



Australian Government

The Board of Taxation

POST-IMPLEMENTATION REVIEW OF THE TAX DESIGN REVIEW PANEL RECOMMENDATIONS

A report to the Assistant Treasurer

the **board** of **taxation**
www.taxboard.gov.au

December 2011

the **board** of **taxation**

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FOREWORD

The Board of Taxation is pleased to submit this report to the Assistant Treasurer following its post-implementation review of the Tax Design Review Panel recommendations.

On 22 August 2008, the then Assistant Treasurer released the Tax Design Review Panel's report *Better Tax Design and Implementation*. The report made 26 recommendations and all were accepted in principle by the Government.

Recommendation 26 of the Tax Design Review Panel's report recommended that:

The Government should invite the Board of Taxation to review the tax design process after two years and report to Government on the extent to which there are demonstrated improvements.

The then Assistant Treasurer wrote to the Board of Taxation in September 2008, requesting that the Board of Taxation conduct a review of the tax design review process recommended by the Tax Design Review Panel. The Board was asked to commence the review late in 2010 and to report to the Assistant Treasurer on whether there have been any improvements as a result of implementing the Panel's recommendations.

The Board appointed a Working Group chaired by Mr Peter Quiggin PSM and including Mr Keith James and Ms Elizabeth Jameson to oversee the review. In addition, the Board asked Mr Neil Wilson, Chairman of the Tax Design Review Panel, to be a member of the Board's Working Group.

The Board released a discussion paper setting out the Board's findings from its review of the tax design process over the two year review period and the extent to which the recommendations made by the Tax Design Review Panel have been implemented.

The Working Group conducted consultation with stakeholders, including representatives of the Treasury and the Australian Taxation Office. The Board would like to thank all those who so readily contributed to assist the Board in conducting the review.

The Secretary to the Treasury, Dr Martin Parkinson PSM, and the Commissioner of Taxation, Mr Michael D'Ascenzo AO, reserved their final views on the issues canvassed in this report for advice to Government.

On behalf of the Board, it is with great pleasure that we submit this report to the Assistant Treasurer.

Chris Jordan AO
Chairman, Board of Taxation

Peter Quiggin PSM
Chairman of the Board's Working Group

EXECUTIVE SUMMARY

On 8 February 2008, the then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs announced the establishment of the Tax Design Review Panel (the Review Panel) to examine how to reduce delays in legislation and improve the quality of tax law changes. The Review Panel, which finalised its report on 30 April 2008, noted that the ‘... objectives of the tax design process are to provide the government with the best possible advice for making tax policy decisions and to produce law and administrative products that give effect to the policy intent in a way that best meets the needs of users of the system’.

In 2010, the Board of Taxation commenced a post-implementation review of the recommendations of the Review Panel. The Board made an evaluation of the extent to which the tax design process had improved following the Review Panel’s recommendations. The evaluation considered a number of dimensions of the tax design process including, in particular, the timeliness of legislation, the quality and quantity of consultation and the involvement of the private sector.

The Board’s key conclusions and recommendations are summarised below.

THE TIMELINESS OF LEGISLATION

The Review Panel observed the common practice for legislative changes to be announced by government prior to them being enacted and, often, for the changes to take effect from a date prior to enactment.

The Review Panel recommended an increase in the proportion of legislation that was prospective, which is legislation whose date of effect is on or after the date of Royal Assent. The Review Panel, while recognising that retrospective legislation in this sense is sometimes unavoidable, sought a reduction in the time between announcement and introduction of the legislation into the Parliament. The Board has found that there have been improvements in these respects, but there remains room for improvement.

At the same time, the Board considers that an approach that emphasises timeliness over all other factors should be avoided. The quality of consultation and of legislative changes is also an important factor in the tax design process. It is also to be noted that retrospective measures can provide benefits to taxpayers as well as correct significant unintended outcomes that compromise the integrity or equity of the tax system.

The Treasury has a central role in the tax design process, having primary responsibility for advising Treasury Ministers on tax policy and the design of tax laws. The Board has concluded that the Treasury has not demonstrated that, in this process, it applies a structured project planning approach in all cases. This is an area for improvement which should assist in making the tax design process more efficient.

Non-government stakeholders in the tax design process have an interest in the progress of legislative measures. Since the Review Panel recommendations, the Government has started to publish a Forward Work Program that sets out the consultation plans for announced measures as well as plans for introduction of legislation into Parliament. More recently, the Treasury has started to publish the status of tax and superannuation related consultations on a monthly basis. The Board considers this to be a positive step.

The Board also considers that there would be benefit in the Government reviewing and making public the stock of unlegislated announcements on an annual basis.

THE QUALITY AND QUANTITY OF CONSULTATION

Consultation with users of the tax system has increasingly been a key element in the tax design process. The Board nevertheless considers that there are a number of aspects of the consultation process that should be improved. These improvements are directed at processes which will lead to the development of legislation that is consistent with the government's policy intent in a way that best meets the needs of users of the tax system.

The review of the Review Panel's recommendations and of the consultation processes since then leads the Board to conclude that no single form of consultation should apply to all interactions between the government and non-government sectors as part of the tax design process. The Board's conclusions and recommendations set out various ways in which these interactions should lead to better tax design outcomes.

The Board is of the view that, for consultation to be most effective, consultation should:

- involve people who are best placed to contribute to the intended policy outcome;
- involve people who approach the consultation process with this outcome in mind;
- adopt best practice outcomes, for example, that it is collaborative, open and the outcomes are clear; and
- be undertaken in a cost effective and efficient manner.

Consultation can occur at various stages of the tax design process. Often, it starts after the Government has announced a particular tax policy proposal. The Board recognises

that that is a decision for the Government to make. Nevertheless, there can be considerable benefit in terms of a better understanding of the implications of a particular policy when the Government consults (perhaps on a confidential and paid basis) on a proposal before a detailed position is announced.

The Board believes that it would be useful to distinguish between two different types of exercise, namely consultation and engagement, albeit that they can both occur as part of the same interaction between government and non-government sectors (although the term 'consultation' is often used in a generic sense to cover both situations).

- Consultation can be seen as the process whereby the Treasury seeks views from parties affected by a particular proposal, in order to inform its advice to the Government on that proposal.
- Engagement, on the other hand, is a two-way interaction between the government and non-government sectors, typically involving the Treasury explaining the proposed policy outcome, and all participants committing to achieving a good tax system outcome, and working together to do so in the most effective and efficient manner.

The nature of an interaction exercise (for example, how much time is taken for consultation and the extent of consultation material that is produced) should depend on factors such as the complexity of the issues involved and the state of knowledge of the government and non-government sectors of those issues. The Board considers that the Tax Consultation Characterisation matrix proposed by the Treasury would be a useful tool in assisting in the determination as to the breadth, depth and nature of engagement or consultation that would be desirable in relation to a particular measure.

More generally, the Board is of the view that the nature of interaction between the government and non-government sectors should be determined in a systematic way, both early in and during the tax design process.

Important elements of how consultation or engagement should be undertaken are:

- seeking a commitment from all stakeholders to achieving good tax system outcomes when involved in engagement or consultation so as to encourage openness and transparency by participants, engender trust as participants become more familiar with each other and with the process, and enable a joint commitment to a national interest outcome;
- establishing ground rules for engagement and consultation at the start of each process which sets out the norms of behaviour expected of all stakeholders, and the implications of departing from those rules; and

- consideration of whether and, if so, how private sector tax experts should be engaged on a paid basis to assist in the tax design process, particularly having regard to the complexity, novelty and scale of the issue in question.

Consideration should also be given to the development of an explicit ethical framework for members of professional bodies who participate in the tax design process.

An effective consultation/engagement process requires that the stakeholders concerned be kept informed about the process. The Board considers that the Treasury has taken some useful steps, for example by providing feedback in the form of consultation summaries. However, further steps could be taken, for example by making the summaries more easily accessible on the Treasury website, and by emailing directly the consultation summaries to those involved in the consultation/engagement. Provision of an indicative timetable would also be useful.

The Board recognises that there are constraints and exigencies that mean that priorities in relation to tax measures can change. At the same time, the overall interaction between the Treasury and the taxpayer community would benefit from better communication between the parties, for example through six-monthly stakeholder meetings to discuss issues such as the policy and legislative program, and consultation arrangements.

INVOLVEMENT OF THE PRIVATE SECTOR

Private or non-government parties generally have knowledge of the tax law and how it operates for them or their clients, of the relevant subject matter and of the commercial environment in which the tax law operates. They can and should bring this to bear in the consultation/engagement process.

The Board has observed that while consultation and engagement processes have improved, the tri-partite design process – involving the engagement of a private sector consultant working with the Australian Taxation Office (ATO) and the Treasury throughout the tax design process – envisaged by the Panel appears not to have been implemented. The Board considers that an alternative approach to systematic involvement of private sector experts in the tax design process is a model referred to as a Tax Consultation Centre, which is based on arrangements adopted in New Zealand.

A Tax Consultation Centre could involve a semi-permanent group of experts available to advise the Treasury on the development of tax legislation, providing a source of advice in addition to its normal consultation processes. The Board recommends the establishment of such a body to enhance the tax design process.

OTHER RECOMMENDATIONS AND OBSERVATIONS

The complexity of the tax system as well as the environment in which it operates requires collaboration between the government and non-government sectors to achieve tax legislation that is consistent with the policy intent and that serves the national interest. The Board's report describes the roles and responsibilities of the ATO, the Treasury and the non-government sectors in the tax design process.

The Treasury's role in terms of the intended outcome of the tax measures, the ATO's understanding of the operation of the tax system in its role of interpretation and administration of the tax law, and the non-government sector's understanding of the operation of the tax system against the particular circumstances of taxpayers should all be brought to bear in the tax design process.

The Treasury's central role in ensuring that legislative products match their policy intent represents a complex task, requiring a high level of skills of a technical and management nature to coordinate the input of a potentially diverse range of parties in respect of often very difficult economic, legal, commercial, accounting and other issues. This role also requires a strong and systematic quality assurance process. It is vital that the Treasury be adequately funded to perform that role.

Overall, there have been improvements in the tax design process, both in the years preceding the Review Panel's review, and since then, despite resourcing and other constraints.

Nevertheless, the Board considers that the process can be considerably improved, quantitatively but particularly qualitatively by deeper and more systematic attention to the design process and the roles and responsibilities of stakeholders involved in that process. The Board considers that its recommendations will foster this improvement.

CHAPTER 1: INTRODUCTION

BACKGROUND

1.1 On 8 February 2008, the then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs announced the appointment of a Tax Design Review Panel (the Review Panel) to examine how to reduce delays in the introduction of tax legislation and improve the quality of tax law changes.

1.2 The Review Panel was asked to examine:

- options to reduce the delay between the announcement of proposed changes to tax laws and the introduction into the Parliament of associated tax legislation;
- how the quality of the law can be improved through enhanced community consultation, particularly in the development of tax policy changes prior to the announcement of specific changes; and
- methods to increase community input into the prioritisation of changes to tax laws.

1.3 The Review Panel concluded its review and finalised its report to the Minister on 30 April 2008, titled *Better Tax Design and Implementation*. The report made 26 recommendations, which are replicated at Appendix A to this paper. The full report can be accessed at the following link:

http://www.treasury.gov.au/documents/1342/PDF/tax_design_review_panel_report.pdf

1.4 The Government released the Review Panel's report on 22 August 2008, accepting, in principle, all 26 of the Review Panel's recommendations.

SCOPE OF REVIEW

1.5 Recommendation 26 of the Review Panel's report recommended that:

The Government should ask the Board of Taxation to review the tax design process after two years and report to Government on the extent to which there are demonstrated improvements.

1.6 The Minister wrote to the Board of Taxation in September 2008, asking that the Board conduct a review of the tax design review process. The Board was asked to commence the review in late 2010 and to report to the Minister on whether there have been any improvements as a result of implementing the Review Panel's 26 recommendations over the two year period.

1.7 Recommendations 16, 17 and 18 of the Review Panel's report related to the Tax Issues Entry System (TIES). The implementation of these three recommendations has already been considered by the Board in its review of TIES which commenced in early 2010. Accordingly, those recommendations have not been revisited in this review.

1.8 No date was set by which the Board was to report to the Minister.

REVIEW TEAM

1.9 The Board of Taxation is an independent, non-statutory body established to advise government on various aspects of the Australian taxation system (refer to Appendix E for the Charter of the Board).

1.10 The Board appointed a Working Group of its members comprising Mr Peter Quiggin PSM (Chairman), Mr Keith James and Ms Elizabeth Jameson to oversee the Board's review. In addition, the Board asked Mr Neil Wilson, Chairman of the Review Panel, to be a member of the Board's Working Group.

REVIEW PROCESS

Collection of data over the review period

1.11 The Board obtained data from the Treasury relating to the tax changes announced during the two year review period from 22 August 2008 to 21 August 2010. The Board used the data received to form the charts, tables and statistics presented in a discussion paper, which was released in February 2011.

1.12 A summary of the raw data is set out in Appendices C to F of the Board's discussion paper, and some of it has been reproduced in this report. The data is divided into the following three categories:

- *Measures Introduced and Enacted* – this covers tax measures announced, introduced and enacted during the review period.
- *Measures Introduced and Lapsed* – this covers tax measures which were announced and introduced into the Parliament during the review period, but which subsequently lapsed at the time the 2010 Federal election was called on 19 July 2010.

- *Measures Announced but not Introduced* – this covers tax measures which were announced but not yet introduced during the review period.

1.13 The results of the data gathered in relation to the tax design process are outlined in Chapters 3 to 6 of this paper.

Submissions

1.14 The Board sought comments from interested parties on their experience of the tax design process during the review period and, in particular, on what improvements have resulted from the implementation of the Review Panel's recommendations.

1.15 The Board requested written submissions on the review by 28 March 2011. The Board received 11 submissions, seven of which are available to the public and can be obtained from the Board of Taxation's website. Appendix B contains a list of the parties who provided submissions and agreed to have their submissions made public.¹ The Board thanks all parties who provided submissions and appreciates the effort and time taken by these parties in putting forward their issues and proposing recommendations.

Consultation meetings

1.16 The consultation process provided an opportunity to discuss the issues canvassed in the Board's discussion paper in more detail. The Board held public consultation forums in Sydney and Melbourne in March 2011 as a further mechanism for obtaining views and to assist stakeholders in preparing written submissions.

1.17 The Board also held targeted consultation meetings with selected stakeholders. The purpose of these meetings was to clarify aspects of the review and to explore possible responses to issues raised in the submissions.

The Board's report

1.18 The Board considered the comments raised by stakeholders in their submissions and in the consultation meetings. However, the Board's report and its recommendations reflect the Board's independent judgment.

1 In order to reference (via footnotes) the information contained in confidential submissions that have been provided to the Board, Appendix B lists the confidential submissions as 'Confidential submission 1', etc, but does not otherwise disclose the identity of the submitter.

CHAPTER 2: EVALUATING WHETHER IMPROVEMENTS HAVE BEEN MADE AS A RESULT OF THE TAX DESIGN REVIEW PANEL RECOMMENDATIONS: OVERVIEW

2.1 For the purposes of the Board's post-implementation review, the 26 recommendations of the Tax Design Review Panel (the Review Panel) were grouped into four broad subject areas:

- (i) **the timeliness of legislation** – recommendations 3, 4, 13, 19, 20 and 21;
- (ii) **the quality and quantity of consultation** – recommendations 1, 5, 6, 7, 8, 9, 10 and 11;
- (iii) **involvement of the private sector** – recommendations 1, 2, 12 and 22; and
- (iv) **other recommendations** – recommendations 14, 15, 23, 24, 25 and 26.

2.2 The results revealed by the data under each of these four broad areas were subjected to a preliminary evaluation of whether improvements have resulted from the implementation of the Review Panel's recommendations.

2.3 In assessing the extent to which each of the recommendations has been implemented and whether they have resulted in improvements in the tax design process, tax measures which relate to tax treaties, deductible gift recipients and tax rate/threshold changes have not been taken into account. These measures generally fall outside the scope of the Review Panel's recommendations, and their inclusion may distort the Board's assessment of the extent to which improvements have been made in the tax design process for new tax measures.

2.4 This preliminary examination was then set out in the Board's discussion paper, which was then reviewed and discussed in public and targeted consultation meetings. In addition, the Board has had access to a range of submissions provided in response to the discussion paper.

2.5 The main issues that arose from this preliminary examination, and the accompanying consultation, are set out in the following four chapters:

- **Chapter 3:** Evaluation: The timeliness of legislation;
- **Chapter 4:** Evaluation: The quality and quantity of consultation;

- **Chapter 5:** Evaluation: Involvement of the private sector; and
- **Chapter 6:** Evaluation: Other recommendations.

2.6 In each of the following chapters, the relevant Review Panel recommendations are set out. The Board's analysis, view and recommendation in relation to each Review Panel recommendation then follows.

CHAPTER 3: EVALUATION: THE TIMELINESS OF LEGISLATION

3.1 Recommendations 3, 4, 13, 19, 20 and 21 broadly relate to the timeliness of legislation. The full text of each of the recommendations appears below.

3.2 To assess the extent to which each of the recommendations has been implemented and whether they have resulted in demonstrable improvements in the tax design process, the following data was collected in relation to each tax measure announced during the period 22 August 2008 to 21 August 2010 (the review period):

- (a) the date of the announcement of the measure;
- (b) whether the measure is prospective or retrospective;
- (c) each Parliamentary sitting for which the measure was on the list of measures to be introduced;
- (d) the date the measure was introduced;
- (e) the date that the Bill containing the measure received Royal Assent; and
- (f) if the measure is not to be proceeded with, the date on which that was announced.

3.3 A summary of this information is set out in Appendices C and D of the Board's discussion paper.

TDRP RECOMMENDATION 3: CHANGES SHOULD BE PROSPECTIVE AND INTRODUCED WITHIN 12 MONTHS

The Government should ensure that announced tax changes generally apply prospectively (that is, from a date following enactment of the legislation). The Government should aim to introduce legislation for such measures within 12 months of announcement.

TDRP RECOMMENDATION 4: RETROSPECTIVE CHANGES SHOULD BE INTRODUCED WITHIN SIX MONTHS

In circumstances where retrospective measures are appropriate, the Government should aim to introduce legislation within six months of announcement, recognising that in order to meet this timeframe it may be necessary to reduce the time allowed for consultation.

Evaluation of data collected

3.4 Consistent with the analysis in the Review Panel's report, prospective measures are those where the date of effect is on or after the date of Royal Assent, and retrospective measures are those where the date of effect precedes Royal Assent.

3.5 As explained in the Review Panel's report, it may be reasonable for the Government to enact legislation in some instances which, although technically retrospective on this definition, operates from the date of announcement rather than from Royal Assent.²

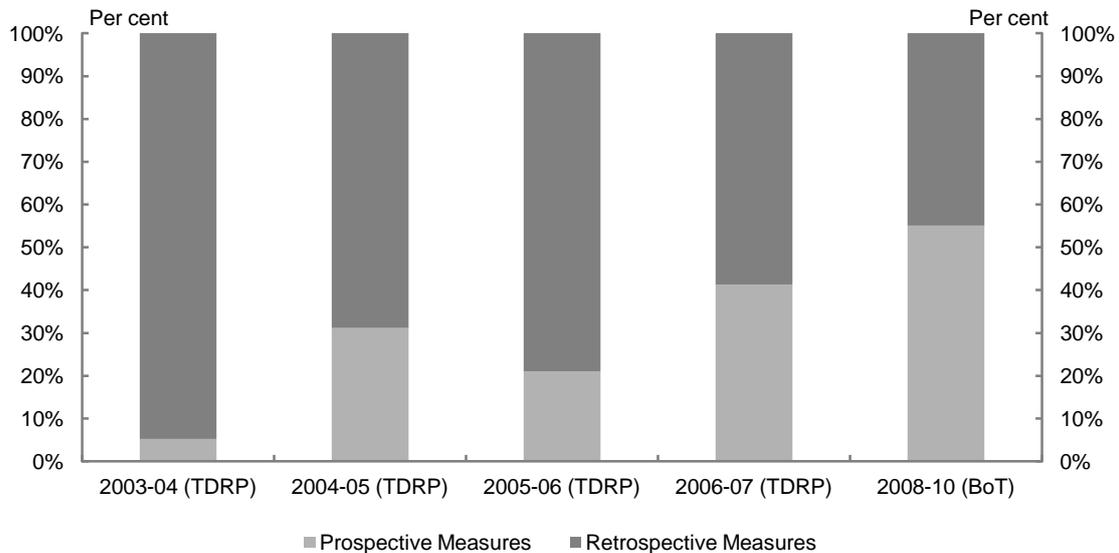
3.6 Information regarding the 49 tax measures announced and enacted during the review period (that is, from 22 August 2008 until 21 August 2010) as compared to the tax measures from the years prior to the review period³ is set out in Chart 1 below (which was developed for the Board's discussion paper).⁴

2 Tax Design Review Panel 2008, *Better Tax Design and Implementation*, Canberra, pages 25-27. An example is an investment allowance applying from the date of announcement so as to avoid an investment deferral whilst waiting for the legislation to be enacted.

3 Tax Design Review Panel 2008, *Better Tax Design and Implementation*, Canberra, page 15. Note, the figures compiled by the Review Panel excluded measures relating to listed deductible gift recipients and technical corrections.

4 Board of Taxation 2011, *Post-implementation review of the Tax Design Review Panel recommendations*, Canberra, page 7.

Chart 1: Comparison of the proportions of measures enacted in 2003-04 to 2006-07 and 2008-10 which were prospective and retrospective⁵



3.7 The data indicates that the proportion of measures enacted that operate prospectively has steadily increased since 2003, with a corresponding decrease in the proportion of tax changes applying retrospectively. The Board then sought comments on whether this increasing percentage of prospective measures has enabled taxpayers to more effectively structure their tax affairs.

3.8 Of the 22 retrospective measures enacted during the review period, nine were measures which took effect on or after the date of announcement (41 per cent), and 13 were measures which took effect prior to their announcement (59 per cent).

3.9 Legislation for 28 prospective measures announced during the review period was introduced into the Parliament during that period. Of these, 26 measures (93 per cent) were introduced within the recommended 12 months of their announcement.

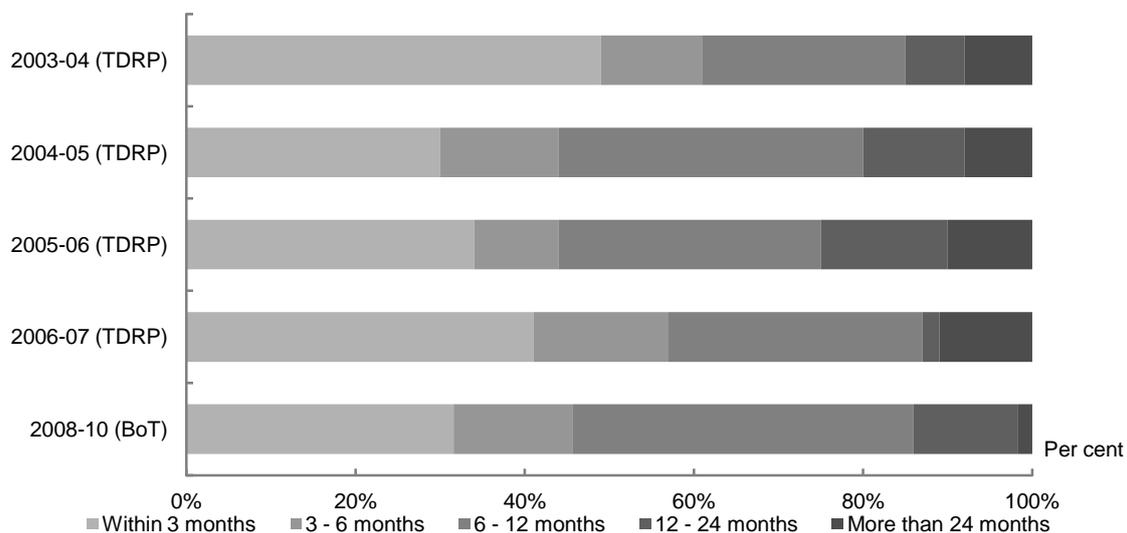
3.10 Legislation for 26 retrospective measures announced during the review period was introduced into the Parliament during that period. Of these, 20 measures (77 per cent) were introduced within the recommended 6 months of their announcement.

3.11 The average time between measures being announced and legislation being introduced was 6.2 months over the review period. This compares with the average of 8.5 months over the period considered by the Review Panel (from 2003-04 to 2006-07).⁶

5 Note that the statistics for the first four columns (entitled 2003-04; 2004-05; 2005-06 and 2006-07, respectively) were gathered by the Tax Design Review Panel during its 2008 review. The statistics for the final column (entitled 2008-10) were gathered by the Board of Taxation under this current review, and represent an aggregate over the two-year review period (from 22 August 2008 to 21 August 2010). Hence, the statistics do not cover the period from 1 July 2007 until 21 August 2008.

3.12 Chart 2, prepared for the Board’s discussion paper, illustrates the time between announcement and introduction of measures introduced into the Parliament during the review period, and compares this with the Review Panel’s findings for measures introduced between 2003 and 2007.

Chart 2: Comparison of time between announcement and introduction of measures enacted in 2003-04 to 2006-07 and 2008-10⁷



3.13 The data indicates a majority of measures announced and introduced during the review period were introduced within the recommended time frames (of 6 and 12 months). The Board invited comments on whether this outcome has lessened concerns about delays in introducing legislation for announced measures.

Views in submissions

3.14 Stakeholders recognised the improvements that have been achieved in meeting the recommended timeframes set out in the Review Panel’s recommendations 3 and 4.⁸

3.15 As to whether or not these improvements have enabled taxpayers to more effectively structure their tax affairs, both the Tax Institute⁹ and CPA Australia¹⁰ responded that they believed this to have been the case.

6 Tax Design Review Panel 2008, *Better Tax Design and Implementation*, Canberra, page 14.

7 Note that the comment under footnote 5 also applies to these statistics.

8 Confidential submission 1.

9 Tax Institute submission, page 2.

10 CPA Australia submission, page 2 (although CPA Australia noted that they did not have hard evidence to support that view).

3.16 Both those submissions also made it clear that, notwithstanding the improvements made since 2003 in meeting recommended timeframes, continuous improvement is desirable.

3.17 The Treasury noted that, while it is desirable that tax measures generally take effect from or after the date of Royal Assent, issues relating to whether measures are to have prospective or retrospective application, and the timing associated with such measures, are matters for the Government, and ultimately for the Parliament, to determine.¹¹

3.18 The Treasury also pointed to an important trade-off which exists between the speed with which measures are introduced, and the quality of the ensuing outcome:

*Poorly constructed legislation is likely to result in increased uncertainty for taxpayers due to the need for subsequent clarification, litigation or amendment. Thus, even the 12-month timeframe indicated for introducing announced measures may not be appropriate for measures involving complex matters requiring detailed, lengthy or repeated consultation. Similarly, meeting the six-month timeframe for retrospective measures can be less meaningful if it does not allow adequate consultation to occur.*¹²

3.19 PwC noted that the greater proportion of prospective measures increases certainty, but uncertainty remains when there is significant delay in the release of sufficient detail in relation to a Government announcement.¹³

3.20 The submission from the Institute of Chartered Accountants in Australia noted that the statistics obscure certain findings, which were not commented upon at the time in the discussion paper.¹⁴ These included:

- The reasons why 30 per cent 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, for example the calling of an election, or other factors where improvements can be made.
- Of the 90 measures actually announced during the period, 31 (34 per cent) are prospective, 37 (41 per cent) are retrospective and, importantly, 22 (25 per cent) are yet to be confirmed. This is in marked contrast to the 55 per cent of enacted measures which were prospective and are the focus of the commentary in the Board's discussion paper.

11 The Treasury's first submission, pages 2-3.

12 The Treasury's first submission, page 2.

13 PwC submission, page 2.

14 Institute of Chartered Accountants in Australia submission, page 3.

- The Board's discussion paper provided no comment on why the start dates of 25 per cent 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.

3.21 In relation to retrospective legislation, a confidential submission suggested that, to assist with planning, further analysis of the measures with retrospective effect might provide insights on how to reduce the need for it further and whether there are alternative ways to address those issues.¹⁵ This suggests that a perception exists that retrospective measures are inherently undesirable. On the other hand, the Tax Institute noted that many retrospective measures enacted in the review period were in fact intended to benefit taxpayers, minor, or enacted in response to an urgent situation (such as the Victorian bushfire, or the Global Financial Crisis).¹⁶ The Institute of Chartered Accountants in Australia also agreed that retrospective legislation is appropriate in some cases. At the same time, ensuring conversion to law in those cases as soon as possible is critical.¹⁷

The Board's view

3.22 In terms of its post-implementation review, the Board notes the improved track record that has been achieved in meeting the recommended timeframes set out in the Review Panel's recommendations 3 and 4. This shows an encouraging trend. The Board also accepts that these improvements have likely enabled taxpayers to more effectively structure their tax affairs.

3.23 At the same time, the Board agrees with both the Tax Institute and the Institute of Chartered Accountants in Australia that a broad aim of improving the prospectivity of measures should not mean a blanket aim of all measures being prospective. The Review Panel itself had indicated¹⁸ that it may be reasonable for the Government to enact legislation in some instances which, although technically retrospective, operates from the date of announcement rather than from Royal Assent. The Treasury elaborated on this.¹⁹ A discussion that accepts that a decrease in retrospective measures

15 Confidential submission 1.

16 Tax Institute submission, page 2.

17 Institute of Chartered Accountants in Australia submission, page 3.

18 Tax Design Review Panel 2008, *Better Tax Design and Implementation*, Canberra, paragraph 3.20.

19 The Treasury's first submission, pages 2-3.

over time is preferable, without inquiring into the nature of the retrospective measures put in place, may overlook that such measures can provide benefits, by correcting divergence of interpretation from intent, relieving taxpayers of a burden, or correcting significant unintended outcomes that compromise the integrity or equity of the tax system.²⁰ These measures can, in fact, also increase certainty for taxpayers.

3.24 The Board also notes that notwithstanding these apparent improvements in meeting recommended timeframes, external stakeholders still have high expectations for continuous improvement to the tax policy design and legislative development timeframes.²¹ The Treasury noted that over the period 2008-10, the proportion of measures enacted within 12 months of announcement was slightly higher than in preceding periods, and that this was achieved despite the increased consultation undertaken by the Government.

3.25 The Board considers that there have been quantitative improvements in the process – through reductions in the time taken between announcing measures and introducing them into the Parliament, and in the increasing amount of consultation undertaken. However, the Board emphasises that there are other dimensions to the tax design process that need to be carefully weighed against quantitative improvements. In particular, the quality of consultation is a very important dimension. As discussed further in *Chapter 4: Evaluation: Quantity and quality of consultation*, there remains considerable room for improvement in this regard.

3.26 In relation to the trade-off that the Treasury referred to, namely, between the speed with which measures are introduced and the quality of the ensuing outcome, the Board notes that embedded within the Review Panel's recommendations 3 and 4 are mechanisms to enable the Government to manage that trade-off. Both recommendations contain a statement of ambition – that the Government should *aim* to introduce legislation for certain measures within a particular time of announcement.

3.27 It is appropriate that those involved in developing measures continue to seek to introduce those measures into the Parliament as expeditiously as possible and, where possible, to meet the recommended timeframes. The Board is of the view, however, that the application of an approach which emphasises timeliness over all other factors is to be avoided. In all matters, a balance needs to be sought. Review Panel recommendations 3 and 4 would appear to enable that balance to be managed appropriately.

20 The Treasury's first submission examines the context (see page 3).

21 Refer to the CPA Australia and Tax Institute submissions.

The Board's conclusion/recommendation 1

The Board considers that there have been quantitative improvements in the process but that there remains room for improvement, particularly in relation to the quality of consultation. However, application of an approach which emphasises timeliness over all other factors should be avoided.

TDRP RECOMMENDATION 13: TREASURY'S PROJECT MANAGEMENT APPROACH

The Treasury should seek continuous improvement in its project management techniques and capabilities.

Information collected

3.28 In its discussion paper, the Board noted that the Treasury had advised that:

- its Revenue Group maintains a specific product – a detailed tax design process map – to assist policy units within Revenue Group to plan and deliver tax projects. It provides a framework which draws together guidelines and project management tools for the various stages of the tax design process; and
- its Revenue Group has a range of structures to co-ordinate the development of legislation across the Group, including a unit – the Legislation Management Unit – specifically tasked with assisting policy units to prepare timelines for tax legislation projects which ensure consultation and legislation processes are taken into account.

Views in submissions

3.29 The Institute of Chartered Accountants in Australia indicated that it considers that the Treasury needs to improve its project management skills.²²

3.30 The Treasury reiterated the points that were set out in the Board's discussion paper, and indicated that it does seek to continuously improve on its project management techniques and capabilities. In its second submission, the Treasury noted:

For some projects Treasury believes its processes are very good. It acknowledges, however, that this is not uniform and more work needs to be done to entrench in the

22 Institute of Chartered Accountants in Australia submission, page 14.

*organisation a fuller understanding of the benefits of increased and better engagement, and nurture the skill set to do it properly.*²³

3.31 The Treasury's second submission also noted the following:

As with non-tax consultations Treasury undertakes, a balance has to be struck between available resources and tax consultation requirements.

Available resources are constrained by budget allocations. In recent times Treasury's budget allocation has been reduced in line with the Government's broader objectives. At the same time, the consultation task has grown with the volume of new tax measures.

*Consequently more intensive consultation on any particular issue draws resources away from other issues and potentially slows down the program of tax law development and implementation.*²⁴

3.32 A confidential submission suggested that information about the Treasury's project management tools and methodology, as well as the training that is provided, could be made available for the information of external parties.²⁵

The Board's view

3.33 The request for greater information about the Treasury's project management tools, methodology and training may be underpinned by a desire to better understand the legislative process and the reasons for perceived delays in this process.

3.34 The Board notes that the Review Panel's recommendation 13 proposed that the Treasury should seek continuous improvement in its project management techniques and capabilities. In this regard, the Treasury has noted that it seeks to do so.²⁶ For example, the Treasury noted that it seeks to learn from successful and unsuccessful consultations²⁷; that it adapts its consultation processes to take account of what it learns²⁸; and that it encourages institutional learning with staff sharing what worked well and what did not, at the conclusion of major tax projects²⁹.

3.35 The Board queries whether the Treasury's tax design process map (referred to in paragraph 3.28), while potentially useful as a checklist or resource in developing tax legislation, provides an adequate basis for improving the Treasury's project management techniques.

23 Page 5.

24 Page 9.

25 Confidential submission 1.

26 The Treasury's second submission.

27 The Treasury's second submission, page 3.

28 The Treasury's second submission, page 9.

29 The Treasury's second submission, page 10.

3.36 The Board does note nevertheless that the Treasury is not the only party involved in carriage of measures affecting the tax system, so an examination of the arrangements of the process needs to consider the role of all parties within the process.

3.37 However, the Board does retain some concerns about the current state of project planning within the Treasury. In particular, the Board considers that it has not been demonstrated by the Treasury that it applies a structured project planning approach in all cases.

3.38 One idea in relation to the continuous improvement aspect that the Board has become aware of in the course of this review came from the ATO, who advised the Board of a facility that it has available when it is asked to provide advice quickly. This involves the formation of a Rapid Response Design Solution team – a specialist design team – to build and test a prototype of a measure in a secure environment. The ATO advised that this approach has been effective recently in raising issues not previously considered, and can be useful for visualising a proposal to explain its opportunities and risks. Such a facility may provide a means of improving the management of the legislative process, and should be considered more generally as part of the Treasury’s continuous improvement of its project management techniques.

The Board’s conclusion/recommendation 2

The Board considers that the Treasury has not demonstrated that it applies a structured project planning approach in all cases. The Board recommends that the Treasury continue to develop its project planning techniques and capabilities, and makes information about this available to stakeholders.

The Board also considers that there would be value in the Treasury investigating the Rapid Response Design Solution approach used by the ATO and considering its benefits in developing and enhancing the project management capability for tax design in relation to urgent projects.

TDRP RECOMMENDATION 19: PUBLISH A FORWARD WORK PROGRAM ON ANNOUNCED MEASURES

The Government should publish a rolling forward work program setting out the consultation it plans for announced tax measures and indicating the legislation it plans to introduce in the next sittings. When a delay occurs, the forward work program should be amended to reflect the delay and to explain the reasons for it.

Evaluation of data collected

3.39 The Government has commenced publishing a *Forward Work Program for Announced Tax and Superannuation Measures*. The first of these Programs was published on 12 February 2009 setting out the Government's consultation plans for announced tax measures and indicating the legislation it planned to introduce in the Autumn 2009 sittings. Subsequent Forward Work Programs were published on 17 June 2009, 11 August 2009, 25 February 2010 and 10 February 2011. Due to the intervention of the 2010 elections, no Forward Work Program was released for the Spring 2010 sittings.

3.40 In its discussion paper, the Board welcomed comments on whether the publication of this Forward Work Program has increased certainty and eased concerns about delays in introducing tax changes.

Views in submissions

3.41 The Treasury noted that it prepares advice to the Assistant Treasurer to allow publication of a Forward Work Program. Reasons for any delays in the progress of a measure are included in the Forward Work Program.³⁰

3.42 CPA Australia supported the publication of a Forward Work Program as it appears to have increased certainty and eased concerns regarding delays in introduction but, as noted earlier, also indicated, generally, that there is a need to continue to improve on delays in preparing and introducing legislation.³¹

3.43 In contrast, the Institute of Chartered Accountants in Australia noted that³²:

- the Forward Work Program does not increase certainty about tax changes, and that only introduction and passage of legislation can do that;
- the Forward Work Program is also impacted by changing government priorities, and delays in introduction of legislation might arise as a result of resourcing within the Treasury and the Office of Parliamentary Counsel;
- it nonetheless considers the Forward Work Program to be a valuable tool allowing stakeholders to monitor progress of announced changes, and to obtain Treasury contact officer details;
- however, the Review Panel had envisaged a more dynamic work program than the one that is produced.

3.44 In a similar vein, the Tax Institute noted that the Forward Work Program has merit, but that the timelines in the program are frequently not met, in many cases

30 The Treasury's first submission, page 4.

31 CPA Australia submission, page 2.

32 Institute of Chartered Accountants in Australia submission, page 4.

because of intervening priorities. The Institute suggested that more frequent and accurate publication would assist.³³

The Board's view

3.45 The Board agrees with submitters that the usefulness of the Forward Work Program is reduced where it is released infrequently which means that the information in the document is often out-of-date. The Board also agrees with the Institute of Chartered Accountants that, while the release of such a document is a useful step and has some merit, the Review Panel had envisaged a more dynamic work program than the one that is produced.

3.46 The merit of the Forward Work Program derives, in part, from the fact that it includes contact details for Treasury officers working on measures. Enquirers therefore have a point of contact that was not always as easily identifiable as previously.

3.47 In September 2011, during the course of this review, the Treasury began to release a Forward Work Program, updated on a monthly basis, which lists tax and superannuation related consultations undertaken by the Treasury and details their status. It provides information on discussion papers and exposure drafts of legislation that are currently open for consultation and those that are currently in preparation.

3.48 The most recent version of this document can be accessed at:

<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1483>

3.49 Access to this document and, in particular, the availability of Treasury contact officer details, appears to be a positive step in terms of the provision of information on the Forward Work Program.

The Board's conclusion/recommendation 3

The Board supports the release of information setting out the status of consultation and legislation on a monthly basis.

33 Tax Institute submission, page 2.

TDRP RECOMMENDATION 20: PROCESS TO DEAL WITH UNENACTED ANNOUNCEMENTS

As soon as practicable, the Government should announce its position in relation to all unlegislated announcements of the previous Government. For those measures that are to be adopted, the Government should announce an indicative work program for their implementation (in accordance with Recommendation 19).

Evaluation of data collected

3.50 In its discussion paper, the Board noted:

- that the Treasurer and the then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, in a media release dated 13 May 2008, announced the Government's position on the majority of the stock of tax measures which had been announced, but not enacted, by the former government. The announcement also outlined an indicative timetable for implementing those measures the Government had decided should proceed; and
- that the Government has subsequently announced its position on all but three of the measures identified in Category 5 of that media release (measures for which final decisions had not, at the time of the 13 May 2008 media release, yet been released) as ones for which final decisions were still to be reached.

Views in submissions

3.51 The Treasury had no additional comments to those provided in the Board's discussion paper.

3.52 A confidential submission suggested that the Forward Work Program could include dates that unenacted announcements are being considered for removal and the date that they are removed.³⁴

3.53 PwC indicated that the Government needs to develop a process for addressing unlegislated announcements of the prior government, applying prioritisation of proposals, and communicating with key stakeholders.³⁵ In a similar vein, the Institute of Chartered Accountants in Australia indicated that the Board should consider how effectively measures announced prior to the start of the review period (that is, announced but not enacted by the former government) have been dealt with.³⁶

34 Confidential submission 1.

35 PwC submission, pages 2-3.

36 Institute of Chartered Accountants in Australia submission, page 4.

The Board's view

3.54 As the Government has announced its position on the vast majority of the measures for which final decisions had not, at the time of the 13 May 2008 media release, yet been released, the Board makes no further comments on this recommendation.

The Board's conclusion/recommendation 4

As the Government has announced its position on the vast majority of the measures for which final decisions had not, at the time of the 13 May 2008 media release, yet been released, the Board makes no further comments on this recommendation.

TDRP RECOMMENDATION 21: PERIODICALLY REVIEW UNENACTED MEASURES

The Government should periodically review any stock of unlegislated announcements and provide certainty to the community by dealing with any measures that are not to proceed.

Evaluation of data collected

3.55 In its discussion paper, the Board noted that the Treasury had advised that progress of individual announced measures was reviewed by the Government on an ad hoc basis as required. A wider review of unlegislated measures has not been necessary during the review period as all measures announced by the Government were proceeding and being progressed.

Views in submissions

3.56 The Treasury had no additional comments to those provided in the Board's discussion paper.

The Board's view

3.57 While it appears that the Government has taken some steps to address the stock of unlegislated announcements that existed at the time that the Review Panel made its recommendations, the Board considers that there would be benefit in reviewing and making public such matters on an annual basis.

The Board's conclusion/recommendation 5

The Board considers that there would be benefit in the Government reviewing and making public the stock of unlegislated announcements on an annual basis.

CHAPTER 4: EVALUATION: QUALITY AND QUANTITY OF CONSULTATION

4.1 Recommendations 1, 5, 6, 7, 8, 9, 10 and 11 broadly relate to the quality and quantity of consultation in the design of tax measures. The full text of each of the recommendations appears below.

4.2 To assess the extent to which each of the recommendations has been implemented and whether they have resulted in demonstrable improvements in the tax design process, the following data was collected in relation to each tax measure announced during the review period:

- (a) whether consultation occurred on:
 - (i) the pre-policy decision;
 - (ii) the design of the announced measure;
 - (iii) the draft legislation;
- (b) the type of consultation undertaken (public or targeted);
- (c) the persons/organisations approached;
- (d) the persons/organisations participating;
- (e) the persons/organisations making submissions;
- (f) the details of timing relevant to consultation, comprising:
 - (i) the date of release of material;
 - (ii) the closing date for submissions;
 - (iii) consultation meeting dates;
 - (iv) the dates of receipt of submissions;
- (g) the extent of changes resulting from consultation; and
- (h) the type of changes resulting from consultation (policy changes, technical corrections or drafting changes).

4.3 A summary of this information is set out in Appendices C to F of the Board's discussion paper.

4.4 Examining these recommendations has required the Board to consider various aspects of engagement and collaboration that are required in order to achieve effective outcomes in consultation. These aspects go beyond questions of how much consultation and engagement is desirable, and when to start it, to issues such as how parties to this process approach it, the various purposes of the process and how this may affect the nature of the process for the particular project. As there are overlaps between the material considered in this Chapter and in *Chapter 5: Evaluation: Involvement of the private sector*, it is recommended that these two Chapters be read together.

TDRP RECOMMENDATION 1: PRE-ANNOUNCEMENT CONSULTATION ON POLICY DESIGN

The Government should generally consult on tax changes at the initial policy design stage, prior to any Government announcement. For major policy changes, consultation should include public consultation on policy design (for example, via the release of a discussion paper). Where possible, the agreement of the States and Territories should be sought on GST changes prior to any Federal Government announcement.

Evaluation of data collected

4.5 Table 1 below, which was produced for the Board's discussion paper, shows the number of measures announced during the review period which were the subject of pre-announcement consultation and whether that consultation was public or confidential. The measures are divided into those announced as part of a Budget ('Budget measures') and those announced outside a Budget context ('non-Budget measures').

Table 1: Measures announced in the review period that were the subject of pre-announcement consultation

Measures announced during the review period	Total measures	Measures with Pre-announcement Consultation		Measures involving both open public and confidential pre-announcement consultations	Measures involving open public pre-announcement consultations only	Measures involving confidential pre-announcement consultations only
Budget measures	56	21	(38%)	13	6	2
Measures introduced & enacted	30	16	(53%)	10	4	2
Measures introduced & lapsed	4	0	(0%)	0	0	0
Measures announced but not introduced	22	5	(23%)	3	2	0
Non-Budget measures	34	6	(18%)	0	4	2
Measures Introduced & enacted	19	3	(16%)	0	2	1
Measures Introduced & lapsed	4	1	(25%)	0	1	0
Measures announced but not introduced	11	2	(18%)	0	1	1
All measures	90	27	(30%)	13	10	4

4.6 The Review Panel noted in its report that there may be circumstances in which the Government would choose not to consult at the policy design stage, such as in the formulation of its Budget.³⁷ The data indicates that of the 90 measures announced during the review period, 56 were announced as part of a Budget (62 per cent). Nevertheless, pre-announcement consultation was undertaken by the Government on 21 of these measures.

4.7 Of the 34 non-Budget measures announced during the review period, six measures (18 per cent) were the subject of pre-announcement consultation – four via open public consultations undertaken by the Board of Taxation, and two via confidential consultations. The Board notes that of the non-Budget measures which did not involve pre-announcement consultation, nine were minor, administrative or concessional measures.

4.8 The Board's discussion paper noted that consultation with the States and Territories has been increasingly undertaken prior to any Federal Government announcement of GST changes.³⁸

4.9 The Board invited comments:

- on whether pre-announcement consultation, where it occurred, had increased certainty for taxpayers; and

37 Tax Design Review Panel 2008, *Better Tax Design and Implementation*, Canberra, page 24.

38 Board of Taxation 2011, *Post-implementation review of the Tax Design Review Panel recommendations*, Canberra, paragraph 2.30.

- as to where pre-announcement consultation, if it had occurred, 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.

Views in submissions

4.10 In terms of its impact on outcomes, the Institute of Chartered Accountants in Australia noted that pre-announcement consultation is extremely important, and that, ideally, it should result in government announcements which are clear in relation to the policy objectives of the measure, and accompanying discussion papers/draft legislation containing 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.³⁹ The Tax Institute noted that measures subjected to pre-announcement consultation also have generally been better received by the industry.⁴⁰ CPA Australia also indicated that the engagement of private sector experts and the involvement of tri-partite design teams enhanced the quality of the tax measures announced during the review period.⁴¹

4.11 In relation to the quantity of consultation, both CPA Australia⁴² and PwC⁴³ indicated, generally, that more measures were now open for consultation. PwC also indicated that this has provided greater opportunities in recent years for the taxpayer community to participate in consultation on tax law design, which has been positive, but that certain practical issues in the consultation process remain, which relate to both the quantity and quality of consultation.⁴⁴ These include:

- allowing sufficient time for consultation;
- enabling all stakeholders to have the opportunity to participate in consultations; and
- improving the form of consultation.

4.12 In contrast, the Tax Institute noted that there is an ongoing industry perception that external stakeholder involvement in the tax design process remains limited – that while the quantity of consultation undertaken has increased, on occasion the quality had been questionable.⁴⁵

39 Institute of Chartered Accountants in Australia submission, page 5.

40 Tax Institute submission, page 3.

41 CPA Australia submission, page 4.

42 CPA Australia submission, page 2.

43 PwC submission, pages 1 and 3.

44 PwC submission, page 3.

45 Tax Institute submission, page 4.

4.13 Examples cited by submissions where it was felt that there was no or limited pre-announcement consultation where, if it had occurred, would have resulted in more effective policy design, included:

- taxation of employee share schemes⁴⁶;
- the Resource Super Profits Tax (RSPT)^{47 48};
- the Minerals Resource Rent Tax (MRRT)⁴⁹;
- exemption of income earned in overseas employment^{50 51};
- non-commercial losses⁵²;
- removal of CGT trust cloning exception and provision of limited fixed trust rollover⁵³;
- new R&D tax credit⁵⁴; and
- extending TFN withholding arrangements to closely held trusts, including family trusts^{55 56}.

4.14 It should be noted that the MRRT measure did involve pre-announcement consultation. However, parties may have different views on whether a particular measure is designed effectively.

4.15 In relation to the quality of consultation, the Institute of Chartered Accountants in Australia cited examples where pre-announcement consultation had occurred, but

46 Tax Institute submission, page 3, suggested that while confidential pre-announcement consultation occurred, it should have been public.

47 CPA Australia submission, page 3.

48 Institute of Chartered Accountants in Australia submission, page 6.

49 The Tax Institute submission, page 3, suggested that while confidential pre-announcement consultation occurred, it should have been public.

50 Tax Institute submission, page 3, noted that this measure included no pre-announcement consultation.

51 Institute of Chartered Accountants in Australia submission, page 6, indicated that while post-announcement consultation occurred, it was sub-optimal.

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56 Institute of Chartered Accountants in Australia submission, page 6, indicated that while post-announcement consultation occurred, it was sub-optimal.

had still resulted in suboptimal outcomes, and suggested that there should be further examination of the reasons why this occurred.⁵⁷ These included:

- reforming the taxation of employee share schemes;
- the definition of a managed investment scheme;
- the R&D tax credit; and
- the indirect tax rulings system transition to the income tax system.

4.16 The Institute of Chartered Accountants in Australia also noted that while integrity measures are not subject to pre-announcement consultation, confidential consultation in those circumstances could assist.⁵⁸

4.17 While not strictly identified in relation to this Review Panel recommendation, the Minerals Council of Australia also recommended greater transparency about how revenue costings are undertaken for major tax measures, to enable external parties to provide input if they thought that the costing model being utilised was flawed.⁵⁹

4.18 The Treasury provided a second submission, which outlined in some detail the Treasury's approach to tax consultation.⁶⁰ It noted that consultation is used for multiple purposes, including:

- as a process of assessing and discovering information not wholly within the Treasury's grasp;
- as a process of policy dissemination; and
- as a process of relationship management.

4.19 It also noted that:

[a]cross different policy fields the community's demand for and expectations of consultation has grown considerably. Tax consultations are still relatively new and are evolving. Consultations are as much a challenge for ministers as they are for stakeholders and for Treasury. The Government side has to learn to hold things less tightly. That is happening gradually, demonstrated by the progression from almost exclusively confidential consultation (in the early 2000s), to a position of almost exclusively open public consultation within less than 10 years. Stakeholders,

57 Institute of Chartered Accountants in Australia submission, pages 7-8.

58 Institute of Chartered Accountants in Australia submission, page 5.

59 Minerals Council of Australia submission to the Board of Taxation's review of rights to future income and residual tax cost setting rules, page 10. The Review Panel recommendation discussed was TDRP Recommendation 12: Engage private sector experts.

60 The Treasury's second submission.

particularly those ‘in the know’, also need to work out how to engage in a more open consultation process. Treasury is learning and benefiting from stakeholder attitudes and views and will adapt its consultation processes accordingly.⁶¹

4.20 The Treasury also noted that it has found the following elements to be useful⁶²:

- explanation of policy by the Treasury in consultative forums, making consultation and submissions more efficient and effective than otherwise;
- appropriate mix of resources (number, level and experience) from the Treasury and the ATO;
- Treasury participation in ATO consultative processes, enabling issues on minor policy gaps to be addressed in a timely way;
- after legislation takes effect, the Treasury monitoring developments through its own consultations and National Tax Liaison Group (NTLG) processes; and
- good working relationships among stakeholders, the Treasury and the ATO, with skill gaps being filled quickly through discussion, consultation, secondments or contracted experts.

4.21 The Treasury also included a chart, reproduced below, to characterise the nature of tax consultations that would fit with the state of knowledge of a particular matter by the Treasury and the ATO on the one hand, and by stakeholders on the other.

Chart 3: Tax Consultation Characterisation matrix

		Stakeholders	
		Know	Don't know
Treasury/ATO	Know	<p>A Implementing well-understood policy in ordinary industry conditions</p> <p>For example basic care and maintenance; possibly deadlocked policy</p> <p>Basic consultation effort</p>	<p>B Implementing newish policy in ordinary industry conditions</p> <p>For example complex care and maintenance; anti-avoidance</p> <p>Above basic consultation effort; policy dissemination</p>
	Don't know	<p>C Implementing well-understood policy in new or changing industry conditions; overlapping regulatory domains</p> <p>For example tax consolidation care and maintenance</p> <p>Well above basic consultation effort; private sector experts supplement Treasury's knowledge base; layered consultation ensure integrity of consultation process</p>	<p>D Implementing newish policy in changing industry conditions; overlapping regulatory domains; new judicial doctrine</p> <p>For example resource rent tax, tax measures for carbon pricing</p> <p>Significant consultation effort; private sector experts supplement Treasury's knowledge base; layered consultation ensure integrity of consultation process, including drawing on international experience</p>

61 The Treasury's second submission, pages 8-9.

62 The Treasury's second submission, page 9.

The Board's view

4.22 The Board considers that consultation at an early stage in the policy development process is generally desirable. Engagement prior to announcement by the Government of its priorities on a matter can enable better information to be factored into the decision-making process. At the same time, where pre-announcement interaction is undertaken, but on a confidential and targeted basis, affected parties not involved in that process may feel that the outcome is suboptimal.

4.23 As noted at the beginning of this chapter, there are some broader aspects of consultation and engagement that need to be developed. In this regard, the Board considers that a key purpose of engagement between the government and non-government sectors in the tax design process is ensuring that tax legislation introduced into the Parliament gives effect to the Government's policy.⁶³ There are four factors that are important in this effort:

- involvement of the people who are best placed to contribute to the intended policy outcome;
- involvement of people who approach the consultation process with this outcome in mind;
- consultation that adopts best practice processes, for example, it is collaborative, open and the outcomes are clear; and
- consultation that is undertaken in a cost effective and efficient manner.

4.24 These benchmarks go to the quality and quantity of interactions between government and non-government parties for the purposes of tax policy design and implementation. Bearing them in mind, the Board has considered the following key issues:

- the need for clarification of roles and responsibilities of those participating in such interactions, including in relation to fostering, through collaborative effort, a shared understanding of and commitment to a particular outcome; and
- the effectiveness of current methods of external engagement to assist in tax policy design.

4.25 The first issue, regarding clarification of roles and responsibilities of those participating in consultation, is discussed below.

4.26 The second issue, regarding the effectiveness of current methods of external engagement to assist in tax policy design, is discussed in *Chapter 5: Evaluation:*

63 The Treasury's second submission, pages 4-8, also noted other purposes of engagement include as a process of assessing and discovering information; as a process of policy dissemination; and as a process of relationship management.

Involvement of the private sector. However, it is useful to note here that the Board views engagement as an exercise that is distinct from consultation. In this regard:

- The Board sees **consultation** as the process whereby the Treasury seeks views from parties affected by a particular proposal, in order to inform its advice to the Government on that proposal. Consultation can provide valuable input on the most effective way to implement a government's policy, and assist in minimising compliance and administration costs, and avoiding unintended consequences. Consultation can be especially relevant where implementation of a government policy decision requires consideration of complex legislative design issues. Lobbying or advocacy on policy matters may be appropriate in a consultation process, because parties are entitled to express a view, including on behalf of themselves or others. Consultation can be both public and targeted and/or confidential, and often occurs in circumstances where relevant materials are released for public comment. One outcome of consultation may be that, through a shared appreciation of matters such as the policy context and the practical circumstances facing taxpayers, the issues for decision become clearer and the information set available to assist in making decisions is improved.
- The Board views **engagement** as a two-way process, involving a typically fuller interaction between the government and non-government sectors, sometimes in order to consider threshold matters relevant to achieving a particular policy outcome. Thus, for example, it would generally entail the Treasury explaining the policy outcome that is sought, and all participants in the process working together to achieve that outcome in the most effective and efficient manner. An essential ingredient of this process is a commitment to a national interest outcome.

4.27 While consultation and engagement can both occur as part of the same interaction between government and non-government sectors, it is important to clearly differentiate between the two, particularly as it affects the roles and responsibilities of participants in tax policy design and implementation.

Roles and responsibilities of participants in tax policy design and implementation

4.28 Effective engagement and consultation is integral to ensuring that the final legislative product that the Government introduces into the Parliament delivers on the tax policy outcomes that the Government has set out to achieve.

4.29 One reason this is important is that the tax system is very complex. The implications of changes can be difficult to determine without engagement of and consultation with affected parties and those with knowledge of the operation of the tax system or the broader economic and social environment within which that system operates.

4.30 Also, institutionally, neither the Treasury nor the ATO is solely responsible for all the elements of the tax system, from advising on tax policy or design of tax legislation,

to the application of that legislation. That is, institutionally, responsibility for the tax system is shared.

4.31 Engagement/consultation can be the vehicle for the various parties – officials and non-government entities – to participate in a collaborative manner to jointly ensure that the final legislative product delivers on its intended policy outcomes. Collaboration in this regard requires the parties to have a shared understanding and commitment to the outcome intended by Government policy.

4.32 This interdependence does mean that the input (for example, the nature and quality of information) that one party provides in a process can fundamentally affect the output (for example, advice provided) by other parties to that process.

4.33 In this regard, it is fair to say that certain gaps have been exposed in recent processes, which appear to relate to the quality of consultation or engagement, rather than the quantity of that consultation or engagement. The Institute of Chartered Accountants in Australia indicated a need for a clear appreciation of, and respect for, the roles and responsibilities of each party, as well as a genuine commitment to improve the tax design process.⁶⁴ The Board considers that greater mindfulness regarding roles and responsibilities of participants within the process would enhance certainty and clarity about approaches to be used, and would assist in meeting the second of the Board's benchmarks for effective engagement, that is, involvement of people who approach the tax design and implementation process with the intended policy outcome in mind. To this end, the Board makes the following observations on the roles and responsibilities of the respective parties below.

The Treasury

4.34 The Treasury, through its Revenue Group, has primary responsibility for advising on tax policy and the design of tax laws.

4.35 In advising on tax policy, the Treasury formulates and provides advice to government on options, prepares official costings in close consultation with the ATO, and produces regulation impact statements.

4.36 In designing tax laws, the Treasury is responsible for instructing legislative drafters, producing explanatory materials, conducting community consultation on tax policy and draft legislation in accordance with government requirements, managing the legislation program, and assisting the government to secure passage of Bills through the Parliament.

4.37 The Treasury has a central role in ensuring that legislative products match their policy intent (the effectiveness of which is integrally dependent on interpretive guidance provided by the ATO, whose role is outlined from paragraph 4.41).

⁶⁴ Institute of Chartered Accountants in Australia submission, page 16.

Accordingly, it is important for the Treasury to understand the likely impacts of not only the intended policy, but also of the legislative provisions flowing from the consultation process; this includes both revenue and other effects. Related to this, there is a need to understand the relationship between the provisions in question and the rest of the tax system: this may require a comparison between the outcomes of one set of provisions with those of another, or an examination of the interaction between different parts of the system. It also might require examination of other, related, systems – for example, arrangements that regulate corporate structures or activities.

4.38 Consideration of these implications should normally form part of engagements/consultations. This would be facilitated by an explanation by the Treasury of the intended outcome of the proposed measure including, where appropriate, of the intended revenue outcome. This would provide opportunities for other parties within that process (including the ATO and external experts) to provide a view about, for example, the capacity of draft legislation, or recommended amendments to such legislation, to deliver on that intended outcome.

4.39 The Treasury's framing role requires strong skills, effort and time. It is vital that the Treasury is resourced appropriately to undertake this important task in terms of a sufficient number of suitably qualified staff, and sufficient time to undertake long-term, complex legislative projects.⁶⁵ The Treasury may need external assistance in its task; it is important that there be adequate funding for the engagement of appropriate experts.⁶⁶

4.40 Advice that the Treasury provides to the Government following engagement or consultation may not be fully effective if the Treasury and other participants do not perform their roles effectively. For example, if the Treasury does not assume responsibility for undertaking that framing discussion, the other parties may not be in a position to respond in a meaningful way.

The ATO

4.41 The Commissioner of Taxation, as the statutory head of the ATO, is responsible for the interpretation and administration of tax laws. In forming its view on the interpretation of enacted law (subject to the courts), the ATO routinely consults the Treasury, the professions, affected taxpayers and the public.

4.42 The ATO has an important role during the tax policy and legislation design process in providing its views and experiences. The ATO provides advice to the Treasury on the administrative and interpretive aspects of tax design, material that may form the basis of official costings of tax proposals (including administrative costs, actual costs to the revenue and compliance implications of policy advice) and issues

65 This issue is discussed further in *Chapter 6: Evaluation: Other recommendations*.

66 This issue is discussed further in *Chapter 5: Evaluation: Involvement of the private sector*.

that emerge through its experience of administration (including compliance costs and other issues that may arise for taxpayers in complying with proposed tax laws).

4.43 The ATO has consulted recently on a proposed change to an ATO practice on the involvement of its officers in consultations (see draft practice statement *PS LA 4373 The Australian Taxation Office's (ATO's) role in tri-partite tax law design*, released on 13 May 2011). This draft practice statement adopts the Review Panel's recommendation 2 relating to tri-partite design (discussed in detail in *Chapter 5: Evaluation: Involvement of the private sector*), enabling ATO officers to provide their views on the operation of proposed tax rules on a non-binding basis.

4.44 Sound outcomes from the tax design process, whether through tri-partite design as provided for by the Review Panel's recommendations or otherwise, requires that the ATO's understanding of the operation of the tax system be brought to bear in this process. Submissions to the current review⁶⁷ supported more active and open participation by the ATO, while recognising that some limits apply. As the ATO's draft practice statement is limited to tri-partite design, it should be noted that the use of tax design processes other than the tri-partite design concept will require consideration of further changes in the ATO's practices to ensure that they can continue to participate in this manner.

External or non-government parties

4.45 External parties generally have knowledge of the tax law and how it operates for them or their clients, of the relevant subject matter and of the commercial environment in which the tax law operates. They can and should bring this to bear in the consultation/engagement process.

4.46 The Board has formed the view that, ideally, such parties would engage in good faith and in a transparent manner, bringing to bear their knowledge and expertise to ensure that national interest outcomes are achieved when developing tax policies and laws. It may be very difficult to give effect to Government policy if, for example, external parties who are involved in a process do not act in good faith or are not transparent in a collaborative environment, where all parties seek to serve the national interest in contrast to personal or sectoral interests. While external engagement has worked in the majority of cases, some may have the perception that the engagement process has been used to negotiate outcomes for specific sectors or parties. While lobbying or advocacy for particular segments of the community is to be expected and welcomed, the distinction between this and engagement for the purpose of producing a national interest outcome should be clear in any tax design process involving government and non-government parties.

⁶⁷ Institute of Chartered Accountants in Australia, page 16; also Confidential submission 3.

4.47 While the Board discusses later (under Review Panel recommendations 6 and 7) the benefits that can be derived from public consultation in that it enables all views to be put on the record and assessed, it notes that a benefit in engaging external parties under a contract for advice is that the terms and conditions of their engagement are set out in the contract. This provides an express statement about the obligations that apply to the parties to that contract.

4.48 However, non-payment by the Government of external experts should not be the basis for arguing that parties need not act in good faith and be transparent in an engagement process, particularly in terms of whether a legislative product gives effect to its intended outcome. Irrespective of whether external experts are paid or not, parties involved (other than lobby or advocacy groups) should have a shared understanding and commitment to a national interest outcome.

4.49 The Board notes that as a result of a series of changes made to processes in New Zealand in the 1990s, a 'Generic Tax Policy Process' was established, one of the objectives of which was to clarify the responsibilities and accountabilities of participants in the process. It may be worthwhile being explicit about such processes within the Australian context. For example, a commitment from all stakeholders to achieving good tax system outcomes when involved in engagement or in consultation would encourage openness by participants, engender trust as participants become more familiar with each other and with the process, and enable greater sharing of expertise for the common good.

4.50 Ground rules should be established at the start of each engagement or consultation process, indicating norms of behaviour expected of all stakeholders, and the implications of departing from the rules.

4.51 Further, consideration could be given to the development of an explicit ethical framework for members of professional bodies who become involved in tax design.

4.52 Having regard to the complexity of the tax system, and that changes to that system need to be properly integrated and coherent, there is a strong need for quality assurance processes as a component of tax policy and legislative design.

The Board's conclusion/recommendation 6

Consistent with Review Panel recommendation 1, the Board recommends that the Government generally consult on tax changes at the initial policy design stage, prior to any Government announcement.

The nature of interaction between the government and non-government sectors should be determined in a systematic way, both early in and during the tax design process and by reference to the Tax Consultation Characterisation matrix. Both consultation and engagement should be considered in this process, although as distinct forms of interaction.

The Board recommends that seeking a commitment from all stakeholders to achieving good tax system outcomes when involved not only in engagement but also in consultation would encourage openness by participants, engender trust as participants become more familiar with each other and with the process, and enable a joint commitment to a national interest outcome.

The Treasury should establish ground rules for engagement or consultation at the start of each process, indicating norms of behaviour expected of all stakeholders, and the implications of departing from the rules.

Further, consideration could be given to the development of an explicit ethical framework for members of professional bodies who become involved in tax design.

The Treasury and the ATO should consider systematically adopting quality assurance processes as a component of tax policy and legislative design.

TDRP RECOMMENDATION 6: TWO-STAGE PUBLIC CONSULTATION AFTER ANNOUNCEMENT

The Government should ensure that post-announcement consultation on substantive tax measures occurs at two stages: (i) on the design of the announced policy; and (ii) on the draft legislation.

TDRP RECOMMENDATION 7: POST-ANNOUNCEMENT CONSULTATION SHOULD BE PUBLIC

The Government should generally adopt public consultation for post-announcement consultations to ensure that all stakeholders have the opportunity to contribute to the process.

Evaluation of data collected

4.53 Table 2 below, which was produced for the Board’s discussion paper, shows, for the 57 tax measures announced and enacted or lapsed during the review period, how many were the subject of post-announcement consultation on the design of the announced policy and how many were the subject of consultation on the draft legislation.⁶⁸ The table also shows whether that consultation was public or confidential.

Table 2: Measures announced and enacted or lapsed in the review period the subject of post-announcement consultation

Measures announced during the review period	Total measures	Consultation on announced policy		Number of those with open or targeted public consultations		Number of those with confidential consultations		Consultation on draft legislation		Number of those with open or targeted public consultations		Number of those with confidential consultations	
		Number	(%)	Number	(%)	Number	(%)	Number	(%)	Number	(%)	Number	(%)
Measures introduced & enacted	49	20	(41%)	20	(100%)	0	(0%)	33 ⁶⁹	(67%)	32	(97%)	2	(6%)
Measures introduced & lapsed	8	6	(75%)	6	(100%)	0	(0%)	6	(75%)	5	(83%)	1	(17%)
Total measures	57	26	(46%)	26	(100%)	0	(0%)	39	(68%)	37	(95%)	3	(8%)

4.54 The specific tax measures which involved post-announcement consultation or consultation on draft legislation are listed in Appendix F of the Board’s discussion paper.

4.55 The data indicates that 46 per cent of the 57 measures announced and introduced during the review period were the subject of post-announcement consultation on the design of the announced policy, and 68 per cent were the subject of consultation on draft legislation. The Board notes that 11 measures which did not involve consultation at the post-announcement or the draft legislation stage were minor, administrative or concessional measures. For the remaining measures, consultation was not undertaken because the available timeframe for introduction into the Parliament was too limited.

4.56 Comments were invited on the following:

- those instances where consultation was not undertaken, but which may have been beneficial if it had occurred; and
- whether, in circumstances where post-announcement consultation occurred, stakeholders felt that they had sufficient opportunity and involvement on tax measures relevant to them in review period.

⁶⁸ Note, measures announced but not yet introduced during the review period were not included in the table because consultation was still underway or yet to commence.

⁶⁹ Note, one tax measure had both public consultations undertaken on the first release of draft legislation, and confidential consultations undertaken on subsequent version of draft legislation.

Views in submissions

4.57 CPA Australia indicated that it was not aware of instances where post-announcement consultation had not been undertaken but which, if it had, might have assisted to refine policy design or draft legislation.⁷⁰ On the other hand, the Institute of Chartered Accountants in Australia cited an example where post-announcement consultation did not occur, but which might have had a beneficial effect if it had.⁷¹

4.58 Consistent with the policy underlying Review Panel recommendation 7, the Institute of Chartered Accountants in Australia agreed that public consultation enables it to ensure that its entire membership base can have their concerns reflected in submissions, and that all taxpayers and their advisers operate on a level playing field.⁷²

4.59 Generally speaking, the Treasury agreed that public consultation post-announcement allows for broad input, but that, depending on the subject matter, targeted consultation may be more effective.⁷³

4.60 PwC noted that it would be useful to understand the criteria for which targeted consultation at the post-announcement stage is selected and to understand who is selected and why.⁷⁴

The Board's view

4.61 The Treasury's second submission⁷⁵ examined the various purposes that might be served in undertaking consultation⁷⁶. In particular, consultation at the post-announcement stage might, in part, bring to light relevant information about how a tax measure might work in practice (in other words, consultation serves as a discovery process).

4.62 Consultation might also serve as an efficient and practical way of discovering new information or identifying information gaps relevant to a specific sector, and/or as a process of policy dissemination, targeted to the stakeholder concerned, and/or as a process of relationship management.

70 CPA Australia submission, page 3.

71 Institute of Chartered Accountants in Australia submission, pages 8-10. The example related to the measure to repeal certain unlimited periods for amending assessments.

72 Institute of Chartered Accountants in Australia submission, page 10.

73 The Treasury's first submission, page 6.

74 PwC submission, page 4.

75 The Treasury's second submission, pages 4-8.

76 The Treasury's use of the term 'consultation' in that second submission appears to have captured what the Board has characterised as 'consultation', as well as what the Board has characterised as 'engagement'.

4.63 Targeted consultation can be beneficial when a proposal is relevant only to a relatively small or discrete sector of the community. However, such consultation can be resource-intensive. As the Treasury notes, because resource constraints are binding, public consultation can be a more efficient and practical way of taking a matter forward.⁷⁷ Further, public consultation enables the broader community to provide its views on the particular proposal.

4.64 The Treasury also noted that ‘consultation cannot insure against stakeholders exaggerating or misrepresenting response effects. This possibility requires Treasury to carefully evaluate stakeholder claims rather than accept everything offered in consultations at face value.’⁷⁸ Submissions provided to a public consultation process are generally publicly available unless parties request confidentiality. A further benefit, therefore, that public consultation brings in tackling this evaluation challenge identified by the Treasury is that there is, in large part, on-the-record access to those stakeholder claims. Others can therefore challenge on-the-record views, where appropriate.

4.65 The Board is of the view that there are advantages associated with both public and targeted consultation, and that there is a place for both in considering how to manage specific measures. However, measures should be assessed to determine whether there should also be pre-announcement engagement.

4.66 To that end, the Board considers that the Treasury should, in a systematic way, assess the nature of the measure with which it is dealing, seeking to apply the Treasury Tax Consultation Characterisation matrix (reproduced as Chart 3 under paragraph 4.21 above) to understand the following:

- the state of information the Treasury and ATO have about industry conditions; and
- stakeholders’ understanding of policy.

4.67 This assessment should then provide preliminary indicators of the breadth, depth and nature of engagement or consultation that would be desirable in relation to a measure. This policy tool should then assist the Treasury to advise the Government about such matters.

The Board’s conclusion/recommendation 7

The Board considers that the Treasury should, in a systematic way, assess the nature of a measure with which it is dealing, by applying the Treasury Tax Consultation Characterisation matrix (reproduced as Chart 3 under paragraph 4.21 above) to understand:

77 The Treasury’s second submission, page 9.

78 The Treasury’s second submission, page 4.

- the state of information the Treasury and ATO have about industry conditions; and
- stakeholders' understanding of policy.

This assessment should provide preliminary indicators of the breadth, depth and nature of engagement or consultation that would be desirable in relation to a measure. This should, in turn, assist the Treasury to advise the Government about the form of consultation or engagement appropriate for the measure.

TDRP RECOMMENDATION 10: CONSULTATION SUMMARY ON TREASURY WEBSITE

The Government should post a consultation summary on the Treasury website when legislation for the measure is introduced into Parliament.

Evaluation of data collected

4.68 The Board's discussion paper noted that, during the review period, written submissions were provided to the Government through a consultation process for 41 of the measures announced and introduced. A consultation summary for 38 of these measures (93 per cent) was posted on the Treasury website.

4.69 The Board sought comments on:

- whether the posting of consultation summaries for almost all measures consulted upon has provided improved feedback and greater certainty for stakeholders participating in the consultation process; and
- the quality of the Government's consultation summaries.

Views in submissions

4.70 On a positive note, the Institute of Chartered Accountants in Australia indicated that consultation summaries have improved feedback for stakeholders.⁷⁹

4.71 However, CPA Australia, the Institute of Chartered Accountants in Australia and the Tax Institute all signalled some concerns regarding the content of consultation summaries, and/or their accessibility, which are set out below.

79 Institute of Chartered Accountants in Australia submission, page 10.

4.72 In relation to the content of consultation summaries, the Tax Institute noted that, in many cases, external stakeholders received no feedback in relation to their concerns or views, especially in formal submissions. The Tax Institute also indicated that consultation summaries are too often published significantly after the consultation, and usually (though not always) fail to articulate the reasons why industry objections were not heeded.⁸⁰ For example, the Tax Institute indicated that the consultation summary for the new R&D tax credit offered little assistance to industry stakeholders seeking to understand why certain options proposed during consultation were not adopted.

4.73 In relation to their accessibility:

- CPA Australia noted that it had not previously been aware of the existence of consultation summaries, but had since found it difficult to access them on the Treasury website.⁸¹
- The Institute of Chartered Accountants in Australia also indicated that the existence of these summaries is not well known, and steps could be taken to ensure greater access.⁸²

The Board's view

4.74 The Board is of the opinion that the Treasury has taken some useful steps in ensuring more effective engagement with the tax community, but that further steps could be taken, which could extend beyond simply the provision of consultation summaries.

4.75 The discussion above (commencing at paragraph 4.33) noted that certain gaps have been exposed in recent consultation processes, which appear to relate to the quality of consultation or engagement, rather than the quantity of that consultation or engagement. The Board considers that greater mindfulness regarding roles and responsibilities of participants within the consultation process would enhance certainty and clarity about approaches to consultation, and would assist in meeting the second of the Board's benchmarks for effective consultation, that is, involvement of people who approach the consultation process with the intended policy outcome in mind.

4.76 Further, systematically applying the Treasury's Tax Consultation Characterisation matrix to identify the form of engagement most appropriate for a particular measure would also deliver more efficient consultation outcomes.

4.77 In addition, for all measures, the Board recommends that the Treasury could fine-tune its existing approach to ensure improved engagement. For example, the Treasury could email directly its consultation summaries to those involved in a

80 Tax Institute submission, pages 3-4.

81 CPA Australia submission, page 3.

82 Institute of Chartered Accountants in Australia submission, page 10.

consultation process (provided the numbers involved are not significant). The Board also recommends that consultation summaries be easily accessible on the Treasury's website.

The Board's conclusion/recommendation 8

The Board is of the opinion that the Treasury has taken some useful steps in ensuring more effective engagement with the tax community, but that further steps could be taken, which could extend beyond simply the provision of consultation summaries on its website. These steps include:

- systematically applying the Treasury's Tax Consultation Characterisation matrix to identify the form of engagement or consultation most appropriate for a particular measure and that would also deliver more efficient consultation outcomes;
- that the Treasury email directly its consultation summaries to those involved in a consultation process; and
- that consultation summaries be easily accessible on the Treasury's website.

TDRP RECOMMENDATION 5: ANNOUNCEMENTS SHOULD INCLUDE DETAIL OF PROPOSED CHANGES

The Government should ensure that press releases advising of tax changes are accompanied by a separate Treasury document providing a level of detail similar to that in the drafting instructions Treasury provides to OPC. The separate document should describe the consultation timetable and include the details of the Treasury contact for the measure.

Evaluation of data collected

4.78 Table 3 below, produced for the Board's discussion paper, shows the number of tax measures announced during the review period which were accompanied by a separate Treasury document (a discussion paper) providing details of the proposed changes.

Table 3: Measures announced during the review period and accompanied by a discussion paper

Measures announced during the review period	Number of announced measures	Number of announced measures accompanied by a discussion paper at time of announcement		Number of announced measures accompanied by a discussion paper released after announcement		Average delay in release of discussion paper after announcement of measure (mths)
Enacted Measures	49	10	(20%)	10	(20%)	1.6 mths
Lapsed Measures	8	4	(50%)	2	(25%)	5.5 mths
Measures Not Introduced	33	9	(27%)	5	(15%)	2.1 mths
All measures	90	23	(26%)	17	(19%)	2.2 mths

4.79 The data indicates that one quarter of all measures announced during the review period were accompanied by a discussion paper at the same time as the announcement. A discussion paper was subsequently released for a further 19 per cent of measures, with an average lag of 2.2 months. It is noted that of the measures which were not accompanied by a discussion paper, 11 were minor, administrative or concessional measures.

4.80 The Board understands that in some cases the release of the discussion paper was delayed to stagger the release of papers and the due dates for comments.

4.81 Where discussion papers were released, they included details of the Treasury contacts responsible for the measure.

4.82 Comments were invited on whether the release of discussion papers for less than half of the measures announced during the two year review period had contributed to uncertainty for taxpayers in managing their tax affairs.

Views in submissions

4.83 The Treasury noted that the Government seeks to release a discussion paper around the time of announcement, and that 40 of the 90 measures in the review period provided a discussion paper. However, the Treasury also noted that, in practical terms, release of a discussion paper may be delayed as it may take some time for a paper to be prepared.⁸³ CPA Australia noted that, going forward, the goal should be to ensure that appropriate discussion papers are issued in most if not all cases unless there are good reasons why it is not necessary.⁸⁴

83 The Treasury's first submission, page 7.

84 CPA Australia submission, page 6.

4.84 Some submissions commented on the content of discussion papers.

- The Tax Institute indicated that while discussion papers have the capacity to create taxpayer certainty, they miss the mark in practice, because while they facilitate debate or deliberation, they often do not give an indication of how the draft legislation will appear. The Tax Institute recommended release of a further document to serve this purpose as soon as practicable after announcement.⁸⁵
- The Institute of Chartered Accountants in Australia noted that its members had not raised concerns about uncertainty created by a lack of discussion papers. However, the Institute also commented that where implementation depends on actions of an agency other than the legislature, the 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.⁸⁶

The Board's view

4.85 Discussion papers provide an important step in drawing out views from the taxpayer community about actual or proposed taxation changes.

4.86 The comments expressed by the Tax Institute and the Institute of Chartered Accountants in Australia reveal high, and possibly static, expectations regarding the level of consultation or engagement on measures.

4.87 However, there are real constraints that may mean that all expectations cannot be met by releasing a single document, such as a discussion paper.

4.88 Arguably, multi-staged engagement is not always necessary or desirable. Judgments may need to be made about the most effective and efficient means of achieving an outcome. For example, often legislative development cannot proceed until after the policy design of a measure has been agreed. Further, multi-stage consultation (for example, discussion papers at both the policy development and legislative design stages) prior to the release of exposure draft legislative will add to the time available prior to the introduction of legislation into the Parliament.

4.89 The Board considers that some of these concerns would be addressed if the Treasury were to actively diagnose the consultation challenge, seeking to apply the Treasury's Tax Consultation Characterisation matrix, to understand:

- the state of information the Treasury and ATO have about industry conditions; and
- stakeholders' understanding of policy.

85 Tax Institute submission, page 5.

86 Institute of Chartered Accountants in Australia submission, page 11.

4.90 This would be likely to more accurately determine the expectations of products and services to be delivered to the taxpayer community.

4.91 The Board also agrees with the Review Panel that, where consultation is undertaken, providing a consultation timetable and including the details of the Treasury contact for a measure is valuable information.

The Board's conclusion/recommendation 9

The Board recommends use of the Treasury's Tax Consultation Characterisation matrix to diagnose the nature of a measure, in order to understand expectations regarding products and services to be delivered to the taxpayer community, such as discussion papers and/or legislative design materials. The Board also agrees that, where consultation or engagement is undertaken, providing a timetable and details of the Treasury contact for a measure is valuable information.

TDRP RECOMMENDATION 8: POST-ANNOUNCEMENT CONSULTATION — FOUR WEEKS AT EACH STAGE

The time allowed for post-announcement consultation should be a minimum of four weeks on the policy design and four weeks on the draft legislation.

TDRP RECOMMENDATION 9: DRAFTING PRIORITY TO ALLOW FOR CONSULTATION

To facilitate the timely introduction of substantive tax measures and in recognition of the need to consult on draft legislation, the Government should ensure that the priority accorded to the drafting of legislation required for consultation purposes would allow the legislation to be drafted by the date by which it needs to be released for consultation.

Evaluation of data collected

4.92 The time periods allowed for post-announcement consultation on measures announced during the review period are set out in Table 4 below, which was produced for the Board's discussion paper.

Table 4: Time periods for consultation on measures announced in the review period

Post-announcement consultations undertaken during the review period	Measures which involved consultations	Number of post-announcement consultations undertaken	Average consultation period length (days)	Number of consultation periods under 28 days		Minimum consultation period (days)	Maximum consultation period (days)
Enacted measures	34	53	25.4	22	(41.5%)	6	49
Consultation on policy design		19	29.3	2	(10.5%)	7	39
Consultation on draft legislation		34	23.2	20	(58.8%)	6	49
Lapsed measures	7	11	28.9	4	(36.4%)	15	49
Consultation on policy design		4	34.8	0	(0.0%)	28	43
Consultation on draft legislation		7	25.6	4	(57.1%)	15	49
Measures not introduced	17	20	38.2	4	(20.0%)	15	80
Consultation on policy design		15	41.5	2	(13.3%)	15	80
Consultation on draft legislation		5	28.4	2	(40.0%)	18	46
All measures	58	84	28.9	30	(35.7%)	6	80
Consultation on policy design		38	34.7	4	(10.5%)	7	80
Consultation on draft legislation		46	24.1	26	(56.5%)	6	49

4.93 The data indicates that, on average, the time period for consultation on policy design was 34 days which exceeds the recommended four week period. However, the average time period for consultation on draft legislation of 24 days is below the recommended four week period. Overall, 30 of the 84 consultation periods held were shorter than the recommended 28 day period (36 per cent). The data also shows that in some instances, the time periods for consultation were as low as 6 or 7 days.

4.94 The specific tax measures with the shortest and longest consultation periods are listed below.

Shortest consultation periods:

- (i) *Measure: Exemption of income earned in overseas employment* – 6 day period for consultation on draft legislation from 12 May 2009 to 18 May 2009.
- (ii) *Measure: Reforming the taxation of employee share schemes* – 7 day period for consultation on policy design from 5 June 2009 to 12 June 2009, and 7 day period for consultation on transitional provisions draft legislation from 15 September 2009 to 22 September 2009.
- (iii) *Measure: Definition of a Managed Investment Trust* – 7 day period for consultation on draft legislation from 16 April 2010 to 23 April 2010.

- (iv) *Measure: GST and cross-border transport supplies* – 7 day period for consultation on draft legislation from 26 February 2010 to 5 March 2010.

Longest consultation periods:

- (i) *Measure: GST Margin Scheme Review* – 80 day period for consultation on policy design from 12 May 2009 to 31 July 2009.
- (ii) *Measure: GST Financial Supply Provisions* – 80 day period for consultation on policy design from 12 May 2009 to 31 July 2009.
- (iii) *Measure: Improvements to Taxation Running Balance Accounts & Interest on Overpayments* – 80 day period for consultation on policy design from 20 May 2010 to 8 August 2010.
- (iv) *Measure: Repeal of the foreign investment fund and deemed present entitlement rules* – 49 day period for consultation on draft legislation from 18 December 2009 to 5 February 2010.
- (v) *Measure: Introduce new R&D tax credit* – 49 day period for consultation on draft legislation from 18 December 2009 to 5 February 2010.

4.95 The shortest period for consultation on draft legislation was for a Budget measure with a 1 July start date in the same year. In several instances, the shortened periods of consultation had been preceded by lengthier consultations at an earlier stage. Some of the references are to a second round of consultation on the draft legislation. The Treasury also advised that on a number of occasions substantial discussions with stakeholders were undertaken outside the formal process and are not included in this data.

4.96 Comments were invited on whether the consultation arrangements:

- on the policy design of announced measures have allowed sufficient time for issues to be identified and addressed before the drafting of legislation; and
- on draft legislation have allowed sufficient time for issues to be identified, addressed and resolved before the introduction of legislation into the Parliament.

4.97 The Parliamentary schedule for each calendar year includes three sittings periods – the Autumn, Winter (or Budget) and Spring sittings periods.⁸⁷ The Office of Parliamentary Counsel (OPC) is responsible for drafting Bills for introduction into either House of the Commonwealth Parliament during one of those sitting periods. OPC drafters also draft amendments of Bills.

87 The 2012 Parliamentary schedule is at:
<http://www.dpmc.gov.au/parliamentary/docs/sittings2012.pdf>.

4.98 Before each Parliamentary sitting period, the Government's Parliamentary Business Committee of Cabinet (PBC) formulates a program of Bills that it requires to be drafted for the sitting period. As it may not be possible for all Bills on the program to be drafted, it decides on a drafting priority for the drafting of each Bill, which it determines by seeking bids from all Commonwealth departments. The Legislation Management Unit (LMU) within the Treasury coordinates bids for tax bills.

4.99 Once a Bill has been allocated prioritisation for introduction into either House of Parliament within a specific sittings period, departmental advisers then instruct drafters in OPC on the policy to be effected by the proposed Bills. OPC drafters draft the legislation in terms intended to give effect, as precisely as possible, to the policy.

4.100 To determine the priority for OPC to draft tax legislation for purposes other than introduction in the next sitting period (in other words, for consultation purposes), the Treasury makes a recommendation to the Minister following consultation with OPC. The Minister then makes a recommendation to the PBC. The PBC's decision to allocate priority for the drafting by OPC of legislation would therefore take account of the Government's overall tax and other legislative priorities. The Board invited comments (from Treasury and others) on whether this prioritisation process is adequate in ensuring legislation is being drafted by the date by which it needs to be released for consultation.

Views in submissions

4.101 Submitters generally had concerns about the time available for consultation.

- CPA Australia⁸⁸, PwC⁸⁹, the Tax Institute of Australia⁹⁰ and the Institute of Chartered Accountants in Australia⁹¹ all commented to the effect that four weeks at each stage may not be sufficient, either for complex or more substantive matters, or for matters that impact on a wider range of taxpayers.
- The Tax Institute also commented that the Treasury often appears to have insufficient opportunity to consider issues raised by industry and amend draft legislation as necessary before introduction. This appears to be most often the case where measures are announced in the Budget, or have an impending announced start date.

88 CPA Australia submission, page 3.

89 The PwC submission, page 4, noted that the appropriate length of time should be assessed having regard to the complexity and significance of the particular measure.

90 Tax Institute submission, page 4.

91 The Institute of Chartered Accountants in Australia submission, page 12, particularly referred to the four-week period at the post-announcement stage as being inadequate to provide sufficient time to comment on the design of substantive measures to implement announced tax policy.

4.102 The Treasury noted that while consultation improves the quality of legislation, it adds to the time before a measure can be introduced into the Parliament, and that the tension between these aims needs to be carefully balanced. Where consultation at this stage is shorter than recommended, this may be balanced by greater consultation at an earlier stage. It also noted that the times allowed for consultation are often pre-determined by the Government, in the context of its overall legislative priorities.⁹²

4.103 The Institute of Chartered Accountants in Australia also pointed to an important link between timeframes and the accuracy of the Forward Work Program. Using the Forward Work Program for timetabling purposes can be challenging if it is out of date.⁹³

4.104 The Institute of Chartered Accountants in Australia saw merit in six-monthly stakeholder meetings between the Treasury, tax professional and industry peak bodies to discuss these issues.⁹⁴

The Board's view

4.105 Given the real constraints that apply to the time available for consultation, the Board considers that better tools to manage communication between the Treasury and the taxpayer community might be of the greatest assistance.

4.106 For example, a six-monthly stakeholder meeting to discuss consultation arrangements, as suggested by the Institute of Chartered Accountants in Australia, might be of value. The Treasury noted that:

Treasury has reached out to a handful of peak professional bodies to inform them of consultations underway and in prospect. It is hoped that periodic high level discussion of this kind will enable peak bodies to better respond to their members' needs as well as engage in dialogue with Treasury that can go beyond particular tax measures and into broader tax-system-wide risks and stresses.⁹⁵

4.107 The Board understands that an arrangement along the lines of that suggested has been implemented by the Treasury.

4.108 Further, more regular updates of information about the consultation timetable (along the lines set out in the Appendix to the Treasury's second submission⁹⁶) should also ameliorate concerns.

92 The Treasury's first submission, pages 2 and 8.

93 Institute of Chartered Accountants in Australia submission, page 4.

94 Institute of Chartered Accountants in Australia submission, page 12.

95 The Treasury's second submission, page 8.

96 The Treasury's second submission, Appendix.

The Board's conclusion/recommendation 10

Given the real constraints that apply in respect of the time available for consultation and/or engagement, the Board considers that better communication between the Treasury and the taxpayer community would be valuable, for example, six-monthly stakeholder meetings to discuss issues such as the policy and legislative program, and consultation arrangements.

TDRP RECOMMENDATION 11: SIMULTANEOUS APPROVAL TO CONSULT ON DRAFT LEGISLATION

The Government should amend its approval processes so that, when seeking the Prime Minister's or Cabinet's policy approval for a tax measure, the Treasury Minister is also able to seek approval to release draft legislation for public consultation, without having to seek further approval.

Evaluation of data collected

4.109 The Board's discussion paper noted that the Government's approval processes enable Treasury ministers to seek approval to release draft legislation for public consultation when seeking policy approval for a measure. Once approval is obtained, Treasury ministers may release draft legislation for consultation without having to seek further approval, unless further policy approval is required.

Views in submissions

4.110 The Treasury indicated that the Review Panel's recommendation 11 has been adopted and has assisted to manage consultation in a timely manner. No further submissions were provided on this matter.

The Board's view

4.111 Given that the Review Panel's recommendation 11 appears to have been implemented, the Board makes no further comments.

The Board's conclusion/recommendation 11

Given that the Review Panel's recommendation 11 appears to have been implemented, the Board makes no further comments.

FURTHER INFORMATION REQUIRED ON THE QUALITY OF CONSULTATIONS

4.112 The Board also recognised that the data collected to date is more an indicator of the *quantity* of consultation undertaken during the review period rather than the *quality* of that consultation.⁹⁷

4.113 However one statistical indicator of the quality of consultation is the number of measures amended as a result of the consultation process. This is summarised in Table 5 below, produced for the Board's discussion paper.⁹⁸

Table 5: The number of measures announced in the review period that were amended as a result of the consultation process

Measures announced during the review period	Measures where written submissions were received	Measures amended as a result of consultation		Policy change amendments		Technical correction amendments		Drafting change amendments	
		Number	(%)	Number	(%)	Number	(%)	Number	(%)
Measures introduced & enacted	34	27	(79%)	13	(38%)	8	(24%)	17	(50%)
Measures introduced & lapsed	7	7	(100%)	2	(29%)	2	(29%)	5	(71%)
Total measures	41	34	(83%)	15	(37%)	10	(24%)	22	(54%)

4.114 The table shows that of the 41 measures for which written submissions were received, changes were made to either the policy detail or the draft legislation for 34 measures as a result of consultation (83 per cent). Of the seven measures which received submissions where no changes were made, the Board notes that four received submissions supporting the details of the measure.

4.115 To supplement this limited statistical evidence, the Board invited:

- stakeholder comments on the quality of consultation undertaken during the review period at each of the three stages: pre-announcement consultation on policy design, post-announcement consultation on the design of the announced policy, and consultation on the draft legislation; and
- suggestions as to the manner in which the Board could evaluate the quality of the consultation process based on the experience of stakeholders.

97 Confidential submission 1 noted in relation to Review Panel recommendation 10 (relating to consultation summaries) a need for there to be qualitative measures of consultation (ease, time and costs required to implement the change), indicating that arguably these measure how much detail has been obtained in the policy and legislation stages.

98 Note, measures announced but not yet introduced during the review period have not been included in the table because consultation was still underway or yet to commence.

4.116 The Board noted that this information would assist the Board to evaluate whether improvements have resulted from the implementation of the Review Panel's recommendations, and identify any new recommendations which may be required.

Views in submissions

4.117 A range of views were expressed in relation to the quality of consultation, which have been outlined in this report.

4.118 The Institute of Chartered Accountants in Australia referred to a specific consultation which it considered to have been undertaken reasonably well – the measure to improve the capital gains tax treatment of earnout agreements – but indicated that there are further examples.⁹⁹

4.119 In relation to suggestions as to the manner in which the Board could evaluate the quality of the consultation process based on the experience of stakeholders:

- the Tax Institute indicated that industry perception provides a valuable indicator of the quality of consultation, and also suggested considering how measures are amended to reflect views provided during consultation;¹⁰⁰
- CPA Australia suggested that the Board invite feedback from stakeholders following the completion of processes from time to time;¹⁰¹ and
- the Institute of Chartered Accountants in Australia suggested examining a range of case studies, including those where the consultation processes used were rated highly, and those where the process was not rated highly.¹⁰²

4.120 PwC noted that the main practical concerns that go to the core of the quality of the outputs of consultation are:

- sufficient time given to consultation;
- all key stakeholders having the opportunity to participate in consultation; and
- the form in which consultation occurs.¹⁰³

4.121 A confidential submission addressed this final concern, noting that the form of consultation can impact on the quality of outputs of consultation. The submitter

99 Institute of Chartered Accountants in Australia submission, page 13.

100 Tax Institute submission, page 5.

101 CPA Australia submission, page 4.

102 Institute of Chartered Accountants submission, page 13.

103 PwC submission, pages 3-4.

proposed that workshops with industry representatives might, in appropriate circumstances, deliver better outcomes than consultation sessions.¹⁰⁴

The Board's view

4.122 As noted above, the Board considers that some of these concerns would be addressed if the Treasury were to actively diagnose the consultation challenge, seeking to apply the Treasury's Tax Consultation Characterisation matrix, to understand:

- the state of information the Treasury and ATO have about industry conditions; and
- stakeholders' understanding of policy.

4.123 The four benchmarks that the Board has identified as necessary for effective consultation should also assist the Treasury to consider how consultation should progress in identified circumstances:

- involvement of the people who are best placed to contribute to the intended policy outcome;
- involvement of people who approach the consultation process with this outcome in mind;
- that consultation adopts best practice processes, for example, it is collaborative, open and the outcomes are clear; and
- that consultation is undertaken in a cost effective and efficient manner.

4.124 For example, applying the Tax Consultation Characterisation matrix, and the Board's benchmarks, might indicate that offering workshops could be an effective form of engagement.

104 Confidential submission 1.

The Board's conclusion/recommendation 12

Concerns regarding the quality of consultation are likely to be addressed if the Treasury were to systematically apply the Treasury's Tax Consultation Characterisation matrix to identify the nature and form of engagement and/or consultation most appropriate for a particular measure. The four benchmarks that the Board has identified as necessary for effective consultation should also assist the Treasury to consider how consultation should progress in identified circumstances:

- involvement of the people who are best placed to contribute to the intended policy outcome;
- involvement of people who approach the consultation process with this outcome in mind;
- that consultation adopts best practice processes, for example, it is collaborative, open and the outcomes are clear; and
- that consultation is undertaken in a cost effective and efficient manner.

CHAPTER 5: EVALUATION: INVOLVEMENT OF THE PRIVATE SECTOR

5.1 Review Panel recommendations 1, 2, 12 and 22 broadly relate to the involvement of the private sector in the design of tax measures. The full text of each of the recommendations appears below.

5.2 To assess the extent to which each of these recommendations has been implemented and whether they have resulted in demonstrable improvements in the tax design process, the following data was collected in relation to each tax measure announced during the review period:

- whether the measure was developed by a tri-partite design team (comprising Treasury, ATO and private sector participants);
- whether the Office of Parliamentary Counsel (OPC) was involved in the policy design stage; and
- whether a tri-partite design team monitored the early implementation of substantive new law.

5.3 The Review Panel's recommendations 1, 2, 12 and 22 are assessed together, as they overlap to a significant degree.

TDRP RECOMMENDATION 1: PRE-ANNOUNCEMENT CONSULTATION ON POLICY DESIGN

... For smaller changes, Treasury should engage the best available private sector experts on a paid professional basis to provide confidential advice on policy design ...

TDRP RECOMMENDATION 12: ENGAGE PRIVATE SECTOR SPECIALISTS

In accordance with Recommendation 1, the Treasury should engage external experts to ensure tax design is better informed by practical knowledge of the tax law, industry structures and commercial practices.

TDRP RECOMMENDATION 2: TRI-PARTITE DESIGN TEAMS

Substantive tax changes should be developed by a tri-partite team led by the Treasury, which includes tax officers and private sector experts. The team should have carriage of the measure throughout the design phase and should also monitor its implementation. Where appropriate, the Office of Parliamentary Counsel (OPC) should also be involved at the policy design stage.

TDRP RECOMMENDATION 22: MONITOR EARLY IMPLEMENTATION OF NEW LAW

The tri-partite design team should monitor the early implementation of substantive new law to ensure that the legislation is operating as intended by identifying legislative refinements that are needed and ensuring that appropriate administrative products and guidance material are in place.

Evaluation of data collected

5.4 The Board's discussion paper indicated that 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 (8 per cent), as follows:

- *Measure: Reform the foreign source income anti-tax deferral rules*
- *Measure: Make adjustments to the Income Tax Assessment Act 1997 to ensure the proper functioning of the CGT to improve the ability of businesses to restructure*
- *Measure: Make changes to GST cross-border transaction rules*
- *Measure: Further amendments to the Taxation Of Financial Arrangements – Tranche 2*
- *Measure: Improvements to Taxation Running Balance Accounts and Interest on Overpayments*
- *Measure: Restructure the current GST margin scheme provisions*
- *Measure: Improve the integrity of specific financial provisions in the GST law*

5.5 The level of participation of the private sector consultants in the resulting tax design process varied. In respect of one measure, *Reform of the foreign source income anti-tax deferral rules*, the involvement of the private sector consultant has been extensive. In others, including the *Further amendments to the Taxation Of Financial Arrangements – Tranche 2* measure, their involvement has been less extensive, with greater reliance being placed on the input of a wide cross-section of the private sector through comprehensive public consultation.

5.6 The data indicates the OPC was involved at the policy design stage for only one tax measure during the review period – *Reform of the foreign source income anti-tax deferral rules*.

5.7 The data also indicates that none of the seven tri-partite teams were used to monitor the early implementation of substantive tax measures during the review period. However, the Board notes that Treasury officers and private sector experts were involved in ATO consultative forums which monitored the implementation of substantive changes in tax laws during the review period.

5.8 Nevertheless, the analysis above suggests that, although elements of the recommendations were implemented for some measures, they were not fully implemented during the review period.

5.9 The Board invited:

- comments from the Treasury on its experience with the tri-partite design team arrangements and its plans for their future use;
- suggestions from stakeholders, particularly those with experience of the process, as to how the engagement of private sector experts in consultations / tri-partite design teams could be improved and the reasons why those suggestions could be expected to lead to improvements in tax design; and
- comments from stakeholders on whether the limited involvement of tri-partite teams in the tax design process has impacted on the quality of the tax measures announced during the review period. Comments were to take into account the increasing opportunities provided for private sector input through public and confidential consultations during the review period. Specifically, during the review period consultation was undertaken pre-announcement (either by the Treasury or via the Board of Taxation) in respect of 30 per cent of measures; on the announced policy for 46 per cent of measures; and on draft legislation for 68 per cent of measures.

Views in submissions

5.10 These Review Panel recommendations generated a range of views.

5.11 In relation to Review Panel recommendation 1, the Treasury noted that, in addition to the seven measures listed in the Board's discussion paper, external private sector experts were engaged on a paid professional basis to provide advice in relation to an additional four measures:¹⁰⁵

¹⁰⁵ This information was provided in an email to the Board of Taxation Secretariat dated 4 April 2011, supplementary to the Treasury's first submission.

- *Measure: Amend consolidation rules – calculation and collection of income tax liabilities*
- *Measure: Response by the Government to the Board of Taxation’s Review – Managed Investment Trust*
- *Measure: Introduce a new R&D tax credit*
- *Measure: Minerals Resource Rent Tax*

5.12 The Treasury also noted that while much of the Government’s pre-announcement consultation occurs through the Tax Design Advisory Panel (discussed below, from paragraph 5.15), there are occasions where other forms of engagement are more appropriate (such as direct engagement). The Board of Taxation can also be an efficient means of consulting.¹⁰⁶

5.13 Within this context, some commented on the adequacy of resourcing within the Treasury.

- The Minerals Council of Australia noted that it had observed inadequate resourcing on at least one project, which may have been addressed if the Review Panel’s recommendation 12 had been adopted. The Council recommended that in future the Treasury be provided with substantial additional funding to ensure that this recommendation is implemented.¹⁰⁷
- The Tax Institute recommended that the adequacy of policy design resources within the Treasury, and drafting resources within the OPC, be reviewed, observing that staff from both organisations seem over-extended.¹⁰⁸

5.14 Some submissions focused on the nature of engagement, noting the limited use that has been made of tri-partite teams.

- A confidential submission queried whether tri-partite consultation is genuine when a party is engaged very late in the process to review Treasury-produced materials.¹⁰⁹
- CPA Australia, PwC, the Tax Institute and the Institute of Chartered Accountants in Australia all noted certain deficiencies with tri-partite design teams:
 - CPA Australia noted that public consultation is a complement but not a substitute for earlier external expert input under tri-partite design teams.¹¹⁰

106 The Treasury’s first submission, page 10.

107 Minerals Council of Australia’s submission to the Board of Taxation’s review of rights to future income and residual tax cost setting rules, page 10.

108 Tax Institute submission, page 5.

109 Confidential submission 4.

110 CPA Australia submission, page 4.

- In contrast, PwC suggested that the most effective consultation occurs where the private sector had direct dialogue with the Treasury, accompanied by a formal submission, and that there is merit in having the ATO participate in that dialogue, particularly on complex issues, for implementation purposes.¹¹¹
- The Tax Institute indicated that the tri-partite model recommended by the Review Panel is deficient, and would benefit from a significant increase in communication, transparency and accountability for all concerned.¹¹²
- The Institute of Chartered Accountants in Australia noted that, as, in its view, the tri-partite design concept has not operated in the manner envisaged by the Review Panel, it might be premature to substantially modify the tri-partite model at this stage, but suggested greater transparency around the discussions between the Treasury, the ATO and stakeholders.¹¹³

5.15 To implement the Review Panel's recommendations regarding tri-partite design, the Government agreed to establish a panel of organisations (the Tax Design Advisory Panel) to facilitate Treasury sourcing, at short notice, confidential advice from external experts. The Panel comprises 13 organisations, selected by public tender, and includes five accounting firms, five law firms, two economic research and modelling houses and one legal academic and research organisation. Appendix F sets out the 19 October 2009 media release that announced the Tax Design Advisory Panel, including the members of that panel.

5.16 Some of the submissions received by the Board focused on the process of engagement of private sector experts, and in particular under the Tax Design Advisory Panel. The Tax Institute recommended a review of these processes, and noted that its experience had been that the process 'appears to be disorganised and haphazard'.¹¹⁴

5.17 In its current review, the members of the Board's Working Group met with representatives of some of the organisations on the Tax Design Advisory Panel in March 2011. Generally, those parties expressed some dissatisfaction with the small amount of work that had arisen from the Panel arrangement. Some of the members of the Tax Design Advisory Panel that had also had sought to obtain work under that arrangement provided specific comments regarding how to improve the tendering process.¹¹⁵

111 PwC submission, page 4.

112 Tax Institute submission, page 6.

113 Institute of Chartered Accountants in Australia submission, page 15.

114 Tax Institute submission, page 5.

115 Confidential submission 4.

5.18 The feedback from those Panel members suggests that they had expected that external parties would be closely involved throughout the policy design and implementation phases for all measures, regardless of their scale. In contrast, the Treasury representatives who met with the Board in targeted consultations expressed the view that attempting to meet these expectations may be unaffordable. Also, use of tri-partite design at all stages (policy design and implementation) on all measures may not deliver value for money, as it may extend beyond the comparative advantages external experts can bring to consultation.

5.19 An advantage in using the Tax Design Advisory Panel to source advice is that Panel members approached to tender for work are bound by confidentiality arrangements, even if they are unsuccessful in obtaining work. In theory, this should facilitate greater pre-announcement consultation, as the Government has commercially competitive processes in place to source external input, while retaining confidentiality. However, feedback from those organisations that had obtained some work under this arrangement (and that also participated in this consultation process, or who had provided comments via submissions) suggested that the Panel had not been used in the way they had anticipated. None of the Panel members present at those particular consultation sessions indicated that they had been selected to provide advice at the pre-announcement stage, and some also commented that they had been engaged late in the process, once the Government's policy had already been determined, to 'road test' material already produced by the Treasury.

5.20 In terms of monitoring early implementation of the new law (see the Review Panel's recommendation 22), the Treasury noted that the ATO has arrangements for monitoring the effectiveness of enabling legislation in the post-enactment period, including the NTLG and its subcommittees.

The Board's view

5.21 A key Review Panel recommendation that the Board has been examining from a post-implementation perspective seeks to facilitate more effective non-government input into tax design and implementation processes, by requiring that a 'tri-partite design team' (comprising the Treasury, the ATO and non-government representatives) have carriage of tax measures through both their design phase, and during implementation. To facilitate implementation of this recommendation, in the 2009-10 Budget, the Government provided \$1.8 million over three years (\$600,000 per year) to the Treasury to support the engagement of private sector experts via the Tax Design Advisory Panel to provide advice on tax policy design. The Board notes that the Treasury has advised that:

- of that amount, \$346,432.98 was spent in 2009-10 and 2010-11; and
- as departments are required to publish details of consultancy contracts let in each financial year that were valued at \$10,000 or more, these figures may not provide an

exhaustive list of all advice obtained via the Tax Design Advisory within those two financial years.¹¹⁶

5.22 The Review Panel considered that the tax design process would have the following hallmarks or features:¹¹⁷

- Tri-partite design teams would be established to see ‘substantive’ tax measures from the design and legislative stages through to the end of a reasonable implementation period (see Review Panel recommendation 22).
- ‘Substantive’ tax measures were considered to include all tax base measures other than those that have both a very limited impact and involve straightforward drafting (eg, minor technical corrections or the specific listing of deductible gift recipients).
- Each team would be led by the Treasury (reflecting its formal role in developing tax policy and legislation) and would include tax officers and private sector experts engaged throughout the design stage to ensure that relevant expertise is brought to bear at all stages of the process.
- To aid continuity, the same private sector experts engaged to advise on policy design should also participate in the design team.

5.23 An advantage that was expected to arise from using the Tax Design Advisory Panel to facilitate tri-partite engagement was that it would enable consultants to be engaged by the Treasury relatively quickly. This is difficult to assess, but it is likely that this has been the case.

5.24 However, the Treasury has been unable to point to a circumstance where tri-partite design teams, as envisaged by the Review Panel, have been implemented. As such, the Board has come to the view that tri-partite design has not been implemented in the way that it appears was intended. The Board feels that there may be a variety of factors contributing to that, including a lack of appreciation regarding what, in fact, was intended.

5.25 The Board considers that no one model of external involvement in tax design is, in fact, suitable for all tax measures. Factors such as the size, complexity and novelty of measures are relevant to the degree to which such involvement is necessary. A more pragmatic approach might make the decision to engage external expertise dependent on the comparative advantages that such expertise can deliver on a specific project (which is, in part, dependent on the stage at which a matter is at), and the complexity,

116 Refer to Table 7 in both *The Treasury Annual Report 2009-2010* and *The Treasury Annual Report 2010-2011*.

117 Tax Design Review Panel 2008, *Better Tax Design and Implementation*, Canberra, paragraphs 3.10 to 3.13, and in particular paragraphs 3.11 and 3.12.

novelty and scale of the policy matter in question. For example, 'road-testing' products already prepared by the Treasury could be a more cost-effective way of gaining external views, and could be adopted as the norm for certain types of tax measures.

5.26 Such matters could be assessed using the Treasury's Tax Consultation Characterisation matrix.

5.27 Further, the Board observes that in 2007, the Board considered an idea for a Taxation Consultation Centre while undertaking its 2006-07 review, *Improving Australia's Tax Consultation System*, which could involve a semi-permanent group of experts available to advise the Treasury on the development of tax legislation, providing a source of advice in addition to its normal consultation processes.

5.28 The Tax Consultation Centre concept was based on arrangements that have been adopted in New Zealand. The Board observed in 2006 that it entailed cultural changes, including acceptance by participants in consultation that their role was to produce the best outcome for the country and not to pursue personal or professional interests. This had been achieved in New Zealand over a number of years through mutual respect and a strong determination by all stakeholders that no one should act in a manner that jeopardises the process or its outcomes. Any breach of confidence or pursuit of personal or commercial interests would lead to exclusion of the breaching party.

5.29 Similar outcomes to those identified above could be achieved in Australia if a structured and prudent pathway is developed. A Taxation Consultation Centre in Australia (see further detail in Appendix D) could be made up of experts nominated by the professional bodies and may have a number of functions, including:

- participating in Treasury consultation processes on behalf of the professional bodies, or assisting professional bodies to participate;
- providing a source of advice on expertise within the profession; and
- providing tax professional advice to the Treasury.

5.30 If the Government were to decide to implement this model, the Board could facilitate discussions between the tax professional bodies and the Treasury to bring this proposal to fruition. Once established, the Board envisages that it could meet regularly with executives of the professional bodies with the objective of enhancing a culture of acting in the national interest, an objective that is accepted in New Zealand.

5.31 A centre such as this could assist to ensure that the Government consults with those best able to provide expert advice on a particular subject, from a wider field than the 13 organisations currently participating on the Tax Design Advisory Panel. It would also be likely to facilitate meeting the Board's first benchmark for effective consultation (that is, involvement of the people who are best placed to contribute the intended policy outcome) as well as the Board's fourth benchmark (that consultation is

undertaken in a cost effective and efficient manner). In addition to directly providing advice, such a structure, which is supported by ethical processes, should reassure the Government that a process exists to support early and effective engagement on tax proposals.

5.32 The Board considers that, irrespective of whether Review Panel recommendations 1, 2 and 12 (regarding tri-partite design teams) are implemented, the Tax Consultation Centre model could be used to ensure involvement of the people who are best placed to contribute the intended policy outcome, in a cost effective and efficient manner.

5.33 In addition, the Board notes that the Government announced at the 2011 Tax Forum that it has agreed to contribute around \$1 million per year to create an independent Tax Studies Institute, as a centre for research excellence, linked to Australia's universities, to consider, for example, the design and simplification of the tax-transfer system. The Board believes that this is a useful development.

5.34 Engagement could be further enhanced by the holding of regular meetings between the Treasury and the professional associations (as proposed by the Institute of Chartered Accountants in Australia and discussed under paragraph 4.104 above).

The Board's conclusion/recommendation 13

The Board considers that no one model of external involvement in tax design is, in fact, suitable for all tax measures. Factors such as the size, complexity and novelty of measures are relevant to the degree to which such involvement is necessary. A more practical approach might make the decision to engage external expertise dependent on the comparative advantages that such expertise can deliver on a specific project (which is, in part, dependent on the stage at which a matter has reached), and the complexity, novelty and scale of the policy matter in question.

Such matters could be assessed using the Treasury's Tax Consultation Characterisation matrix.

The Board's conclusion/recommendation 14

The Board considers that, irrespective of whether Review Panel recommendations 1, 2 and 12 (regarding tri-partite design teams) are implemented, the Tax Consultation Centre model could be used to ensure involvement of the people who are best placed to contribute the intended policy outcome in a cost effective and efficient manner.

The Board recommends that the Government establish a Tax Consultation Centre.

CHAPTER 6: EVALUATION: OTHER RECOMMENDATIONS

6.1 The full text of the remaining recommendations made by the Review Panel, namely Recommendations 14, 15, 23, 24, 25 and 26, appears below.

6.2 Data was collected to assess the extent to which each of the recommendations has been implemented and whether they have resulted in demonstrable improvements in the tax design process.

TDRP RECOMMENDATION 14: NO CHANGE TO CURRENT DRAFTING ARRANGEMENTS

The Government should not outsource the legislative drafting function nor should the use of regulations be expanded.

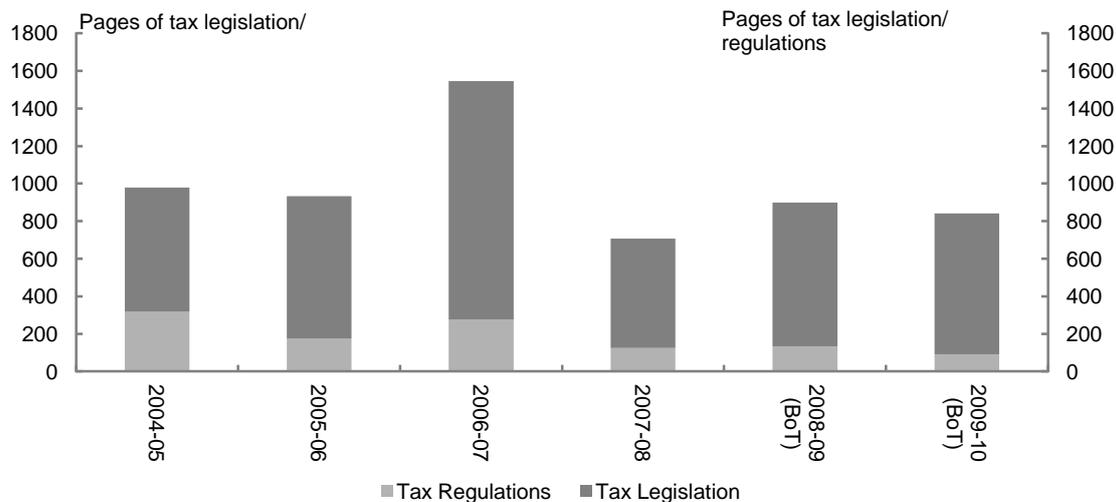
TDRP RECOMMENDATION 15: NO CHANGE TO THE LOCATION OF DRAFTING RESOURCES

The Government should not establish a dedicated tax drafting resource within the Treasury.

Evaluation of data collected

6.3 The Board's discussion paper noted that during the review period, the legislative drafting function was not outsourced, nor was a dedicated tax drafting resource established within the Treasury. The legislative drafting function remained the responsibility of OPC.

Chart 4: Comparison between pages of tax legislation and tax regulations enacted and made from 2004-05 to 2009-10



6.4 Chart 4, above, produced for the Board’s discussion paper, shows the number of pages of tax legislation and regulations enacted and made during each of the two income years of the review period, compared with the four preceding income years. The data indicates the use of regulations was not expanded during the review period.

Views in submissions

6.5 In relation to recommendations 14 and 15, a confidential submission noted that outsourcing is not the only means to improve the legislative drafting function, and proposed exploring other arrangements.¹¹⁸

6.6 The Institute of Chartered Accountants in Australia indicated that:¹¹⁹

- the Government should not outsource the legislative drafting function, and nor should the use of regulations be expanded (Review Panel recommendation 14); and
- the Government should not establish a dedicated tax drafting resource within the Treasury (Review Panel recommendation 15).

The Board’s view

6.7 The Board notes that submissions did not raise any substantial issues in relation to either Review Panel recommendations 14 or 15. As a consequence, the Board makes no further comment on these recommendations.

118 Confidential submission 1.

119 Institute of Chartered Accountants in Australia submission, page 16.

The Board's conclusion/recommendation 15

The Board notes that submissions did not raise any substantial issues in relation to either Review Panel recommendations 14 or 15, and makes no further comment on these recommendations.

TDRP RECOMMENDATION 23: BOARD OF TAXATION TO PERFORM MORE POST-IMPLEMENTATION REVIEWS

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.

Evaluation of data collected

6.8 The Board's discussion paper noted that, during the review period, the Government asked it to conduct two formal post-implementation reviews of major policy initiatives. These comprised post-implementation reviews of:

- the alienation of personal services income (requested on 3 June 2009 and completed by the Board in October 2009); and
- into certain aspects of the tax consolidation regime (currently being undertaken by the Board).

6.9 The Board also undertook a review of the Tax Issues Entry System in 2010, following its first year of operation.

6.10 Prior to the review period, the Board had, since its establishment in August 2000, undertaken two post-implementation reviews, in relation to small business capital gains tax concessions (completed in October 2005) and non-commercial losses (completed in June 2004).

Views in submissions

6.11 The Treasury supports the concept of post-implementation reviews but noted that, for major policy reforms, allowing a longer period of time than two years may enable the measure to be bedded down.¹²⁰

6.12 Both the Tax Institute¹²¹ and the Institute of Chartered Accountants in Australia¹²² signalled the importance of post-implementation reviews in the tax design process. The

120 The Treasury's first submission, page 11.

Institute of Chartered Accountants in Australia also saw value in the Board conducting such reviews, and in the Government more frequently asking the Board to do so.¹²³

The Board's view

6.13 The Board considers that post-implementation reviews offer a real opportunity to consider unintended consequences, but makes no further comment on this recommendation.

The Board's conclusion/recommendation 16

The Board considers that post-implementation reviews offer a real opportunity to consider unintended consequences, but makes no further comment on this recommendation.

TDRP RECOMMENDATION 24: INVESTIGATE POWERS TO GRANT EXTRA-STATUTORY CONCESSIONS

The Government should consider whether the Commissioner of Taxation 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.

Evaluation of data collected

6.14 The Board's discussion paper noted that, on 12 May 2009, the Treasury released a discussion paper entitled 'Extra-statutory concessions power for the Commissioner of Taxation' for public consultation. The discussion paper explored whether the Commissioner of Taxation should have an extra-statutory concession power to modify tax laws to give relief to taxpayers in appropriate circumstances.

6.15 Treasury received 11 submissions from the public in response to the discussion paper. These can be accessed at the following link:

<http://www.treasury.gov.au/contentitem.asp?ContentID=1681&NavID=037>

6.16 The Government has not made any further announcement in relation to this matter. The Board invited comments on the progress of this matter.

121 Tax Institute submission, page 1.

122 Institute of Chartered Accountants in Australia submission, page 16.

123 Institute of Chartered Accountants in Australia submission, page 16.

Views in submissions

6.17 In its submission, the Institute of Chartered Accountants in Australia urged the Board to encourage the Government to consider whether the Commissioner should be given further power to modify the tax law or provide extra-statutory concessions in appropriate circumstances.¹²⁴

6.18 On the other hand, the Tax Institute indicated that it considers that the Commissioner should not be given further power to modify the tax law to give relief to taxpayers, on the basis that the risks associated with the measure would outweigh the potential benefits. These risks include:¹²⁵

- lack of certainty (caused by the requirement for the Commissioner to exercise an extra-statutory concession power);
- detriment to certain taxpayers (taxpayers designed to be 'disadvantaged' by certain laws may be granted relief by the Commissioner resulting in an overriding of the policy of the law);
- weakening of the rule of law; and
- that giving further powers is likely to lead to delays in the legislative process.

The Board's view

6.19 The Board is of the view that as this matter is now before the Government, Review Panel recommendation 24 has been implemented. The Board makes no further comment on this recommendation.

The Board's conclusion/recommendation 17

The Board is of the view that as the matter of an extra-statutory concession power to modify tax laws to give relief to taxpayers in appropriate circumstances is now before the Government, Review Panel recommendation 24 has been implemented. The Board makes no further comment on this recommendation.

124 Institute of Chartered Accountants in Australia submission, page 16.

125 Tax Institute submission, page 6.

TDRP RECOMMENDATION 25: A MECHANISM TO IMPLEMENT THE RECOMMENDATIONS

The Government should ensure there is a mechanism in place to drive the implementation of the new tax design process.

Evaluation of data collected

6.20 In its discussion paper, the Board noted that the Treasury advises that its Senior Executive drives the implementation of the new tax design processes. They are assisted by the Group's Legislation Management Committee, Tax Specialists' Network and Tax Policy Network, as well as the Group's tax design process map. As outlined in paragraph 3.28 above, the tax design process map assists Treasury officers plan and deliver tax projects.

Views in submissions

6.21 A confidential submission indicated that any such mechanism to implement the Review Panel's recommendations needs to be underpinned by a strong methodology to deliver the outcomes and ensure that the objectives are met. If effective, it could assist to build an environment of trust.¹²⁶

6.22 The Institute of Chartered Accountants in Australia indicated that a mechanism would ensure that more than lip service is paid to the Review Panel's recommendations, noting that it considered that there is still some way to go to achieve the new tax design process that was envisaged by the Review Panel.¹²⁷

6.23 While not specifically referring to this recommendation, the Treasury noted that:

[a]vailable resources are constrained by budget allocations. In recent times, the Treasury's budget allocation has been reduced in line with the Government's broader objectives. At the same time, the consultation task has grown with the volume of new tax measures. Consequently more intensive consultation on any particular issue draws resources away from other issues and potentially slows down the program of tax law development and implementation.¹²⁸

The Board's view

6.24 The Board has not been advised of a specific process or structure that has been established to ensure that Review Panel recommendation 25 has been implemented. In

126 Confidential submission 1.

127 Institute of Chartered Accountants in Australia submission, page 16.

128 The Treasury's second submission, page 9.

the absence of evidence pointing to a specific process or structure, the Board has found it difficult to conclude that the recommendation has, in fact, been implemented.

6.25 That is not to say that there have been no improvements in the tax design process. As set out in the Board's report, improvements have been made (while further improvements should be made).

6.26 The Board considers that a mechanism to facilitate further improvements would be the Tax Consultation Centre: see the Board's conclusion/recommendation 14. Also, the implementation of the Board's conclusion/recommendation 19 (at the end of this Chapter) would provide the opportunity for the Board to review the extent to which further improvements in the tax design process have been made.

6.27 The Board also notes the central role that the Treasury has in the tax design process. A fundamental aspect of this is ensuring that legislative products match their policy intent. This is a complex task, requiring a high level of skills of a technical or management nature to coordinate the input of a potentially diverse range of parties in respect of often very difficult economic, legal, commercial, accounting and other issues. Apart from the \$1.8 million allocated over three years (\$600,000 per year) to the Treasury in the 2009-10 Budget to support the engagement of private sector experts via the Tax Design Advisory Panel to provide advice on tax policy design, the Treasury has been required to absorb the other costs of implementing these recommendations.

6.28 It is vital that the Treasury continue to be adequately funded to perform this role, but also to ensure that a mechanism is in place to drive the new tax design process.

The Board's conclusion/recommendation 18

In the absence of evidence pointing to a specific process or structure to implement the Review Panel's recommendations, the Board has been unable to conclude that Review Panel recommendation 25 has, in fact, been implemented.

The Treasury has a central role in ensuring that legislative products match their policy intent. This is a complex task, requiring a high level of skills of a technical or management nature to coordinate the input of a potentially diverse range of parties in respect of often very difficult economic, legal, commercial, accounting and other issues. It is vital that the Treasury continue to be adequately funded to perform that role, but also to ensure that a mechanism is in place to drive the new tax design process.

TDRP RECOMMENDATION 26: REVIEW IMPLEMENTATION OF RECOMMENDATIONS AFTER TWO YEARS

The Government should ask the Board of Taxation to review the tax design process after two years and report to Government on the extent to which there are demonstrated improvements.

Evaluation of data collected

6.29 The Board's discussion paper noted that this particular recommendation instigated the current review by the Board to evaluate the implementation of the Review Panel's recommendations.

Views in submissions

6.30 Various submissions noted some improvements over the review period, which have been explored at various points in this report. Most also noted that there remains room for further improvement.

6.31 For example, PwC noted that there is much greater opportunity in recent years for the taxpayer community to participate in consultation. PwC also indicated it had observed positive experiences and outcomes (albeit inconsistent) emerging from the consultation process. These include:¹²⁹

- through the sharing of industry or taxpayer experiences;
- practical insights into the potential application of a measure;
- raising of additional technical issues; and
- highlighting other consequential legislative issues.

6.32 The Institute of Chartered Accountants in Australia also commended the Treasury on the level of consultation that it undertakes, and particularly its willingness to engage stakeholders in relation to measures that are the subject of consultation.¹³⁰

The Board's view

6.33 One aspect of the Board's function is to provide advice to the Treasurer on the quality and effectiveness of tax legislation and the processes for its development, including the processes of community consultation and other aspects of tax design.¹³¹

129 PwC submission, page 3.

130 Institute of Chartered Accountants in Australia submission, cover letter.

6.34 In pursuing this aspect of its function, the Board has undertaken a number of reviews of the tax design process since its establishment in 2000.

6.35 For example, in March 2002, the Board finalised its report *Government Consultation with the Community on the Development of Taxation Legislation*. At the time, the Board indicated that it was generally acknowledged that the then government had taken steps to improve the level and quality of consultation on the development of tax legislation, but that stakeholders could still identify a range of shortcomings in legislation development arrangements. These included:

- a lack of order and planning around the then government's tax reform agenda;
- an ad hoc approach to consultation, contributing to a perception that the then government was not committed to 'genuine consultation';
- insufficient external input being obtained at the policy design phase;
- a lack of clarity and transparency about the aims of tax initiatives and the accompanying consultation processes;
- a lack of clear accountability for the tax design process, in particular for ensuring that legislation achieves the Government's policy intent;
- an over-emphasis on compliance in tax legislation and its implementation; and
- an insufficient continuity of technical expertise and experience within government agencies, and not enough government use of external expert advisers.

6.36 As a result of that 2002 review, the Board acknowledged that a culture of cooperation and trust within consultation arrangements was lacking at that time, and would take time to build, and that its role within this framework was one primarily of monitoring and reporting on general arrangements for consultation. The Board also signalled that it would regularly review consultative processes and the legislative outcomes.

6.37 In February 2007, the Board delivered another report entitled *Improving Australia's Tax Consultation System*. It noted that since 2002 there had been significant improvements in tax consultation arrangements, and that they were consistent with international practice, generally functioning well with community support. As a result, the recommendations outlined in that report were for evolutionary change to the tax consultation system, within the broad framework of the existing arrangements developed in response to the Board's 2002 report.

131 Board of Taxation Charter, see:
<http://www.taxboard.gov.au/content/Content.aspx?doc=about/charter.htm>.

6.38 The Board therefore has an ongoing role, which extends beyond undertaking a post-implementation review of the Review Panel's recommendations, as was envisaged by the Review Panel's recommendation 26.

6.39 The Board considers that there has been a shift, over time, towards a greater openness in tax consultation and/or engagement. The Board notes a couple of recent examples of collaborative approaches towards engagement.

Example 1: Policy Transition Group

6.40 On 2 July 2010, the Government announced new taxation arrangements for the resources sector. As part of these arrangements, a Minerals Resource Rent Tax (MRRT) will apply to coal and iron ore projects from 1 July 2012.

6.41 The MRRT has its origins in the recommendations of the Australia's Future Tax System (AFTS) Review, which found that the royalty regimes applied by the States and Territories are among the most distorting taxes in the Federation, and that royalty regimes are not particularly flexible.

6.42 As a consequence of being distorting and relatively inflexible, royalties tend to be set at rates low enough for mining to operate in periods of low to average commodity prices. This approach means that royalties will often fail to provide an adequate return to the community when commodity prices are high.

6.43 The company income tax is also a profits-based tax, which applies to incorporated businesses generally, and will tend to raise more revenue from mining operations when profits are high. However, the AFTS Review found that there would be benefit to the economy through lowering the company tax rate to assist in attracting internationally mobile capital investment provided resource rents are appropriately captured.

6.44 The AFTS Review concluded that a lower company tax rate was desirable for Australia but only if a specific profits-based tax was extended to mining operations to ensure a sufficient return to the community in periods of high commodity prices.

6.45 The detailed design of the MRRT applies the recommendations of the Policy Transition Group (PTG) which was established to advise on the implementation and technical design elements of the tax reforms, with the aim of minimising compliance costs and enabling a smooth transition to the new arrangements. The PTG was chaired jointly by Don Argus, AC and the Hon Martin Ferguson AM MP, Minister for Resources and Energy. The PTG undertook an extensive consultation process with over 80 formal submissions received in response to the consultation paper released on 1 October 2010, and a significant number of face-to-face discussions with industry and other stakeholders. In its cover letter attaching its December 2010 report to the Treasurer, the PTG made the following observations:

Throughout our deliberations we conducted extensive consultations across Australia. We acknowledge that not all those consulted support the new taxation arrangements. However, the consultations were overwhelmingly constructive, as were the written materials received through the public submission process. Our deliberations have been unambiguously enhanced by this input ... We encourage industry and the Government to continue to work together in the detailed administrative design and implementation of the new taxation arrangements.

6.46 Recommendation 61 of the PTC's report recommended that the Treasury and ATO should continue to engage with industry to progress the administrative design and implementation of the MRRT, including establishing an Implementation Group involving industry representatives and relevant advisors and officials from the Department of Resources, Energy and Tourism (RET), the Treasury and ATO.

6.47 The Resource Tax Implementation Group (RTIG) was established to support the legislative drafting stage. The RTIG is chaired by the Treasury and comprises representatives of associations and companies from the coal, iron ore, oil and gas sectors, peak taxation, legal and accounting bodies and officials from the Treasury, ATO and RET.

6.48 The Institute of Chartered Accountants in Australia has commented that the involvement of experts from within the resources industry and experts from within the tax profession in the consultation on the policy and legislative design were features of the PTC and the RTIG process 'that I would recommend the government adopt going forward when it comes to the implementation of other major policy reform initiatives in the tax system and perhaps beyond the tax system as well'.

Example 2: Business Tax Working Group

6.49 The Business Tax Working Group was announced by the Deputy Prime Minister and Treasurer on 5 October 2011 at the 2011 Tax Forum.

6.50 The role of this Working Group is to make recommendations to the Government on how the Australian business tax system can be improved to make the most of the challenges and opportunities arising from transformations in the broader economic environment, including the patchwork economy.

6.51 The Working Group, which includes business leaders, tax experts, unions, and supported by the Treasury, is tasked with looking at revenue neutral reforms that can increase productivity and deliver tax relief to struggling businesses. Initially, the Working Group has been asked to look at the tax treatment of losses, including how to fund any changes from within the business tax system. Then, the Working Group will focus on longer-term reform ideas for the business tax system, like a deduction for corporate equity or changing the company tax rate.

6.52 The Working Group will consult widely with industry and the broader community in developing its final reports.

General comments

6.53 The Board considers that various implications can be drawn from the Board's earlier 2002 and 2007 reviews, its current post-implementation review of the recommendations of the Review Panel, and the above examples.

6.54 First, governments of both persuasions have taken steps over the last decade or so to improve tax design and implementation processes. New structures and processes have been piloted. These include the establishment of a Legislation Management Unit within the Treasury to assist policy units to prepare timelines for tax legislation projects which ensure consultation and legislation processes are taken into account; the regular publication of a Forward Work Program setting out the Government's consultation plans for announced tax measures and indicating the legislation planned for introduction in a particular sittings; and the release of consultation summaries on its website for the majority of measures consulted on during the review period. Further, these structures and processes have been accompanied by a 'progression from almost exclusively confidential consultation (in the early 2000s), to a position of almost exclusively open public consultation within less than 10 years'.¹³² The Board encourages further evolutionary change.

6.55 Second, given the complexity of the tax system, no one single agent can hold all of the information to ensure that changes to that system can be made confidently and without risk. 'Old school' forms of consultation will need to make way for more active engagement by all involved in tax reform, to ensure that reforms are robust, implementable and sustainable.

6.56 Third, the recent examples above suggest a new benchmark for collaboration between the agents involved in tax reform. It is hoped that these examples will, in future years, be evaluated for the manner of their contribution.

132 The Treasury's second submission, pages 8-9.

The Board's conclusion/recommendation 19

The Board notes that there have been improvements in tax design and implementation processes, both in the years preceding this specific review, and during the review period. This is despite resourcing and other constraints. At the same time, there are areas for improvement both in terms of the timeliness and quality of these processes.

The Board recommends that the Government engage the Board to undertake a further review of these processes in three years.

GLOSSARY

AFTS	Australia's Future Tax System Review
ATO	Australian Taxation Office
The Board	Board of Taxation
CGT	Capital Gains Tax
LMU	Treasury's Revenue Group Legislation Management Unit
MRRT	Minerals Resource Rent Tax
NTLG	National Tax Liaison Group
OPC	Office of Parliamentary Counsel
PBC	Parliamentary Business Committee of Cabinet
PTG	Policy Transition Group
R&D	Research and Development
RET	Department of Resources, Energy and Tourism
Review Panel	The Tax Design Review Panel (also 'TDRP')
Review period	The two year period from 22 August 2008 to 21 August 2010
RSPT	Resource Super Profits Tax
RTIG	Resource Tax Implementation Group
TDRP	The Tax Design Review Panel (also 'Review Panel')
TFN	Tax File Number
TIES	Tax Issues Entry System

APPENDIX A: THE TAX DESIGN REVIEW PANEL'S RECOMMENDATIONS

TDRP Recommendation 1: Pre-announcement consultation on policy design

The Government should generally consult on tax changes at the initial policy design stage, prior to any Government announcement. For major policy changes, consultation should include public consultation on policy design (for example, via the release of a discussion paper). For smaller changes, Treasury should engage the best available private sector experts on a paid professional basis to provide confidential advice on policy design. Where possible, the agreement of the States and Territories should be sought on GST changes prior to any Federal Government announcement.

TDRP Recommendation 2: Tri-partite design teams

Substantive tax changes should be developed by a tri-partite team led by the Treasury, which includes tax officers and private sector experts. The team should have carriage of the measure throughout the design phase and should also monitor its implementation. Where appropriate, the Office of Parliamentary Counsel (OPC) should also be involved at the policy design stage.

TDRP Recommendation 3: Changes should be prospective and introduced within 12 months

The Government should ensure that announced tax changes generally apply prospectively (ie, from a date following enactment of the legislation). The Government should aim to introduce legislation for such measures within 12 months of announcement.

TDRP Recommendation 4: Retrospective changes should be introduced within six months

In circumstances where retrospective measures are appropriate, the Government should aim to introduce legislation within six months of announcement, recognising that in order to meet this timeframe it may be necessary to reduce the time allowed for consultation.

TDRP Recommendation 5: Announcements should include detail of proposed changes

The Government should ensure that press releases advising of tax changes are accompanied by a separate Treasury document providing a level of detail similar to

that in the drafting instructions Treasury provides to OPC. The separate document should describe the consultation timetable and include the details of the Treasury contact for the measure.

TDRP Recommendation 6: Two-stage public consultation after announcement

The Government should ensure that post-announcement consultation on substantive tax measures occurs at two stages: (i) on the design of the announced policy; and (ii) on the draft legislation.

TDRP Recommendation 7: Post-announcement consultation should be public

The Government should generally adopt public consultation for post-announcement consultations to ensure that all stakeholders have the opportunity to contribute to the process.

TDRP Recommendation 8: Post-announcement consultation — four weeks at each stage

The time allowed for post-announcement consultation should be a minimum of four weeks on the policy design and four weeks on the draft legislation.

TDRP Recommendation 9: Drafting priority to allow for consultation

To facilitate the timely introduction of substantive tax measures and in recognition of the need to consult on draft legislation, the Government should ensure that the priority accorded to the drafting of legislation required for consultation purposes would allow the legislation to be drafted by the date by which it needs to be released for consultation.

TDRP Recommendation 10: Consultation summary on Treasury website

The Government should post a consultation summary on the Treasury website when legislation for the measure is introduced into Parliament.

TDRP Recommendation 11: Simultaneous approval to consult on draft legislation

The Government should amend its approval processes so that, when seeking the Prime Minister's or Cabinet's policy approval for a tax measure, the Treasury Minister is also able to seek approval to release draft legislation for public consultation, without having to seek further approval.

TDRP Recommendation 12: Engage private sector specialists

In accordance with Recommendation 1, the Treasury should engage external experts to ensure tax design is better informed by practical knowledge of the tax law, industry structures and commercial practices.

TDRP Recommendation 13: Treasury's project management approach

The Treasury should seek continuous improvement in its project management techniques and capabilities.

TDRP Recommendation 14: No change to current drafting arrangements

The Government should not outsource the legislative drafting function nor should the use of regulations be expanded.

TDRP Recommendation 15: No change to the location of drafting resources

The Government should not establish a dedicated tax drafting resource within the Treasury.

TDRP Recommendation 16: Greater priority to care and maintenance

The Government should ensure greater priority is given to the ongoing care and maintenance of the tax system.

TDRP Recommendation 17: Adopt the Board of Taxation's 2007 TIES recommendation

The Government should pilot the Tax Issues Entry System (TIES) to identify legislative and administrative issues relating to the care and maintenance of the tax system. The Board of Taxation should review the operation of the system after 12 months.

TDRP Recommendation 18: Board of Taxation to advise on TIES priorities

The Government should ask the Board of Taxation to consult with the community and provide advice to the Government on how issues identified through TIES should be prioritised. The Board's advice to the Minister should be made public.

TDRP Recommendation 19: Publish a forward work program on announced measures

The Government should publish a rolling forward work program setting out the consultation it plans for announced tax measures and indicating the legislation it plans to introduce in the next sittings. When a delay occurs, the forward work program should be amended to reflect the delay and to explain the reasons for it.

TDRP Recommendation 20: Process to deal with unenacted announcements

As soon as practicable, the Government should announce its position in relation to all unlegislated announcements of the previous Government. For those measures that are to be adopted, the Government should announce an indicative work program for their implementation (in accordance with Recommendation 19).

TDRP Recommendation 21: Periodically review unenacted measures

The Government should periodically review any stock of unlegislated announcements and provide certainty to the community by dealing with any measures that are not to proceed.

TDRP Recommendation 22: Monitor early implementation of new law

The tri-partite design team should monitor the early implementation of substantive new law to ensure that the legislation is operating as intended by identifying legislative refinements that are needed and ensuring that appropriate administrative products and guidance material are in place.

TDRP Recommendation 23: Board of Taxation to perform more post-implementation reviews

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.

TDRP Recommendation 24: Investigate powers to grant extra-statutory concessions

The Government should consider whether the Commissioner of Taxation 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.

TDRP Recommendation 25: A mechanism to implement the recommendations

The Government should ensure there is a mechanism in place to drive the implementation of the new tax design process.

TDRP Recommendation 26: Review implementation of recommendations after two years

The Government should ask the Board of Taxation to review the tax design process after two years and report to Government on the extent to which are demonstrated improvements.

APPENDIX B: LIST OF SUBMISSIONS

The Board received six public submissions to the present review from the following organisations:

- CPA Australia
- PwC
- Treasury – submission 1
- Treasury – submission 2
- The Institute of Chartered Accountants in Australia
- The Tax Institute

The Board also received four confidential submissions, which are referred to in this report as follows:

- Confidential submission 1
- Confidential submission 2
- Confidential submission 3
- Confidential submission 4

The Board also received one public submission to another Board of Taxation review (the Board's review of consolidation rights to future income and residual tax cost setting rules), which referred to some (but not all) of recommendations of the Review Panel:

- Minerals Council of Australia.

APPENDIX C: THE BOARD'S CONCLUSIONS/ RECOMMENDATIONS FROM THIS REVIEW

The Board's conclusion/recommendation 1

The Board considers that there have been quantitative improvements in the process but that there remains room for improvement, particularly in relation to the quality of consultation. However, application of an approach which emphasises timeliness over all other factors should be avoided.

The Board's conclusion/recommendation 2

The Board considers that the Treasury has not demonstrated that it applies a structured project planning approach in all cases. The Board recommends that the Treasury continue to develop its project planning techniques and capabilities, and makes information about this available to stakeholders.

The Board also considers that there would be value in the Treasury investigating the Rapid Response Design Solution approach used by the ATO and considering its benefits in developing and enhancing the project management capability for tax design in relation to urgent projects.

The Board's conclusion/recommendation 3

The Board supports the release of information setting out the status of consultation and legislation on a monthly basis.

The Board's conclusion/recommendation 4

As the Government has announced its position on the vast majority of the measures for which final decisions had not, at the time of the 13 May 2008 media release, yet been released, the Board makes no further comments on this recommendation.

The Board's conclusion/recommendation 5

The Board considers that there would be benefit in the Government reviewing and making public the stock of unlegislated announcements on an annual basis.

The Board's conclusion/recommendation 6

Consistent with Review Panel recommendation 1, the Board recommends that the Government generally consult on tax changes at the initial policy design stage, prior to any Government announcement.

The nature of interaction between the government and non-government sectors should be determined in a systematic way, both early in and during the tax design process and by reference to the Tax Consultation Characterisation matrix. Both consultation and engagement should be considered in this process, although as distinct forms of interaction.

The Board recommends that seeking a commitment from all stakeholders to achieving good tax system outcomes when involved not only in engagement but also in consultation would encourage openness by participants, engender trust as participants become more familiar with each other and with the process, and enable a joint commitment to a national interest outcome.

The Treasury should establish ground rules for engagement or consultation at the start of each process, indicating norms of behaviour expected of all stakeholders, and the implications of departing from the rules.

Further, consideration could be given to the development of an explicit ethical framework for members of professional bodies who become involved in tax design.

The Treasury and the ATO should consider systematically adopting quality assurance processes as a component of tax policy and legislative design.

The Board's conclusion/recommendation 7

The Board considers that the Treasury should, in a systematic way, assess the nature of a measure with which it is dealing, by applying the Treasury Tax Consultation Characterisation matrix (reproduced as Chart 3 under paragraph 4.21 above) to understand:

- the state of information the Treasury and ATO have about industry conditions; and
- stakeholders' understanding of policy.

This assessment should provide preliminary indicators of the breadth, depth and nature of engagement or consultation that would be desirable in relation to a measure. This should, in turn, assist the Treasury to advise the Government about the form of consultation or engagement appropriate for the measure.

The Board's conclusion/recommendation 8

The Board is of the opinion that the Treasury has taken some useful steps in ensuring more effective engagement with the tax community, but that further steps could be taken, which could extend beyond simply the provision of consultation summaries on its website. These steps include:

- systematically applying the Treasury's Tax Consultation Characterisation matrix to identify the form of engagement or consultation most appropriate for a particular measure and that would also deliver more efficient consultation outcomes;
- that the Treasury email directly its consultation summaries to those involved in a consultation process; and
- that consultation summaries be easily accessible on the Treasury's website.

The Board's conclusion/recommendation 9

The Board recommends use of the Treasury's Tax Consultation Characterisation matrix to diagnose the nature of a measure, in order to understand expectations regarding products and services to be delivered to the taxpayer community, such as discussion papers and/or legislative design materials. The Board also agrees that, where consultation or engagement is undertaken, providing a timetable and details of the Treasury contact for a measure is valuable information.

The Board's conclusion/recommendation 10

Given the real constraints that apply in respect of the time available for consultation and/or engagement, the Board considers that better communication between the Treasury and the taxpayer community would be valuable, for example, six-monthly stakeholder meetings to discuss issues such as the policy and legislative program, and consultation arrangements.

The Board's conclusion/recommendation 11

Given that the Review Panel's recommendation 11 appears to have been implemented, the Board makes no further comments.

The Board's conclusion/recommendation 12

Concerns regarding the quality of consultation are likely to be addressed if the Treasury were to systematically apply the Treasury's Tax Consultation Characterisation matrix to identify the nature and form of engagement and/or consultation most appropriate for a particular measure. The four benchmarks that the Board has identified as necessary for effective consultation should also assist the Treasury to consider how consultation should progress in identified circumstances:

- involvement of the people who are best placed to contribute to the intended policy outcome;
- involvement of people who approach the consultation process with this outcome in mind;
- that consultation adopts best practice processes, for example, it is collaborative, open and the outcomes are clear; and
- that consultation is undertaken in a cost effective and efficient manner.

The Board's conclusion/recommendation 13

The Board considers that no one model of external involvement in tax design is, in fact, suitable for all tax measures. Factors such as the size, complexity and novelty of measures are relevant to the degree to which such involvement is necessary. A more practical approach might make the decision to engage external expertise dependent on the comparative advantages that such expertise can deliver on a specific project (which is, in part, dependent on the stage at which a matter has reached), and the complexity, novelty and scale of the policy matter in question.

Such matters could be assessed using the Treasury's Tax Consultation Characterisation matrix.

The Board's conclusion/recommendation 14

The Board considers that, irrespective of whether Review Panel recommendations 1, 2 and 12 (regarding tri-partite design teams) are implemented, the Tax Consultation Centre model could be used to ensure involvement of the people who are best placed to contribute the intended policy outcome in a cost effective and efficient manner.

The Board recommends that the Government establish a Tax Consultation Centre.

The Board's conclusion/recommendation 15

The Board notes that submissions did not raise any substantial issues in relation to either Review Panel recommendations 14 or 15, and makes no further comment on these recommendations.

The Board's conclusion/recommendation 16

The Board considers that post-implementation reviews offer a real opportunity to consider unintended consequences, but makes no further comment on this recommendation.

The Board's conclusion/recommendation 17

The Board is of the view that as the matter of an extra-statutory concession power to modify tax laws to give relief to taxpayers in appropriate circumstances is now before the Government, Review Panel recommendation 24 has been implemented. The Board makes no further comment on this recommendation.

The Board's conclusion/recommendation 18

In the absence of evidence pointing to a specific process or structure to implement the Review Panel's recommendations, the Board has been unable to conclude that Review Panel recommendation 25 has, in fact, been implemented.

The Treasury has a central role in ensuring that legislative products match their policy intent. This is a complex task, requiring a high level of skills of a technical or management nature to coordinate the input of a potentially diverse range of parties in respect of often very difficult economic, legal, commercial, accounting and other issues. It is vital that the Treasury continue to be adequately funded to perform that role, but also to ensure that a mechanism is in place to drive the new tax design process.

The Board's conclusion/recommendation 19

The Board notes that there have been improvements in tax design and implementation processes, both in the years preceding this specific review, and during the review period. This is despite resourcing and other constraints. At the same time, there are areas for improvement both in terms of the timeliness and quality of these processes.

The Board recommends that the Government engage the Board to undertake a further review of these processes in three years.

APPENDIX D: TAX CONSULTATION CENTRE

When the Board's 2007 report *Improving Australia's Tax Consultation System* was delivered to the previous government, the Board had met with Chief Executives of the key tax professional bodies (CPA Australia, the Institute of Chartered Accountants, the National Institute of Accountants, the Law Council of Australia, and the Taxation Institute of Australia) to explore ways that those bodies could address issues regarding participation in consultation to produce the best outcome for the country, and not to pursue personal or professional interests.

Those parties had acknowledged that they could do more to improve their input into tax consultation processes, and committed to addressing concerns identified in the 2007 report. In particular, they had reached in-principle agreement to establish a Consultation Centre that would facilitate their input jointly into tax consultation processes.

Where members of the Taxation Consultation Centre are engaged in activities that the tax professional bodies are already involved with in relation to tax consultation processes, it was not envisaged that they would be remunerated by government. Also, where they provide consultancy services, this would be subject to normal contractual and procurement requirements with payment at professional rates.

The bodies proposed to use the governance structure that CPA Australia and the Institute of Chartered Accountants used at the time for their input into accounting issues – the Joint Standing Committee – for this purpose, to assist in ensuring the quality of the advice provided by the Consultation Centre and the maintenance of confidentiality. The Board hoped that these governance arrangements would enable strong trusting relationships to develop, and facilitate greater involvement of the tax professional bodies in the development of taxation policy and legislation.

APPENDIX E: MEMBERS, CHARTER OF THE BOARD OF TAXATION AND CONFLICT OF INTEREST DECLARATION

MEMBERS

The members of the Board of Taxation are:

Chairman

Mr Chris Jordan AO

Deputy Chairman

Mr Keith James

Members

Ms Annabelle Chaplain

Mrs Teresa Dyson

Mr John Emerson AM

Ms Elizabeth Jameson

Mr Curt Rendall

Ex officio members

Mr Michael D'Ascenzo AO (Commissioner of Taxation)

Dr Martin Parkinson PSM (Secretary to the Treasury)

Mr Peter Quiggin PSM (First Parliamentary Counsel)

Secretariat

Members of the Board's Secretariat who contributed to this report were Ms Brenda Berkeley (past Secretary), Mr Roger Paul (current Secretary), Mr Sean Lee and Ms Simone Abbot.

CHARTER

Mission

Recognising the Government's responsibility for determining taxation policy and the statutory roles of the Commissioner of Taxation and the Inspector General of Taxation, the Board's mission is to contribute a business and broader community perspective to improving the design of taxation laws and their operation.

Membership

The Board of Taxation will consist of up to ten members.

Up to seven members of the Board will be appointed by the Treasurer, for a term of up to three years, on the basis of their personal capacity. It is expected that these members will be appointed from within the business and wider community having regard to their ability to contribute at the highest level to the development of the tax system. The Chairman will be appointed by the Treasurer from among these members of the Board. If the Treasurer decides to appoint a Deputy Chairman, he or she will also be appointed from among these members of the Board. Members may be re appointed.

The Secretary to the Department of the Treasury, the Commissioner of Taxation and the First Parliamentary Counsel will also be members of the Board. Each may be represented by a delegate.

Function

The Board will provide advice to the Treasurer on:

- the quality and effectiveness of tax legislation and the processes for its development, including the processes of community consultation and other aspects of tax design;
- improvements to the general integrity and functioning of the taxation system;
- research and other studies commissioned by the Board on topics approved or referred by the Treasurer; and
- other taxation matters referred to the Board by the Treasurer.

Relationship to Other Boards and Bodies

From time to time the Government or the Treasurer may establish other boards or bodies with set terms of reference to advice on particular aspects of the tax law. The Treasurer will advise the Board on a case by case basis of its responsibilities, if any, in respect of issues covered by other boards and bodies.

Report

The Chairman of the Board will report to the Treasurer, at least annually, on the operation of the Board during the year.

Secretariat

The Board will be supported by a secretariat provided by the Treasury, but may engage private sector consultants to assist it with its tasks.

Other

Members will meet regularly during the year as determined by the Board's work programme and priorities.

Non government members will receive daily sitting fees and allowances to cover travelling and other expenses, at rates in accordance with Remuneration Tribunal determinations for part time public offices.

The Government will determine an annual budget allocation for the Board.

Conflict of interest declaration

All members of the Board are taxpayers in various capacities. Some members of the Board derive income from director's fees, company dividends, trust distributions or as a member of a partnership.

The Board's practice is to require members who have a material personal interest in a matter before the Board to disclose the interest to the Board and to absent themselves from the Board's discussion of the matter, including the making of a decision, unless otherwise determined by the Chairman (or if the Chairman has the interest, the other members of the Board).

The Board does not regard a member as having a material personal interest in a matter of tax policy that is before the Board merely because the member's personal interest may, in common with other taxpayers or members of the public, be affected by that tax policy or by any relevant Board recommendations.

APPENDIX F: MEMBERS OF THE TAX DESIGN ADVISORY PANEL

The media release (below, No. 72 of 2009) entitled *Rudd Government Appoints Expert Tax Design Advisory Panel*¹³³ was issued by Nick Sherry, the then Assistant Treasurer¹³⁴, on 19 October 2009:

Assistant Treasurer, Senator Nick Sherry, today announced the composition of Tax Design Advisory Panel, delivering on the Rudd Government's commitment to enhanced consultation with the business community in the development and design of new tax laws.

The Panel comprises thirteen organisations, selected by public tender, and includes five accounting firms, five law firms, two economic research and modelling houses and one legal academic and research organisation.

The establishment of the Panel stems from a recommendation made in the earlier review of Government tax design and review processes which called for an increase in the use of external experts, including at the initial policy design stage.

'This is a major enhancement to the design of tax policy, formalising industry consultation as a vital early ingredient in the tax design process,' the Assistant Treasurer said.

'The Panel will complement the resources available within Treasury and the Tax Office by providing ready access to some of the best private sector brains in the field.'

'With the Panel now in place, important tax legislation will be developed by teams involving Treasury, the Tax Office and the private sector, as represented by the members of the Panel.'

'This will, of course, still be followed by the use of full public consultation.'

'The use of expert advice from the private sector is a common and long-running practice used by Government, but we're setting up a strategic and structured approach compared to the ad-hoc way of doing things in the past.'

133 See: <http://www.dpm.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/072.htm&pageID=003&min=njsa&Year=2009&DocType=0>.

134 For the period 9 June 2009 - 14 September 2010.

‘This means better outcomes, better value for money and better quality.’

The Panel will be engaged by Treasury through a case-by-case process in which the whole panel, or a subset of the panel, are approached for a particular task.

Panel members will nominate personnel they believe are best suited for the task and Treasury will select one or more experts. Where a known expert on a particular topic is available through one panel member, Treasury can approach just that organisation.

‘The Rudd Government looks forward to ongoing consultation with industry, business and professional groups as we move down the road of reform and recovery,’ the Assistant Treasurer said.

As part of the consultation process, the Government now publishes a forward work program on proposed tax legislation. It is available on the Treasury website www.treasury.gov.au.

The thirteen organisations successfully appointed to the Tax Design Advisory Panel are:

Organisation	Area of speciality
Access Economics	Economic research, modelling and quantitative analysis
ATAX – UNSW	Legal academic and research
Centre for International Economics	Economic research, modelling and quantitative analysis
Clayton Utz	Legal practice
Corrs Chambers Westgarth	Legal practice
Deloitte Touche Tohmatsu	Accounting practice
DLA Phillips Fox	Legal practice
Ernst & Young	Accounting practice
Greenwoods & Freehills	Legal practice
Hall & Wilcox ¹³⁵	Legal practice
KPMG ¹³⁶	Accounting practice
Pitcher Partners	Accounting practice
PricewaterhouseCoopers ¹³⁷	Accounting practice

135 The Deputy Chairman of the Board of Taxation, Mr Keith James, is a partner with Hall & Wilcox.

136 The Chairman of the Board of Taxation, Mr Chris Jordan AO, is a partner with KPMG.

137 The Chairman of the Tax Design Review Panel, Mr Neil Wilson, is a partner with PricewaterhouseCoopers. Mr Wilson was engaged by the Board of Taxation, as a member of the Board’s Working Group undertaking this review.

