



**The Institute of  
Chartered Accountants  
in Australia**

11 April 2011

The Board of Taxation  
c/- The Treasury  
Langton Crescent  
CANBERRA ACT 2600

By email: [taxboard@treasury.gov.au](mailto:taxboard@treasury.gov.au)

Dear Board

### **Post-implementation review of the Tax Design Review Panel recommendations**

The Institute of Chartered Accountants in Australia (the Institute) is pleased to provide this submission in response to the Discussion Paper "Post-implementation review of the Tax Design Review Panel Recommendations".

Our comments on specific questions posed in the Discussion Paper are set out in the attached submission.

In our view Treasury is to be commended on the level of consultation which it undertakes and particularly on its willingness to engage with stakeholders in relation to measures that are the subject of consultation. The benefits of this approach to the consultation process cannot be overstated.

However, there is in our view room for improvement in the way in which Treasury manages the process surrounding some tax projects. We also believe that an optimum tax design process will require embracing, to a far greater extent than at present, a genuine tri-partite model approach involving Treasury, the Australian Taxation Office (the ATO) and stakeholders (whether as paid experts or otherwise).

Our submission focuses only measures where the consultation process has in our view been less than ideal, but it is worth noting that these exceptions represent a relatively small portion of the total measures progressed during the consultation period.

If you would like us to expand on any of the comments made in our submission please contact me on 02 9290 5623 or Susan Cantamessa on 02 9290 5625.

Yours sincerely,

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## Submission Post-implementation review of the Tax Design Review Panel recommendations

### Q 2.1: Issues/Questions on the timing of legislation

The Board of Taxation (the Board) seeks stakeholder comments on the following questions relating to the timing of legislation.

**Whether the increase in the proportion of prospective measures announced during the review period has enabled taxpayers to more effectively structure their tax affairs; and**

**Whether the introduction of a majority of measures within the recommended time frames (of 6 and 12 months) has lessened concerns about delays in introducing legislation for announced measures.**

These two questions are based on data relating to 57 standard measures<sup>1</sup> announced and introduced during the review period 22 August 2008 to 2010 (out of a total of 90 measures announced). Of these 57 measures, 49 measures were enacted and 8 measures lapsed. The data indicates that:

- Of the 49 measures enacted, 55% applied prospectively from the date of royal assent. This is an increase over the experience of previous years; and
- Of the total 57 measures enacted or which lapsed, 49% ( 28 measures) apply prospectively, 46% (26 measures) retrospectively and the start date of 5% (3 measures) is to be confirmed.

Of the 28 measures which apply prospectively, 93% were introduced within 12 months of announcement. Of the 26 measures which apply retrospectively, 77% were introduced within six months of announcement.

The fact that, during the review period, the percentage of measures enacted which applied prospectively is higher than in previous years is a positive indicator. This is because taxpayers are entitled to know with certainty what the law is at the time they enter into transactions.

However, as the Discussion Paper itself notes, retrospective legislation is appropriate in some cases. This includes where:

- the start date is the date of announcement or a later date in order to ensure that business decisions are not deferred purely for tax reasons;
- the start date is the date of announcement or an earlier date to limit tax avoidance opportunities as soon as identified; or
- the start date is earlier than the date of announcement in order to correct defects in the law which operate to the detriment of taxpayers.

<sup>1</sup> Standard measures exclude treaty measures, deductible gift recipient (DGR measures) and rate/threshold change measures. We understand that the inclusion of treaty measures would skew the statistics favourably.



In these circumstances, ensuring that announcements are converted to law as soon as possible is critical as announcements rarely contain sufficient detail for taxpayers to act upon with certainty. Delays in introducing retrospective legislation increases compliance costs for taxpayers required to amend assessments, uncertainty (including the risk that a new government may not proceed with an announced change) and risks to the revenue.

We would hope that, over time, implementation of the recommendations of the Tax Design Review Panel (the Review Panel) will reduce significant defects in the law and that this will be reflected in the statistics.

The fact that a relatively high percentage of measures announced during the period were introduced within the Panel's recommended time frame of 12 months for prospective changes (93%) and 6 months for retrospective legislation (77%) is also a good sign. However, in our view, it has not lessened concerns about delays in introducing legislation for announced measures. Reasons for this include:

- A number of measures which were not introduced in the period are important and, despite not yet falling outside the recommended time frame for introduction, have already been subject to discussion for a lengthy period before the announcement of any changes. An example which appropriately represents this is the announced changes to the tax treatment of earn-out arrangements.
- At a practical level, during the review period, stakeholders have been dealing with amendments to the law which relate to announcements made well before the start of the review period. Some of these measures have involved substantial amounts of time.

We consider that the statistics which the questions focus upon obscure a number of other findings evident from the tables, but not commented upon, in the Discussion Paper. These include:

- The reasons why 30%<sup>2</sup> of the measures announced during the period were not introduced within the recommended time frames. Focusing on the cause may reveal the extent to which it is due to factors which could not be controlled, e.g. the calling of an election, or other factors where improvements can be made.
- Of the 90 measures actually announced during the period, 31 (34%) are prospective, 37 (41%) are retrospective and, importantly, 22 (25%) are yet to be confirmed. This is in marked contrast to the 55% of enacted measures which were prospective and are the focus of the commentary in the Discussion Paper.
- The Discussion Paper provides no comment on why the start dates of 25% of announced measures are to be confirmed (most of which are in respect of measures announced but not introduced during the review period.)
- Of the 33 standard measures announced during the period which had not yet been introduced at the end of the review period, how many were expected to be introduced within the recommended 6 and 12 month time frames (noting that five measures already exceeded these timeframes).
- How announced changes are prioritised so that those with higher priority are introduced within the recommended time frames.

<sup>2</sup> This comprises 7% of prospective announcements and 23% of retrospective announcements.



In our view, in finalising its report to the government, the Board should not limit itself to measures announced during the review period but take into account how effectively measures announced prior to the start of that period have been dealt with. This would include measures announced but not enacted by the former government, a large number of which were accepted by the subsequent government on 13 May 2008.

**Whether the Government's publication of the Forward Work Program for Announced Tax and Superannuation Measures has increased certainty and eased concerns about delays in introducing tax changes.**

In our view the Forward Work Program does not increase certainty about tax changes: ultimately, only the introduction and passage of legislation can do that.

Nor do we consider that publication of the Forward Work Program has eased concerns about delays in introducing tax changes. This is not intended as a criticism. It simply recognises that Treasury's Forward Work Program is impacted by changing government priorities. For example, we note that the statistics show that during the review period 56 of the 90 measures announced (62%) were made in a budget context. This must have the potential to affect existing priorities of both Treasury and the Office of Parliamentary Counsel (the OPC).

Despite its limitations, in our view the Forward Work Program is a valuable tool for stakeholders. It allows stakeholders to monitor the progress of announced changes, and the inclusion of the name of the Treasury officer responsible for the measure is particularly useful in providing a specific contact point for future discussions and follow-up.

In our view, the real issue is determining when delays to the introduction of legislation are such that questions must be asked about the general level of resourcing of Treasury and the OPC.

We do note that the Review Panel appears to have contemplated a form of Forward Work Program which is different to what we now have. In particular, the Review Panel envisaged that the program would be amended whenever there is a delay and that it should explain the reason for the delay.

**Whether the information collected and presented in this discussion paper in relation to recommendations on the timing of legislation accords with the perception and understanding of industry.**

Industry perceptions continue to exist that there is a long lead time between the timing of announcements and the introduction of legislation to give effect to announcements. As indicated above, part of the reason for this is that during the review period stakeholders were still involved with consultations on measures announced well prior to the review period.

**Whether there is any further evidence / information which the Board should consider in its review of the recommendations on the timing of legislation? If so, please provide this to the Board for its consideration.**

On page three we note that the statistics which the questions focus upon obscure a number of other findings evident from the tables which the Board may wish to consider commenting upon in finalising its report to the government.



## Q 2.2: Issues/Questions on the quality and quantity of consultation

The Board seeks stakeholder comments on the following questions relating to the quality and quantity of consultation.

**Whether the pre-announcement consultation which has been undertaken by the Government (including pre-announcement consultation through the Board of Taxation) has increased certainty for taxpayers.**

In our view pre-announcement consultation is extremely important. It should ensure as far as possible that policy decisions are made having regard to the full range of factors which should inform the policy decision.

Ideally, pre-announcement consultation should result in:

- government announcements which are clear in relation to the policy objectives of the measure, and
- accompanying discussion papers/draft legislation which contains sufficient detail for affected taxpayers to understand how the measure applies to them, particularly when the measure applies retrospectively from the date of announcement or earlier.

However, as post-announcement consultation does mean that changes may be made to the proposed design of the measure and possibly also to the policy and/or start date, ensuring that announced measures are implemented quickly is also important.

We understand that integrity measures are not subject to pre-announcement consultation. In our view, even in these cases, pre-announcement consultation on a confidential basis may avoid some of the pitfalls previously encountered in relation to these types of measures.

**What instances of pre-announcement consultation could have been undertaken which would have resulted in more effective policy design than that reached by post-announcement consultation on the design of the announced policy and the draft legislation.**

The Discussion Paper notes that, of the 90 measures announced during the review period, the pattern of pre-announcement consultation is as follows:

Measures announced during the period	Total	Pre-announcement consultation	Pre-announcement consultation		
			Public	Confidential	Both
Budget measures	56	21	6	2	13
Non-budget measures	34	6	4	2	0
Total	90	27	10	4	13

As we understand it, a further seven measures were the subject of pre-policy consultation by paid experts. So, approximately 38% of the 90 measures announced during the review period were subject to pre-policy consultation.

The statistics indicate that 38% of Budget measures were the subject of pre-announcement consultation but only 18% of the non-Budget measures involved pre-announcement consultation (20% if the four non-Budget measures the Discussion Paper describes as minor, administrative or concessional in nature are excluded).



The Discussion Paper does not indicate what percentage of measures which were subject to post-announcement consultation resulted in policy changes but this would be a useful statistic in determining whether pre-announcement consultation would have been beneficial.

***Measures with no pre-announcement consultation but subject to post-announcement consultation or discontinued***

Those measures listed in Appendix C (introduced and enacted) which were subject to post-announcement consultation on the design of the legislation and/or the draft legislation which, in our view, would have benefited most from pre-announcement policy consultation include:

- The exemption of income earned on overseas employment which was subject to 6 days consultation on the announcement and a further 6 days on the draft legislation. (Item 10).
- Extending the tax file number withholding arrangements to closely held trusts, including family trusts. This measure was subject to 29 days consultation on the announcement and 14 days on the draft legislation. (Item 51)

In addition, although discontinued in its original form, the proposed resource super profits tax (RSPT) announced during the review period would clearly have benefitted from pre-policy consultation. We acknowledge that these measures were either budget announcements or unique tax policy announcements.

*Exemption of income earned on overseas employment*

In the case of this measure, the absence of pre-announcement consultation coupled with limited post-consultation has meant that there have been and continue to be teething problems. Indeed, the time constraints were such that the Institute did not lodge a submission on either the announcement or draft legislation but expressed its concerns to the Senate inquiry into the bill which contained this measure.

To illustrate the shortcomings associated with this measure, at the National Tax Liaison Group (NTLG) meeting on 30 March 2011, the chair of the Fringe Benefits Tax Sub-committee provided its governance report in which he notes that:

*Numerous consequential FBT issues were discussed at meetings due to changes to section 23AG of the Income Tax Assessment Act. These issues were a significant topic for the NTLG FBT Sub-committee at each meeting in 2010. The matters were raised for discussion as issues were identified by members following the changes to section 23 AG with effect from 1 July 2009.*

*Apart from ongoing deliberations and discussions with members where an administrative solution was possible, discussions continued with Treasury with input from the members of this forum.*

In our view, regardless of whether you agree with the policy rationale for the amendments, pre-announcement consultation would have gone some way to ensuring that the measure was implemented more smoothly than has been the case.

*Extending the tax file number withholding arrangements to closely held trusts*

In our view, this measure would also have benefitted from pre-announcement consultation. Policy issues aside, pre-announcement consultation should have ensured that concerns about the compliance costs and complexity of the approach proposed were identified.



We note that Appendix C indicates that a policy change was made as a result of post-announcement consultation.

*Resource super profits tax*

The RSPT does not appear in the Discussion Paper as a measure announced in the review period. We do not think we need say anything substantial here about the history of this measure. We accept that this measure was announced in a unique environment, in that it was a component of the government's initial response to the Future Tax System Review recommendations. However, it also represented a major tax policy decision for which the Review Panel recommended public consultation on policy design.

In our view, the Board should either explain the reason for its exclusion from measures announced during the review period or take it into account when formulating its recommendations to government.

**Measures subject to pre-announcement consultation but unsatisfactory outcomes**

Significantly, the Discussion Paper does not call for comment on measures which, despite pre-announcement consultation<sup>3</sup> by the Board itself and/or others (excluding paid experts) do not appear to have achieved all of the objectives sought by the Review Panel.

Nor does the Discussion Paper seek comment on tax measures announced during the review period which may superficially reside under the control of a Department other than Treasury, for example, the Research and Development (R&D) Tax Credit.

We accept that certain measures enacted during the review period are designed to achieve policy objectives we do not necessarily agree with, e.g. the removal of the exemption of income earned on overseas employment. However, policy differences aside, in our view it is undisputed that some of the measures which, on the face of it tick all of the right boxes, went wrong. These include:

- Reforming the taxation of employee share schemes. As indicated in Appendix E, this measure involved pre-policy consultation with the Board and others. Again, the controversy following the announcement of this measure and the fact that it caused listed companies to suspend their employee share schemes speaks volumes of the original design of the policy changes.
- Definition of a managed investment scheme. This measure was also the subject of pre-announcement consultation by the Board and others and post-announcement consultation on both the design of the amendments and draft legislation. Despite this, amendments were required to be made after introduction of the relevant Bill into Parliament.
- R&D Tax Credit. Despite considerable pre-announcement consultation being undertaken, including the Cutler Review on innovation, the widely-shared concerns around the extent to which the R&D incentive would be curtailed and recast by the new R&D credit regime appeared to be disregarded with the original draft law containing all possible restriction options raised during the consultation, rather than only one or some. The overly restrictive draft law resulted in an R&D incentive that

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<sup>3</sup> Appendix E contains two schedules. One contains a list of measures involving pre-announcement consultation via the Board of Taxation. The other contains a list of measures involving pre-announcement consultation by others. The lists are not mutually exclusive, i.e. some measures appear on both schedules indicating that there was pre-announcement consultation by the Board and others. We are advised the "others" do not include pre-announcement consultation with paid experts [to confirm] or the Taxation Office.



represented materially different policy from that announced by the government and that reflected in the Cutler report. This resulted in extensive amendments to the Bill being required to better reflect the policy and make it workable, a Senate inquiry being launched and the subsequent lapsing of the Bill in Parliament, with ongoing uncertainty for business and investment. At this point, the policy and legislation underpinning the re-designed R&D system has still yet to be finalised.

- Indirect tax rulings system transition to the income tax system. This was a significant amendment arising out of a recommendation of the Board. That recommendation was accepted by the government in the May 2009 Budget. Despite pre-announcement consultation on the measure, the level of detail contained in the Treasury discussion paper and disclosed at consultation meetings with the ATO was such that the indirect tax profession could not have reasonably comprehended the magnitude and adverse implications of the proposed change for taxpayers until the Bill was before Parliament. This resulted in the professional bodies jointly writing to the Minister seeking to have the Bill withdrawn so that it could be amended. Of particular concern was that the Bill invalidated thousands of public rulings without notice, leaving taxpayers stripped of their existing level of certainty and protection in relation to their GST positions. Despite the professional bodies' request for appropriate transitional 'grandfathering' to be included in the law, instead, an eleventh hour '12-month moratorium' from the ATO covering only 'industry association' rulings was announced by the Commissioner (which is arguably legally unenforceable as against the Commissioner should an unprotected issue come to his attention during an audit). In our view, the process surrounding the implementation of this fundamentally important tax reform initiative reflects unfavourably on the consultation process. This is particularly the case as the measure was promoted to stakeholders as reflecting an 'improvement' to the indirect tax system.

These are a cause for concern and the reasons why the pre-announcement consultation did not tease out some of the subsequent issues, particularly in the case of the employee share scheme measure, R&D tax credit, and indirect tax rulings system transition, should in our view be further investigated. Any lessons that can be identified should be factored into a re-working of the policy development process to ensure repeat instances of this issue do not arise in the future.

**Instances where post-announcement consultation was not undertaken, but which might have been beneficial in refining the policy design or the draft legislation.**

*Measure to repeal certain unlimited amendment periods*

In our view, the measure to repeal certain unlimited periods for amending assessments could have been better handled by Treasury.

By way of history, one of the recommendations of Treasury following its Review of Aspects of Income Tax Self Assessment, which was accepted by the then Treasurer on 16 December 2004, was that:

*Treasury should conduct a detailed review of the specific provisions with unlimited amendment periods to identify those that could have a set amendment period. Such set periods could be in line with the current general rules, or longer with good reason.*

*This Review should identify appropriate transitional arrangements so that the issues from earlier income years (for which there is currently an unlimited amendment period) become final where a finite amendment period is adopted.*



Almost three years later, on 22 August 2007 Treasury released a Discussion Paper, *Review of Unlimited Amendment Periods in the Income Tax Laws*, outlining a number of alternatives to unlimited amendment periods. Stakeholders were asked to comment on whether they supported/agreed with a number of principles discussed in the Discussion Paper including:

- Removal of unlimited amendment periods for circumstances that should be able to be dealt with by the Commissioner within the general 2 or 4 year rule.
- For circumstances that will take more than 4 years for the Commissioner to verify, replacing unlimited amendment period with a longer fixed amendment period. So, for example, for transfer pricing adjustments the Discussion Paper mooted an 8 year limited amendment period.

On 12 May 2009, as part of the budget, the Government announced that it would repeal certain provisions that provided unlimited amendment periods for those provisions where it considered that the Commissioner had sufficient time under the general amendment period provisions to review an assessment. Subsequently, on 17 March 2010, *Tax Laws Amendment (2010 Measures No. 2) Bill 2010* was introduced into Parliament. Schedule 6 was described as repealing over 100 legislative provisions which give the Commissioner of Taxation (the Commissioner) an unlimited period in which to amend taxpayers' assessments.

The reality is that, of the 117 unlimited amendment periods which were repealed 106 related to unlimited amendment provisions contained in amending Acts drafted between 1985 and 2005 that contain an unlimited amendment power due to the uncertainty surrounding the timing of the passage of the amending Act. As the EM notes, the practice that created these unlimited amendment periods ceased in 2005. So, of the 117 unlimited amendment periods repealed, we would describe 106 as being housekeeping in nature.

In a discussion with Treasury we were advised that the amendments made were the simpler ones to implement and the repeal of any further unlimited amendment periods, some of which are significant, was subject to Government priorities. However, there is nothing in the Explanatory Memorandum to the Bill to suggest this. The consultation summary for this measure indicates that:

*The remaining unlimited amendment periods proposed to be replaced with contingent or fixed amendment periods, will be repealed at a later stage subject to the Government's legislative priorities.*

*None of the parties that made submissions raised any concerns with the proposed changes included in the Bill. Consequently, further consultation on draft legislation that would simply repeal the provisions was considered unnecessary.*

Leaving aside the fact that the Institute did express its disappointment with the outcome, we do not consider the consultative process to be working effectively when the only option stakeholders have to raise concerns is to approach the Government directly or via the Senate Economics Committee once a bill has been introduced to Parliament. This is not a step which the Institute or, we suspect, other professional bodies take lightly.

The fact that there was no post-announcement consultation is particularly disappointing when, as the Explanatory Memorandum itself states, all submissions supported the elimination of unlimited amendment periods with some recommending changes to the replacement amendment periods proposed in the Discussion Paper.

We accept that addressing unlimited amendment periods may not have been a high priority issue. Indeed, the fact that the Bill was introduced and passed without concerns being



raised by all of the various stakeholders is testament to the fact that they themselves were dealing with other higher priority issues at the time. However, the issue is an important one and we would have preferred for the review to be deferred for proper consideration at a later date or for Treasury to have been more transparent about the approach being adopted.

*Other comments*

The Discussion Paper suggests that there are two reasons why a particular measure was not subject to consultation at the post-announcement or draft legislation stage, namely, that the measure was minor administrative or concessional or because the available timeframe for introduction into Parliament was too limited. It is not clear into which category the measure to address unlimited amendment periods falls.

More generally, in our view, circumstances in which a measure is not subject to consultation at the post-announcement or draft legislation stage where that is desirable in order to get the legislation substantially correct should be rare.

**Whether the increased use of public consultation relative to confidential consultation has enabled stakeholders to have sufficient involvement in consultations on tax measures relevant to them over the two year review period.**

From the Institute's perspective, the use of public consultation gives us the opportunity to ensure that our entire membership base has an opportunity to have their concerns reflected in submissions which we make on proposed tax changes.

The other advantage of public consultation is that it ensures that all taxpayers and their advisers operate on a level playing field.

For measures which involve major policy change, e.g. the RSPT, we agree with the Review Panel that it should involve public pre-policy consultation.

**Whether the posting of consultation summaries for almost all measures consulted upon has provided improved feedback for stakeholders participating in the consultation process.**

The posting of consultation summaries has improved feedback for stakeholders participating in the consultation process. The only additional points we would make are as follows:

- the existence of these summaries is not well known and measures should be taken to ensure that stakeholders are aware of their existence; and
- consultation summaries do not carry the same weight as explanatory memoranda and should not contain material which should properly be addressed in the legislation itself or, at a minimum, the explanatory memorandum for a measure. So, for example, the consultation summary for the measure to extend TFN withholding to closely held trusts indicates that:

*Commissioner's discretions under the legislation*

*In addition to the changes made to the legislation, greater explanation has been provided in the explanatory material to clarify that where a reporting or remittance obligation is required within a certain period under this measure, the legislation will provide the Commissioner with a power to exercise discretion to extend the due dates for lodgment or payment. **These discretions have been included***



***specifically, to allow the Commissioner to align the reporting and remittance obligations with the ATO's Lodgment Program. (our emphasis)***

Unfortunately, the professional bodies have been advised that the ATO cannot exercise its discretion to allow TFNs for new beneficiaries to be notified to the ATO in trust income tax returns for 2011 and subsequent years (instead of one month after the end of a quarter in which a beneficiary notifies the trustee of its TFN). If the Government intended that the Commissioner be able to exercise his discretion to align reporting obligations with the lodgement program, this should have been made clear in the legislation and/or the explanatory memorandum.

**Whether the release of discussion papers for just under half of the measures announced during the two year review period has caused uncertainty for taxpayers in managing their tax affairs.**

The Discussion Paper does not list which measures announced during the review period were not accompanied by a discussion paper. That said, our members have not raised concerns about uncertainty created by the lack of a discussion paper in respect of just over half of the measures announced.

From the Institute's perspective, our recollection is that there were discussion papers (or draft legislation) for almost all of the tax measures in which we were involved.

In our view, the indirect tax rulings transition is an example of a reform undertaken without adequate disclosure in the discussion paper of the intended design and implementation of the measure. The profession incorrectly believed that the new system would be prospective such that existing public rulings would be carried over by the ATO (either labelled or gazetted) into the new rulings system (and if appropriate reviewed and withdrawn) rather than being invalidated by the reform. However, it became apparent at a point too late that this was not the ATO's intention. As such, the devil was in the detail that was not in the discussion paper and could not be ascertained on the face of the draft legislation, around how the reform was to be implemented in practice.

Where implementation depends upon the actions of an agency other than the legislature, we believe that Treasury should ensure that the agency provides stakeholders with adequate details of the critical implementation aspects of a change so that all stakeholders have sufficient information to ascertain at an early time the consequences of the change.

**Whether the fact the minimum recommended time period (of four weeks) for post-announcement consultation on policy design has on average been met during the review period has allowed sufficient time for the public to identify issues, and for them to be addressed, before the legislation is drafted.**

The Discussion Paper indicates that the average time period for post-announcement consultation was 34 days and 27 days for consultation on draft legislation.

The Review Panel recommended a minimum four week consultation period in respect of post- announcement consultation and a further four week period for consultation on draft legislation. Although the Review Panel noted that the Board had previously recommended an ideal consultation period to be a six week period, it considered the combined four weeks of consultation on policy design and four weeks on draft legislation to be adequate.

In making its recommendation, the Review Panel appears to have been influenced by the fact that adoption of its recommendation to publish a forward work program would enable stakeholders to schedule their workload. In our view, the forward work program will rarely be



capable of fulfilling this role if only because priorities are apt to change depending on the Government's agenda at any point in time. Moreover, it disregards the fact that people suitably qualified to participate in consultations generally have other work commitments which will take priority over any scheduled consultation, however accurate.

In our view, a four week period is rarely adequate for post-announcement consultation on the design of substantive measures to implement announced policy. However, we acknowledge that an appropriate period will always depend on the particular measure being implemented and that there will be circumstances where a short period of consultation is preferable to none at all.

We note that the Discussion Paper indicates that in some cases the release of discussion papers is delayed to stagger their release and due dates. We would have thought a more appropriate approach would be to release the discussion paper but stagger the due dates.

**Whether the prioritisation process undertaken by Treasury and OPC is adequate in ensuring legislation is being drafted by the date by which it needs to be released for consultation.**

We are not familiar with the prioritisation process undertaken by Treasury and OPC. Nor are we generally aware of the dates legislation is required for release. So, strictly speaking, we are not in a position to respond to the question.

However, there are numerous examples of where the period between the release of discussion papers and draft legislation (or draft legislation and revised draft legislation) is longer than we would expect to be the case. For example, the latest Forward Work Program indicates that consultation on draft legislation to refine the company loss recoupment rules to recognise multiple classes of shares and make other technical amendments concluded on 2 October 2009. Revised draft legislation is expected in early 2011. If this means the first quarter of 2011 then the release of draft legislation is already late.

In terms of the Review Panel's recommendation that legislation to enact retrospective measures be introduced within 6 months of announcement, we note that this measure was announced on 13 May 2008 with a start date of 1 July 2002 for some measures and 1 July 2007 for others. So, legislation to implement this measure should ideally have been introduced in late 2008.

We are not aware of the reason for lengthy turn-around times within Treasury and/or the OPC or the extent to which they are due to changing government priorities.

We see merit in some private sector involvement in the prioritisation process either formally or less formally by, for example, reinstating six monthly meetings between Treasury and tax professional and industry peak bodies which we understand used to take place some years ago. The priority of various tax measures could be a standing agenda item.

**Whether the information collected and presented in this discussion paper in relation to recommendations on the quantity of consultation accords with the perception and understanding of industry.**

Yes. Being heavily involved in a wide variety of tax consultation processes, the Institute is neither surprised nor concerned about the volume of consultation undertaken during the review period.

**Relevant and factual information on the quality of the consultation that was**



**undertaken by the Government in relation to tax measures announced during the review period.**

The Discussion Paper acknowledges that statistical data is an indicator of the quantity of consultation undertaken during the period rather than its quality. However, it notes that one statistical indicator of quality is the number of measures amended as a result of the consultation process. So, of the 41 measures for which written submissions were received, there were 34 measures which changed as a result of consultation as follows:

Policy change	15
Technical correction	10
Drafting change	22
Total	47

The commentary suggests the fact that changes occurred is a positive indicator of the quality of consultation and we agree.

While we may not always agree with the outcome of the consultation process, generally speaking our experience is that Treasury officers are open to discussing measures the subject of consultation and to participate in meetings with stakeholders when approached. The value of this approach to the consultation process cannot be overemphasised and is welcomed by the Institute.

**Suggestions as to the manner in which the Board could evaluate the quality of the consultation process based on the experience of stakeholders.**

In our view, the quality of the consultation process would be best evaluated through case studies for a sample of measures which, based on the experience of stakeholders, rate highly and those which do not.

In our view, consultations which were less than ideal include:

- the reform of the taxation of employee share schemes which, on the face of it, ticked all the right boxes;
- the exemption of income earned in overseas employment which was subject to 6 days consultation on both the announcement and draft legislation; and
- the R&D tax credit; and
- the adoption of the general rulings system for indirect taxes.

A consultation which we consider has gone reasonably well to date is the measure to Improve the capital gains tax treatment of earnout agreements<sup>4</sup>. There are others.

**Whether there is any further evidence/information which the Board should consider in its review of the recommendations on the quality and quantity of consultation? If so, please provide this to the Board for its consideration.**

We do not have any further evidence/information for the Board to consider but would be pleased to discuss any of the points raised in more detail if that would assist the Board in its review.

**Q 2.3: Issues/Questions on the involvement of the private section**

The Board seeks comments on the following questions:

<sup>4</sup> Appendix C Measures announced but not introduced, item 5.



**From Treasury, its experience with the tri-partite design team arrangements and its plans for their future use; and  
From stakeholders, their experience with the engagement of private sector experts by the Government and the resulting tri-partite design team arrangements.**

The Institute is aware that a number of member firms are on the selection panel from which Treasury seeks private sector experts. We understand that some of those firms which have been engaged as private sector experts during the review period will be responding directly to the Board's Discussion Paper.

Our discussions with a number of private sector experts highlighted a number of issues resulting from a lack of experience of Treasury dealing with private sector experts and vice versa. In summary, the general view is that the process is not working as it should and that Treasury needs to improve its project management skills.

All of the organisations we spoke to indicated that the ATO was not involved in discussions but this may have been because the measure involved was not regarded as a substantive tax measure for which a tri-partite approach was recommended by the Review Panel.

**Whether the Government's limited use of tri-partite design teams during the review period, and increasing reliance on public consultation, suggests some modification of the tri-partite design team concept proposed by the Review Panel is appropriate.**

But for major policy changes where pre-policy consultation was considered appropriate, the Review Panel recommended that Treasury engage private sector paid experts to provide confidential advice on policy design. For substantive tax changes, the Review Panel further recommended a tri-partite design team approach involving Treasury, the ATO and the paid experts to have carriage of the measure throughout not only the policy phase but also the design and implementation phase.

The Discussion Paper notes that during the review period 22 August 2008 to 21 August 2010 external private sector experts were engaged on a paid professional basis to provide advice in relation to seven of the 90 tax measures announced during the review period. Those seven measures are listed at paragraph 2.59<sup>5</sup> of the Discussion Paper.

Without attempting to highlight which of those 7 measures the Board regards as substantive, the Discussion Paper notes that the level of participation by paid experts in the resulting tri-partite design teams has varied but has been extensive in the case of the Reform of the foreign source income anti-tax deferral rules and less extensive in relation to the Further amendments to the Taxation of Financial Arrangements – Tranche 2. None of the tri-partite teams were used to monitor early implementation of substantive measures other than indirectly via ATO consultative forums.

The Discussion Paper does not address the degree to which the ATO has been involved in the manner envisaged by the Board, particularly where there has been extensive use of paid experts. In our view, in finalising its report the Board should consider whether the ATO has been involved and, if so, the quality of that involvement from the perspective of Treasury and the paid experts.

<sup>5</sup> We are unclear as to why those measures do not include the measure to introduce a new R&D tax credit which Appendix F indicates was announced on 12 May 2009 and which is widely known to have involved pre-policy consultation with paid experts. We also understand that paid experts were involved in the 27 February 2009 measure to provide a capital gains tax roll-over to water entitlements and provision for exit fees (Appendix C Measures introduced and lapsed, item 9).



Given that the tri-partite design team concept between Treasury, the ATO and paid experts has not operated in the manner envisaged by the Review Panel we consider that it would be premature to substantially modify it at this stage. This is particularly the case as the Discussion Paper raises the possibility of modifications because, during the review period, the Government has made limited use of tri-partite design teams. The Discussion Paper provides no explanation as to why this is the case. We acknowledge that feedback from Treasury and paid experts themselves may identify areas where changes would improve the process or expressly recognise that other forms of pre-policy consultation, e.g. with the Board itself, may be preferable in certain cases.

Paid experts aside, it is recognised that there will always be a role for public consultation at either the pre-policy and/or the post-announcement stage. Based on our experience in the consultation process, we consider that something needs to be done to ensure more effective communication between Treasury, the ATO and stakeholders.

Currently, the relationship between Treasury and the ATO is governed by the *Australian Taxation Office/Treasury Protocol – Tax Policy and Legislation*. The ATO’s relationship with stakeholders is less clear. On the one hand Practice Statement PS LA 2004/6, which governs the ATO’s role in providing information or advice on the potential application of announced changes to the tax law or potential changes to the law, limits the ATO’s ability to engage in the tri-partite tax design process. On the other hand, the Commissioner has on a number of occasions agreed to the ATO participating in the development of tax law on a tri-partite basis. The ATO’s promised practice statement may go some way to providing some clarity around what it can and cannot do in this space.

In the meantime, the position of stakeholders involved in the public consultation process is oftentimes like the proverbial “meat in the sandwich”. So, there needs to be greater transparency around the discussions between Treasury, the ATO and stakeholders.

We understand that as part of the Board’s review it will be considering the consultative process leading up to the introduction of the consolidation measures in measures contained in *Tax Laws Amendment (No 1) Act 2011* which may result in recommendations in relation to an appropriate tri-partite approach in the public consultation sphere.

**Suggestions as to how the engagement of private sector experts could be improved, based on the experiences of stakeholders, and the reasons why those suggestions could be expected to lead to improvements in tax design.**

As indicated above, the Institute is aware that a number of member firms are on the selection panel from which Treasury seeks private sector experts and that some of those firms which have been engaged as private sector experts will be responding directly to the Board.

**Whether the information collected and presented in relation to recommendations on the involvement of the private sector accords with the perception and understanding of industry.**

We are surprised that so little use has been made of private sector experts during the review period and that no effort appears to have been made to engage them in the manner envisaged by the Review Panel. It is difficult to pass judgement on the tri-partite design team concept when little attempt appears to have been made to use it in the way the Review Panel envisaged.



**Whether there is any further evidence / information the Board should consider in its review of the recommendations on the involvement of the private sector? If so, please provide this to the Board for its consideration.**

It is apparent from our involvement in the consultation process that stakeholders would like more active and open participation by the ATO than is currently the case. At the same time, we recognise that there are limits on what the ATO can do. In our view what is needed is a clear appreciation of, and respect for, the roles and responsibilities of each party and a genuine commitment to improve the tax design process. As indicated above, the ATO's proposed practice statement may go some way to bridging the expectation gap.

#### **Q 2.4: Issues/Questions on other Review Panel recommendations**

The Board seeks stakeholder comments on:

**Whether the information collected and presented in relation to recommendations 14, 15, 23, 24 and 25 accords with the perception and understanding of industry.**

These recommendations are, in order:

- The Government should not outsource the legislative drafting function nor should the use of regulations be expanded (Recommendation 14)
- The Government should not establish a dedicated tax drafting resource within the Treasury (Recommendation 15)
- The Government should more frequently ask the Board of Taxation to conduct a formal post-implementation review of major policy initiatives, after two to three years of operation (Recommendation 23)
- The Government should consider whether the Commissioner should be given further power to modify the tax law to give relief to taxpayers or whether there are preferable ways in which the Commissioner could provide extra-statutory concessions in appropriate circumstances (Recommendation 24)
- The Government should ensure that there is a mechanism in place to drive the implementation of the new tax design process (Recommendation 25)

#### *Recommendation 23*

The Institute values the role of the Board in conducting post-implementation reviews of major policy initiatives.

#### *Recommendation 24*

In relation to Recommendation 24, we urge the Board to encourage the Government consider whether the Commissioner should be given further power to modify the tax law or provide extra-statutory concessions in appropriate circumstances.

#### *Recommendation 25*

Recommendation 25 is to the effect that the Government ensure that there is a mechanism in place to drive implementation of the new tax design process to ensure that more than lip service is paid to its recommendations.

It is apparent from our comments above that in our view we have some way to go to achieve the sort of new tax design process envisaged by the Review Panel.



**Whether there is any further evidence / information the Board should consider in its review of these recommendations? If so, please provide this to the Board for its consideration.**

We have no further evidence / information which the Board should consider in its review of the Review Panel's recommendations.

