



THE TAX INSTITUTE

6 April 2011

Attention: Ms Brenda Berkeley  
Secretary to the Board of Taxation

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

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

Dear Ms Berkeley

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

The Tax Institute is pleased to provide our comments on the Board of Taxation's (BOT) Discussion Paper on its post-implementation review of the Tax Design Review Panel recommendations (the "**Discussion Paper**").

The Tax Institute commends the efforts and independence of the BOT's Working Group in compiling this Discussion Paper. Effective community consultation in relation to tax measures, both pre and post-announcement plays a significant role in improving the operation and policy of enacted tax legislation. Post-implementation reviews are integral to continued improvement of the tax design process.

Our submissions concerning matters raised in the Discussion Paper are set out below.

**Recommendations**

Our key recommendations are as follows.

*Timing*

Taxpayers need to know:

- the dates on which certain measures may be enacted;
- at what stage of development certain measures are within Treasury; and
- what the status of announced but unenacted measures is at any particular time.

*Quality and quantity of consultation*

The consultation process would be improved by:

- ensuring pre-announcement consultation is conducted with adequate time for industry input; and

- Treasury following up each policy announcement with a document setting out the proposed details of the legislation.

### *Involvement of the private sector*

The consultation process would be improved if:

- Treasury reviews its processes for recruiting the services of private sector experts on a paid professional basis; and
- the ATO is required to disclose its representations to Treasury as part of tri-partite consultation.

Our detailed analysis follows.

### **Timing**

The Tax Institute notes that the increase in the percentage of measures enacted on a prospective-only basis over the review period has improved taxpayers' ability to manage their tax affairs.

It is our view that the tax design process has improved in this respect during the review period. Post-implementation scrutiny is integral to ensuring continued improvement in this respect.

However, in our view, it is necessary to also have regard to the specific measures that were introduced during the review period in order to appropriately interpret these findings.

This is because the effect of the date of application of legislation will depend on the nature of the measure. By way of example, where a tax measure is intended to clarify the operation of the law so that the amendment results in a restoration of the position that, in the industry's view, always existed under the current/previous law (such as the proposed earn-out amendments) taxpayers will benefit from a retrospective application of the amendments.

Many retrospective measures enacted during the review period were intended to benefit taxpayers, minor, or enacted in response to an urgent situation (such as the Victorian bushfires or the global financial crisis).

While Treasury's publication of a forward work program has merit, it has been our experience that the timings indicated on this work program are frequently not abided by, in many cases because of other more urgent issues that arise. The publication of a more frequently updated and more accurate forward work program would assist taxpayers in their tax planning.

Furthermore, taxpayers still experience uncertainty regarding the status and progress of measures that have been announced but not yet enacted. While some measures have taken significant periods of time to enact after announcement, even when the measure is intended to apply from the date of announcement, of greater significance is the lack of information on when such measures will be enacted. This creates significant uncertainty for taxpayers.

Examples of such measures include:

- Implement the Board of Taxation recommendations relating to the taxation of off-market share buybacks
- Resolve CGT issues relating to instalment warrants

- Reform the foreign source income anti-tax deferral rules
- Improve the capital gains tax treatment of earnout agreements

The information collected and presented in the Discussion Paper only partly accords with the perception and understanding of industry. While there has been noticeable improvement in the setting of appropriate commencement dates for enacted measures, there remains confusion as to:

- the dates on which certain measures may be enacted;
- at what stage of development certain measures are within Treasury; and
- what the status of announced but unenacted measures is at any particular time.

### **Quality and Quantity of Consultation**

In our view, measures subject to public pre-announcement consultation have generally been better received by industry, as this gives Treasury the opportunity to consider and address industry concerns in relation to the measure prior to announcement.

Certain measures which were subject to confidential pre-announcement consultation have fallen short of this standard, and in our view would have benefitted from public pre-announcement consultation. Examples are as follows:

- Reforming the taxation of employee share schemes
- Minerals Resources Rent Tax

Measures such as the following (in relation to which no pre-announcement consultation was conducted) would have benefitted from such consultation:

- Exemption of income earned in overseas employment
- Non-commercial losses
- Removal of capital gains tax trust cloning exception and provision of limited fixed trust roll over
- Introduce a new R&D tax credit
- Extending the tax file number withholding arrangements to closely held trusts, including family trusts

Where public consultation was undertaken, external stakeholders generally had sufficient capacity to express their views in respect of the relevant measure. However, in many cases, external stakeholders have received no feedback in relation to their concerns or views, especially in formal submissions.

While we understand that it is not possible for Treasury to provide specific feedback to each external stakeholder on their submission, consultation summaries could adequately fulfil this role and promote transparency if these summaries were improved in terms of detail and timeliness.

In our view, consultation summaries are too often published after a significant period of time has lapsed after the consultation, and usually (though not always) fail to articulate the reasons why industry objections were not heeded.

An example of this is the recently enacted Bill referred to in the Discussion Paper as “Introduce a new R&D tax credit”.

This provides a clear example of a situation in which public consultation was conducted, but industry was unsatisfied with the benefit of the consultation process and the Bill, owing in part to a lack of transparency over the reasons for refusing to address industry concerns.

The following is an extract from Treasury’s consultation summary of the consultation on the second exposure draft of this Bill.

#### *Core R&D*

*The revised definition of core R&D activities used clear language instead of ambiguous concepts such as ‘considerable (or appreciable) novelty’ and ‘high levels of technical risk’. ... However, other submissions were critical of the revised definition, expressing concern about what ‘new knowledge’ means, and suggesting that the change creates ambiguity and uncertainty.*

*The Bill retains the definition of core R&D activities from the second exposure draft.*

This extract offers little assistance to industry stakeholders seeking to understand why the definition of core R&D activities was not amended as submitted.

While the quantity of consultation has been satisfactory, on occasion the quality of consultation has been lacking. Although industry have been permitted to put their view to Treasury in most cases, the perception within industry remains that external stakeholder involvement in the tax design process remains limited.

This perception is also underpinned by the average period of time allowed for consultation. For complicated or significantly technical measures, 4 weeks may not be sufficient time for industry to fully identify all relevant issues, owing to two factors:

- The overwhelming majority of submissions are prepared by members in the tax profession who are not compensated for their involvement in the tax design process. As such, involvement in this process is generally subject to commercial considerations.
- Where several measures have arisen for consultation in a specific area of tax law (such as for example GST), the time allowed to industry to respond to each measure does not constitute the entire 4 weeks, but is usually truncated as a result of competing demands.

Furthermore, Treasury often appears to have insufficient opportunity to consider issues raised by industry and amend draft legislation as necessary prior to its introduction into Parliament. In our experience this rush to introduce measures into Parliament is most often the case where measures have either been announced during the Budget, or have an impending announced start date. For example, draft legislation that is made available for consultation during March, April and May of a year, with a view to having the legislation enacted on or by 30 June of the same year (where for example, the measure is intended to apply as of 1 July) is unlikely to have been subject to a rigorous consultation process.

Despite assertions to the contrary, such a rush does not create certainty for taxpayers, but instead creates uncertainty in the form of errors or oversight in the legislation. Often, there is little benefit in or cause to rush such measures towards a 1 July start date, especially where the benefit of the measure is moot.

The publication by Treasury of Discussion Papers intended to provide “a level of detail similar to that in the drafting instructions Treasury provides to OPC” has the capacity to create taxpayer certainty, but misses this mark in practice. Such discussion papers play a vital role in the tax design process i.e. to facilitate debate or deliberation on the major aspects of the policy, but do not act as an indicator of what the draft legislation will look like.

In addition to discussion papers, we recommend that Treasury release a document that provides the recommended level of detail as soon as practicable after the date on which the measure is announced.

While The Tax Institute recognises that it is difficult for the BOT to measure the quality (rather than the quantity) of consultation, we note that industry perception provides a valuable indicator of the quality. We recommend the BOT have regard to the manner in which measures were amended as a result of consultation, with a view to establishing the percentage of instances in which these amendments were either significant or in line with industry submissions.

### **Involvement of the private sector**

We recommend that Treasury review its processes for engaging with and recruiting the services of private sector experts on a paid professional basis for the purposes of consultation. It has been our experience that this process appears to be disorganised and haphazard. Practitioners generally do not know how to apply for tenders to undertake such work, or do not receive feedback in relation to their application. Furthermore, where practitioners have been so engaged, Treasury is unwilling on occasion to allow the practitioners to undertake a holistic review and instead adopts a piecemeal approach to the process.

The Tax Institute also notes that while Treasury has undoubtedly increased engagement with the private sector in the tax design process as a result of the Tax Design Review Panel’s recommendations, the quality of consultation will further improve if:

- The practice of undertaking pre-announcement consultation becomes more widespread.
- Consultation becomes more transparent (see also our comments in relation to tri-partite consultation below).
- Accountability for the outcome of a consultation process is increased – this may be done by the issue of more timely and detailed consultation summaries.
- The process by which Treasury engages paid professionals to provide advice is better organised and publicised.

In addition to the above, we recommend that the adequacy of policy design resources within Treasury and drafting resources within the OPC be reviewed. It has been our observation over the course of several consultations during the review period that Treasury and OPC staff seem over-extended.

### *Tri-partite consultation*

In our experience, the operation of the tri-partite consultation model is deficient. The lack of transparency of interactions between Treasury and the ATO during the consultation process generates significant misunderstanding and confusion between industry and both Government agencies.

By way of example, while the ATO liaises with Treasury in relation to the design of tax policy and legislation, such communications are not disclosed in any meaningful way to industry, even where the subject matter does not appear to be confidential (as demonstrated by Treasury officials subsequently disclosing and discussing such matters with industry in separate meetings).

In our experience the ATO does not comment publicly on its interactions with Treasury, but Treasury officials frequently refer to, and discuss, submissions made by the ATO on a particular matter with industry, even in the course of evaluating or providing responses to feedback from industry on the same measure. Industry stakeholders are unable to raise and discuss such matters directly with the ATO. This generates an impression within industry that the current tri-partite consultation process creates a bias towards the ATO view, while this view remains unrefuted by industry.

In our view, the tri-partite consultation process would benefit from a significant increase in communication, transparency and accountability for all parties involved. We recommend that the ATO be required to disclose its representations to Treasury on measures on which consultations are being conducted, subject to confidentiality requirements. We further recommend that the ATO develop and release its practice statement confirming its role in tri-partite legislative development as soon as possible.

### **Other recommendations**

As per our submission lodged with Treasury on 15 July 2009, The Tax Institute is of the view that the Commissioner should not be given further power to modify the tax law to give relief to taxpayers. While such a power may be beneficial in some ways, the risks associated with such a measure would outweigh the potential benefits. In our view, these risks include:

- 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).
- Weakens the rule of law.
- Is likely to lead to delays in the legislative process.

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Should you require further information or assistance in relation to the above, please do not hesitate to contact me on 02 8223 0011 or The Tax Institute's Tax Counsel, Deepti Paton, on 02 8223 0044.

Yours sincerely

A handwritten signature in grey ink, appearing to read "P Murray".

Peter Murray  
President