That to ensure proper accountability of the taxation administration to Parliament that -**

- **the Australian Taxation Office develop a means for measuring the revenue impact of the Income Tax Compliance/Enforcement strategy and report to the Parliament at the earliest opportunity;**

- **the Australian Taxation Office prepare estimates of possible revenue gains relating to all systems redevelopment proposals which pertain to modernisation developments, including changes to administrative practices and procedures and advise Parliament of those estimates;**

- **an Independent External Review examine the revenue impact study of the Australian Taxation Office relating to the Income Tax Compliance/Enforcement strategy, the estimates of revenue gains from various initiatives, and the techniques that could be developed for measuring or setting parameters for estimating the 'tax gap'; and**

- **an Australian Board of Taxation should monitor the progress made by the Australian Taxation Office in developing and updating techniques for measuring revenue gains from various initiatives and to update the ' tax gap' so that figures are published annually along the lines of those published, prior to the Tax Summit in 1985, in the Draft White Paper *Reform of the Australian Taxation System*.[42]**

42. *Reform of the Australian Tax System - Draft White Paper*, AGPS, Canberra, June 1985

**To ensure the independence of small business -**

- **that the push by the Australian Taxation Office to include independent contractors and sub-contractors within the PAYE scheme be resisted on the basis of fairness and equity.**

## 11. Tax Reform and Tax Simplification

### 11.1 Tax reform measures of the last ten years predicated upon reduction of tax evasion and tax avoidance

The so called tax reform measures such as the capital gains tax, fringe benefits tax and the taxation of foreign source income were premised on the basis that they were required to curb an anticipated growth in tax evasion and tax avoidance in the tax system. No regard was had to the impact of these measures on the economy. Thus the Draft White Paper stated:

> 3.12 ..., avoidance and evasion practices can be expected to grow rapidly in the future unless further major measures are taken to deal with them. For example the increasing movement of average PAYE taxpayers into higher tax brackets is likely to stimulate growing resort to fringe benefits so that higher marginal tax rates will apply to a shrinking tax base and a vicious circle will be set in train. The loss of revenue through avoidance and evasion in other areas (including the business sector) is also likely to grow rapidly. In aggregate, revenue losses through the forms of avoidance and evasion which are discussed in this paper could increase from the estimated existing level of around $4.5 billion to around $7 billion (in 1984-85 prices) over the next three years unless a concerted attack is made in these areas.
>
> 3.13 Measures canvassed in other chapters in respect of fringe benefits tax , tax shelters, trusts, tax havens, income splitting, capital gains, foreign tax credits, restructured personal income tax rate scales and changes in the tax mix have the potential to reduce significantly the opportunities and/or the incentives to engage in avoidance and evasion practices.[43]

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43. ibid.

These measures in one form or another have been introduced since 1985 and honest taxpayers, who bore the burden of these measures, can find little comfort in the lament of the Commissioner of Taxation, in his last Annual Report to Parliament, that the Auditor-General could have been more helpful and should have refrained from making a 'quasi-qualification' on a matter which the Commissioner of Taxation considers is of 'tangential connection only with our Financial Statements' for the year ended 30 June 1992.[44]

> I had occasion during the year to question whether the Auditor-General was being as helpful as his role allowed him to be. That is, if we are to be criticised for not coming up to scratch and are told we should do better, then we ought to know in advance what the desired standard is.
>
> While on the subject of the Auditor-General, I draw attention to a further matter. Our Financial Statements make note of the fact that the ATO has not estimated the total amount of tax legally owing to the Commonwealth but not collected because of failure on the part of elements of the community to meet their obligations under tax law.
>
> The Auditor-General feels obliged to draw these failings of the community to the attention of the Parliament in his report on our Financial Statements, to be included in this Annual Report. While the Auditor-General has made it clear in correspondence that highlighting this issue is not intended to reflect upon the ATO, I wish to record here my concern that any such 'quasi-qualification' is of little use in assisting the reader to understand this issue and may indeed mislead the reader into believing that the ATO is not active in pursuing revenue. I have to question the wisdom of including such an audit observation, in view of our successful efforts over recent years to systematically analyse compliance by market segment, and the tangential connection between the issue and our Financial Statements.

In view of the tax evasion and tax avoidance driven nature of the tax reforms over the last ten years, honest taxpayers will find it surprising that the valedictory plea of the Commissioner of Taxation is that the Auditor-General should not refer to the 'tax gap', the key bottom line figure in the Financial Statements of the ATO that must mean most to them. This is the figure that will inform taxpayers whether the burdens of the tax reform measures have had the desired effect.

The fact that the ATO, under the administration of the same Commissioner of Taxation, considered itself able to estimate the 'tax gap' for the Tax

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44. Commissioner of Taxation, *Towards a World Class Tax Administration, Annual Report 1991-92*, AGPS, Canberra, 1992, pp. 3, 4

Summit in 1985, does not stand easily with the plea that the ATO after *eight years of his administration is not equipped to make such a judgment.* This would also prompt honest taxpayers ask the question whether they have had an overdose of burdensome tax reform measures, without a compensatory wider distribution of the tax burden.

They may also be curious to discover whether the 'level playing field' has become illusory. Have these reform measures done their part in driving away an unacceptable level of Australians from the playing field, altogether, for the foreseeable future? Will the patch work repair now being done to the worn out turf of tax reform measures bring back the players onto the playing field? Or will it be necessary to roll back the turf and reject those parts that deter economic recovery in the interest of getting more *Australians back, as quickly as possible, onto a playing field?*

11.2 A recent study indicates that a segment of the tax evaded in 1989-90 was around $6 billion

A 1992 article titled *Estimates of Cash-Based Income Tax Evasion in Australia,* by Glen Hepburn of the Department of Economics, University of Melbourne, estimated the tax revenue loss for 1989-90 at $6.2 billion. This study confined itself to estimating the tax loss on cash-based income tax evasion. As explained by the author:

> Tax evasion is raised as a major concern in discussions of *reform of the Australian tax system yet there is lack of* information relating to the extent of evasion. Tax evasion may take several forms, some do not require underground cash circulation, such as evasion through the exaggeration of tax deductible expenses, or evasion practiced through barter transactions. This article concentrates on cash-based income tax evasion, which refers to the omission of assessable income from an individual's tax return through concealed, that is 'cash in hand', payments which are not reported to the taxation authorities.[45]

The figure of $6.2 billion of tax evaded is only a segment of the total tax evaded and does not include tax avoided by tax minimisation practices. The capital gains tax of $582 million collected in the year 1989-90[46] ($293 million in 1991-92) compares unfavourably with a sum of $6.2 billion or even half that amount that has not been brought into the Consolidated Revenue. Taxpayers are entitled to ask the question whether the complexities of capital gains tax and other taxes such as the taxation of

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45. Hepburn, G, 'Estimates of cash-based income tax evasion in Australia', *The Australian Economic Review,* 2nd Quarter 1992, p. 54
46. Commissioner of Taxation, op. cit., p. 204

fringe benefits and foreign source income have served the purposes of curbing tax evasion and tax avoidance and whether there is an alternative which is appropriate and easier to administer.

**While finding answers to some of these questions did not come directly within the terms of reference of this Committee, the question of tax simplification clearly figures in it, as this holds a key to a more efficient tax administration.** Tax simplification will also relieve the burden placed on taxpayers with the self assessment regime, if it is to continue. However, simplifying the tax legislation and the tax system cannot be considered in isolation from the question of tax reform.

This report considers the complexities and ramifications of the capital gains provisions in the following section. Its reach has extended well beyond the attempt to tax gains falling within the grey area of the definition of income in the *Income Tax Assessment Act 1936.* The capital gains provisions nurture an hidden inheritance tax and a discriminatory tax on capital or wealth. The revenue intakes from this multi-faceted tax bear no comparison to tax evasion which the ATO has failed not only to estimate but appears to have failed to reign in. A revamped ATO under an Australian Board of Taxation, which is properly accountable for its compliance and enforcement measures, on the basis of periodically published figures of the 'tax gap', should make good the projected declining revenues from the taxation of capital gains by successfully pursuing a fraction of the tax evaded and avoided.

The introduction of a speculative gains tax which is simpler to administer and would not have the hidden features of an inheritance tax and a discriminatory wealth tax, would also mitigate against the loss of revenue from the present capital gains tax.

The major impact of the taxation of capital gains , in the present economic situation which features unacceptable levels of unemployment, is to act as a disincentive to investment. In the interests of rewarding the risk takers who are urgently required to get the economy moving and creating real growth and employment, it is recommended that the taxation of capital gains in its present form be abandoned. It may be appropriate to consider the implementation of a speculative gains tax, which is simpler to administer and would not have the hidden features of an inheritance tax and a discriminatory wealth tax, after the proposed Australian Tax Law Reform Commission has examined its feasibility and makes its recommendations. The acceptance of this recommendation will increase the possibility of simplifying the tax system by removing this multi-faceted tax and the accompanying complex legislation.

In a submission I made to the Economic Planning Advisory Council in March 1985, in connection with the Taxation Summit held later in that year, I made the following recommendation, which is just as relevant today as it was in 1985:

> There be no general capital gains tax as it is inefficient, unnecessary and in the light of Australia's present taxation regime detrimental to the economy as a whole.

In the light of the experience of the capital gains tax with all its complexities, incomprehensible rules, elements of discriminatory wealth tax and hidden inheritance tax, it is clear that it is a burden on the community in more ways than could have been imagined when it was introduced. The burden on the community has been compounded with the need to self assess.

## Capital Gains Tax

11.3 The complexities of the capital gains provisions carry hidden inheritance and wealth taxes

The extension of the income tax to include capital gains was brought about by the addition of Part 111A to the *Income Tax Assessment Act 1936* (the Assessment Act) by the *Income Tax Assessment Amendment (Capital Gains) Act 1986.*

Professionals dealing with the interpretation of the capital gains tax legislation have over the last seven years expressed the view that there are a number of anomalous situations which are encountered in the application of this legislation. Many of the matters which are considered problematic are design features or design faults of the legislation; others are unintended consequences. The legislation is generally so complex as to be unintelligible to all but those few specialists who are dealing with the legislation on a day to day basis.

In the *Hepples* case the Chief Justice of the High Court observed that there are provisions in Part 111A of the Assessment Act that are 'extraordinarily complex'.[47] The Chief Justice continued:

> They must be obscure, if not bewildering, both to the taxpayer who seeks to determine his or her liability to capital gains tax by reference to them and to the lawyer who is called upon to interpret them.

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47. *Hepples v FC of T* (1991-92) 173 CLR 492 at p. 497

The provisions of Part 111A were originally intended to bring within the income tax net, gains arising from transactions which fell in the grey area of the definition of 'income'. However by a process of convoluted legislative design, Part 111A has been transformed into an instrument to impose all forms of exactions on amounts that are not in ordinary concepts 'gains'. As observed by Harper J of the Supreme Court of Victoria in the *Carborundum* case the complexity of Part 111A is a result of an attempt to classify as 'gain' that which is not:

> The seeds of confusion are often sown by provisions which deem something to be that which is not - or at least is not usually. Part 111A contains its fair share of such provisions. They are, however, intended to ensure that a transaction which results in a transfer of an asset, for a consideration which results in a gain, should not by reason of any artifice or disguise escape the legislative net. They were not, as I read Part 111A, intended to operate as to gather within its sphere transactions which do not involve the passing of consideration and which do not result in a gain. The Act did not intend to effect legislative transformation of black into white.[48]

11.3.1 Incomprehensible capital gains provisions - The Terrible Twins

An example of the complexities of the capital gains provisions is s. 160M(6) and (7) described by Mr Mark Leibler, a respected member of the Tax Liaison Group, as the 'terrible twins'.[49] Section 160M(6) deals with the disposal of an asset that did not exist before the disposal. It purports to deal with the case of an asset which is itself created by the disposal. Section 160M(7) of the Assessment Act deems an asset to have been disposed of in circumstances where there would not be a disposal of an asset within the other provisions of Part 111A.

The interpretation of these sections has presented difficulties and some aspects of the problems involved were considered by the Full Federal Court in *F.C.of T. v Cooling*[50] and *Hepples v F.C. of T.*.[51] The complexity of s. 160M(6) was considered by the Full Court of the Federal Court in the *Cooling* case.[52] The difficulties that a taxpayer, attempting to interpret

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48. *Carborundum Realty Pty Ltd v RAIA Archicentre Pty Ltd & Ors* (1993) 93 ATC 4418 at pp. 4420, 4421
49. 'The Terrible Twins: Sub-sections 160M(6)&(7)', *Taxation in Australia*, July 1990
50. (1990) 22 FCR 42
51. (1990) 22 FCR 1
52. *F.C. of T. v Cooling* (22 FCR 42 at p. 64)

this section will face, particularly in the context of self assessment, can be appreciated, by the following observations of Hills J:

> An interpretation which confines s 160M(6) to a reasonable meaning, consistent with the object and policy of the legislation is, in my view, to be preferred to one which produces capricious results which seem inconsistent with the scheme of it. This is one case at least, where, in my view ambiguity of expression should be resolved in favour of the taxpayer. Perhaps the word 'ambiguity' is in the present context unduly kind.

In both cases the taxpayers involved made application to the High Court for special leave to appeal from the decisions of the Full Federal Court. In the *Cooling* case, on 16 November 1990, the High Court refused the application on the grounds that there was not sufficient doubt that the payment in question fell to be assessed under s. 25 of the Assessment Act. In the *Hepples* case the High Court on 12 October 1990 granted special leave to appeal from the decision of the Full Federal Court which had held that an amount of $40 000 received for entering into a restrictive covenant deed fell into the category of taxable income under s. 160M(7).

The dilemma facing the High Court in the *Hepples* case in making an order, in view of the diverse reasons given by the judges, is illustrated by the following observations of the Court:

> What order should this Court make when a majority would dismiss the appeal but for discrepant reasons and each of those reasons is rejected by a majority differently constituted?[53]

McHugh J in interpreting s. 160M(6) made the following observations in attempting to answer the daunting question: how can a person dispose of an asset that did not exist before the disposal even as part of another asset?

> The difficulties in interpreting the sub-section are very great. One reading is sufficient to confirm the statement of Hill J in *Cooling* [94] that it 'is drafted with such obscurity that even those used to interpreting the utterances of the Delphic oracle might falter in seeking to elicit a sensible meaning from its terms.[54]
>
> [94] - (1990) 22 FCR., at p. 61

### 11.3.2 The discriminatory wealth tax

Although amendments were made to s. 160M(6) and (7) after the decision of the High Court in *Hepples,* due to the piecemeal nature of the

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53. 173 CLR 492 at p. 550
54. ibid., p. 546

amendments it is the view of practitioners that it has resolved very little. Thus an amount received by an employee as consideration for agreeing to a non-compete clause or indeed agreeing not to seek alternative employment for a period of years is treated as consideration for the disposal of a right, the right having, generally, a nil cost base with the result that the consideration so received is assessable in full.

There is no indication to the lay reader of the Act that a compensation payment of this type is caught by the provisions.

Further anomalies arise because of the expansive definition of 'asset' in s. 160A of the Act. 'Asset' is defined to mean 'any form of property' and goes on to include a number of specific assets including 'any other right'. This definition is exceptionally broad and the courts have, in cases already considered, not placed any particular restriction on the breadth of the meaning of 'asset' in the Capital Gains Tax provisions. The wide definition of 'asset' has the effect of subjecting certain types of accretions to capital to tax and to that extent is a discriminatory wealth tax. The Commissioner is himself expanding the definition of 'asset' by the use of the Public Ruling mechanism.

11.3.3 Damages awards may reflect capital gains tax exaction

It is becoming increasingly clear that capital gains tax, far from affecting a select group, is an important consideration for almost all transactions. Recent cases have focussed on the issue of whether an award for damages should take account of the possibility that the award will be subject to capital gains tax. In the *Carborundum* case, the Court refused to order the defendant to indemnify the plaintiff against any capital gains tax that may be assessed on the award of damages.[55] The Court queried whether capital gains tax was assessable, although the plaintiff had obtained a private Ruling from the Deputy Commissioner of Taxation to the contrary. Again stressing the need for clarity in legislation imposing the gains tax, Harper J of the Victorian Supreme Court said:

> This is a remarkable conclusion ... by focussing exclusively on the fact that the plaintiff now has judgment for $75 000.00, the Deputy Commissioner of Taxation was apparently able to conclude (that sum in the plaintiff's hands being a capital sum) that the plaintiff had to that extent received a capital gain. Nobody in the real world would reach such a conclusion .... In my opinion, the Deputy Commissioner Of Taxation's private Ruling, because it defies common sense, could only be justified by reference to legislation expressed in the clearest terms.

The *Carborundum* case focuses on the impact of capital gains tax on

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55. *Carborundum Realty Pty Ltd v RAIA Archicentre Pty Ltd & Ors* (1993) 93 ATC 4418 at p. 4421

litigation and damages awarded to taxpayers and persons who would be taxpayers as a result of the award of damages.It took more than seven years after the introduction of the tax on capital gains for the first case on the taxation of damages to reach the Courts in the *Provan* case.[56] This was followed by the decision in the *Tuite* case, where[57] as in the *Carborundum* case, there were notable differences in approach to the exposition of the legal principles involved.

11.3.4 Hidden inheritance tax

It is also becoming increasingly clear that the capital gains tax is both a tax on gifts and an inheritance tax in respect of assets acquired after 19 September 1985. Where assets acquired after 19 September 1985 are gifted there is liability to capital gains tax and, to the extent that the liability applies to the gains made in excess of the indexation allowance for inflation, it is an exaction by way of an inheritance tax where for instance the gift is made to a child.

The Tax Pack 93 requires that the following items must be sent to the Tax Office by the executor or trustee of a deceased estate:

(a) a certified copy of any will;

(b) a certified copy of the death certificate;

(c) a statement of the deceased's assets and liabilities at the date of death. This statement will be required in relation to salary and wage earners, only if the ATO asks for it.[58]

On the death of a person after 19 September 1985 the tax on capital gains applies to all assets acquired after 19 September 1985. Section 160X provides that, of itself, death does not constitute a disposal and therefore no capital gains tax liability can be triggered by death. However where the executor of an estate sells assets of the estate (which is treated as a trust for tax purposes) as part of the process of clearing up the estate, the executor would be deemed to have disposed of the estate for purposes of capital gains.

The death provisions also deal with the position of beneficiaries of the estate, when they eventually sell or dispose of the assets they inherit. In the hands of the personal representative or beneficiary the asset is deemed to be acquired at the date of death. The consideration for the acquisition will be the value at the date of death, if it was an asset acquired by the deceased person prior to 20 September 1985. Where the asset was acquired

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56. *Provan v HCL Real Estate Limited*; 92 ATC 4644
57. *Tuite and Ors v Exelby & Ors* (93 ATC 4293)
58. Tax Pack 93, p. 44

by the deceased person after 19 September 1985, the consideration is taken to be the cost base of the deceased person together with indexation relief.

Thus in the case of a post 19 September 1985 asset, the gains in excess of the indexation allowance for inflation, prior to the date death of a person from whom the asset was inherited, are liable to tax in the hands of the beneficiary. This is nothing more than an inheritance tax which, was introduced with little publicity in 1986 and which due to its growing significance with the passage of time, has figured in Tax Pack 93 for the first time. The additional powers necessary to enable the Commissioner of Taxation to obtain the required information with the annual income tax returns, to implement this disguised inheritance tax, was provided in 1989 when s. 161 of the *Income Tax Assessment Act 1936* was amended by *Taxation Laws Amendment Act (No. 5) 1989.*

11.4 Recommendation

**It is therefore recommended that:**

- **the taxation of capital gains under Part 111A of the *Income Tax Assessment Act 1936* be abolished by the repeal of Part 111A and, after due consideration by the Australian Taxation Law Reform Commission, a Speculative Gains Tax Assessment Act be enacted for the taxation of speculative gains.**

11.5 Tax Law Simplification

The self assessment system and the accompanying Rulings regime have highlighted the complexities of tax legislation as the main barrier to its effective and efficient implementation. What is required is not merely explaining the existing legislation but completely rewriting it by removing complex provisions which attempt to catch every conceivable (and unlikely) situation and placing reliance on the general anti-avoidance provisions which are intended to meet such situations.

In the *Annual Report 1989-1990* of the Commissioner of Taxation it was reported that the Government had set up a high profile joint ATO/Treasury Simplification project to replace the Law Improvement Unit of the ATO.

> In our 1988-89 Annual Report, we stated our intention in the coming year to 'strive for simpler taxation laws that reflect the needs of all affected parties'.
>
> Early endeavours through a Law Improvement Unit in the Group were subsumed into the Simplification project set up by the Government in February 1990 to consider options to simplify the income tax law to make it easier to understand and to comply with. This is a joint project involving Tax and

> Treasury officers. Its importance is shown by the fact that both agencies invested 25 per cent of their 'Tax policy' resources at the Senior Executive Service level in the project. At the end of the year, we were well advanced in the work.[59]

The final report of the ATO/Treasury joint task force has not been released to date. It would appear that the main difficulty in actively pursuing the simplification of the tax laws lies in an unwillingness to examine the need for the continuation of complex taxes such as the capital gains tax, the fringe benefits tax and the tax on foreign source income. Unless both questions are considered simultaneously, real simplification of the tax laws is unlikely to be realised. The abolition of the capital gains tax was recommended earlier in this report and there is a need to review the assessment of fringe benefits in its present cumbersome form.

The ATO and the Treasury are too close to the day to day tax administration and tax policy formulation to independently recommend the simplification of the tax system. It is therefore recommended that an Australian Taxation Law Reform Commission be established to undertake and complete over a seven year period, the progressive simplification of the taxation laws, generally on the lines suggested in this report.

The Government, whose policy objectives over the last ten years have been driven by the need to counter tax evasion and tax avoidance, has not demonstrated a commitment to simplify the tax system for the benefit of taxpayers. The majority of the PAYE taxpayers have little need to examine more than a few sections in the pages of the complex legislation of the *Income Tax Assessment Act 1936*.

There is therefore a need for a new approach to tax simplification generally on the lines indicated in the following recommendations.

## 11.6 Recommendations

**It is therefore recommended that there be enacted:**

- **An Australian Taxation Law Reform Commission Act to establish an Australian Taxation Law Reform Commission.**
- **An Employees(Income Tax) Assessment Act which will deal with the law relating to the assessment of employment income and those sources of income in the first part of the Tax Pack.**
- **A General(Income Tax) Assessment Act which could deal with the other sources of income and the assessment of companies, trusts and partnerships.**

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59. Commissioner of Taxation, *Annual Report 1989-90*, AGPS, Canberra, 1990, p. 19

- A general provision covering tax avoidance on the lines of Part 1VA of the *Income Tax Assessment Act 1936* should be included in the Employees (Income Tax) Assessment Act as well as the General (Income Tax) Assessment Act and there should be a move towards reliance on the general anti-avoidance provisions rather than on a multitude of specific provisions to cover every conceivable or unlikely situation.

- Further the provisions of the *Income Tax Assessment Act 1936* dealing with specific measures against tax avoidance should be placed in a separate Income Tax (Anti-Avoidance) Act and only cover measures intended to close loopholes in the assessment of income or persons under the General(Income Tax) Assessment Act.

- The Australian Taxation Law Reform Commission when established should examine, as a matter of urgency, the simplification of the law relating to the taxation of fringe benefits and the taxation of foreign source income.

Senator B K Bishop
11 November 1993