



Australian Government

The Treasury

THE TREASURY'S SUBMISSION TO

**Board of Taxation's
Post-implementation Review of the
Tax Design Review Panel Recommendations**

28 March 2011

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INTRODUCTION

Treasury adopts a collaborative approach to developing advice to Government on tax policy and law design, seeking to optimise administrative effectiveness and minimise compliance costs for affected taxpayers in delivering the Government's intended policy outcome. Community consultation is an important part of this approach.

Consultation arrangements:

- allow the community greater insight into the design constraints
- help generate creative/innovative/better targeted and more practical solutions in policy and legislative design
- enable the Government to understand the full range of impacts, and therefore identify sensitivities involved in any proposed action
- provide an opportunity to identify major differences, as well as areas of agreement between various interests
- strengthen community confidence in any proposed change
- promote better understanding and, consequently, a greater community ownership of a proposed approach.

Following the Government's endorsement of the recommendations of the Tax Design Review Panel (TDRP), Treasury has continued to enhance public consultation on taxation measures through:

- preparing a forward work program of proposed consultation on announced tax measures for publication by the Minister
- conducting pre-announcement consultation, where authorised to do so, through the Tax Design Advisory Panel and other consultation arrangements, including on some Budget measures
- formalising post-announcement consultation on discussion papers and draft legislation
- providing feedback to contributors through the release of consultation summaries
- holding substantial discussions with stakeholders, for example, through engagement with industry networks

Each year Treasury progresses a broad range of tax measures. Over the past three years an average of 82 tax measures have been introduced by the Government per year. The sample of measures reported in the Board of Taxation's discussion paper represents a subset of this workload as noted in the introduction to the discussion paper. In total, 31 measures have been excluded as they relate to tax treaties, deductible gift recipients and tax rate/threshold changes which the Board considered fell outside the scope of the TDRP's recommendations.

COMMENTS ON THE BOARD OF TAXATION'S REVIEW OF THE TAX DESIGN REVIEW PANEL RECOMMENDATIONS

Timing of legislation

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.

Whether a measure is prospective or retrospective and the timeframe between announcement and introduction are matters for Government and, ultimately, the Parliament to decide. The priority given to an individual measure is set by Government in accordance with its broader priorities for the development of legislation to implement its policy agenda. The priority given to an individual tax measure is typically set with regard to a number of factors including: the start date for the measure; the implications for taxpayers; and the ability of the Commissioner of Taxation to administer the law in the absence of legislative change.

Changes in Government priorities can influence how consultation processes proceed.

The Treasury recognises that enacting measures in the shortest possible timeframe from announcement should increase certainty for taxpayers. This is especially true of prospective measures.

However, there is an inherent trade-off between the speed with which measures are introduced and the quality of the 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.

Treasury also recognises that it is desirable that tax measures generally take effect from or after Royal Assent, rather than prior to legislation being enacted. Changing legislation after relevant transactions have occurred can result in unexpected gains or losses, missed opportunities or other outcomes that might otherwise have been avoided. However, this does not necessarily arise in all circumstances.

For some measures it is important they take effect from the time of announcement so as not to unduly influence taxpayer behaviour. With other measures, correcting divergence

of interpretation from intent, or relieving taxpayers of a burden, there may be little to be gained by delaying the date of effect. Further, retrospective legislation may be appropriate to correct significant unintended outcomes that compromise the integrity or equity of the tax system.

As noted in the Board of Taxation's discussion paper, the proportion of measures enacted that operate prospectively has steadily increased since 2003, with a decreasing number of tax changes applying retrospectively.

Over the period 2008-10 the proportion of measures enacted within 12 months of announcement was slightly higher than in preceding periods. This was achieved despite the increased consultation undertaken by the Government. A notable change over the past two years has been a reduction the proportion of measures taking more than two years to introduce. Over the 2008-10 period, fewer than 2 per cent of measures (one measure) fell within this category compared with between 8 and 12 per cent in previous periods.

Of the 22 measures that were announced and enacted during the review period that the TDRP consider to be retrospective, nine were measures which took effect on or after the date of announcement and 13 had dates of effect prior to announcement.

Of the nine measures, one was intended to prevent behaviour that would be contrary to the intent of the original enactment and three had a start date that was appropriate for compliance with the measure, for example the beginning of the tax year. The remaining four provided concessions.

Of the 13 measures that took effect prior to announcement, 10 provided concessions and the remaining three sought to clarify or restore the intent of the law.

As noted in the Board of Taxation's discussion paper, 26 of the 28 prospective measures were introduced within the recommended 12 months of their announcement. The remaining two were introduced into Parliament within 13 months.

Of the 26 measures that the TDRP considers retrospective, 20 were introduced within the recommended six-month period. Two of the remaining six measures took effect after announcement and were introduced approximately 12 months later (the recommended timeframe for prospective measures). The remaining four were delayed largely due to complications which arose through the legislative process or from changes to drafting priorities.

TDRP Recommendation 13: Treasury's project management approach

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

Treasury maintains a detailed tax design process map to guide policy officers in best practice policy and legislation development, including consultation. The process map provides guidelines and project management tools for the various stages of the tax design process. It is updated on an ongoing basis to reflect quality improvements and changes to processes, and training is conducted regularly across the Group. The Group's Senior Executive, Legislation Management Committee and Tax Specialists' Network co-ordinate the development of legislation across the Group. The Group's Legislation Management

Unit also assists policy units prepare timelines for tax policy projects which ensure consultation and legislation processes are taken into account.

Treasury is involved in a number of established forums (including the National Tax Liaison Group (NTLG)) that meet regularly and involve senior officers from Treasury and the ATO. These forums operate to ensure a high level of integration and coordination across the policy, legislative and administrative aspects of tax policy, especially changes announced or being contemplated by Government and changes to be recommended by Treasury.

Many of these forums help establish networks between Treasury, the ATO and the private sector which are regularly utilised outside the formal meeting processes.

Treasury also maintains its own consultation program, involving regular meetings with practitioners and industry, as well as a consultation website and email box which enables the business community and the general public to provide feedback or make enquiries regarding consultation arrangements.

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.

Treasury prepares advice to the Assistant Treasurer to allow publication of a rolling forward work program setting out the consultation it plans for announced tax measures and indicating the legislation the Government plans to introduce in the next sittings. The forward work program provides taxpayers and their representatives with summary information about the measure, whether it is scheduled for introduction in the next sittings, advice on past and prospective consultation, and the name and phone number of the contact officer.

In the event that the progress of a measure is delayed, the reasons for the delay are included in the subsequent forward work program.

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).

Treasury has no additional comments to those outlined in the Board of Taxation's discussion paper.

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.

Treasury has no additional comments to those outlined in the Board of Taxation's discussion paper.

Quality and quantity of consultation***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

As noted in the Board of Taxation discussion paper, the Government undertook pre-announcement consultation on 27 of the 90 measures announced in the review period. Of these, 23 involved open public consultation and four involved only confidential consultation. Thirty five of the measures not consulted on were Budget measures, which the TDRP recognised may not be suitable for consultation.

The benefits of pre-announcement consultation on policy are to ensure that intended policy outcomes will be delivered with few or no unintended consequences. Pre-announcement consultation will therefore be most relevant when dealing with measures that are new, complex or intended to operate in a complex or uncertain environment.

Of the 28 non-Budget measures for which there was no pre-policy consultation, 15 were considered sufficiently minor so as to not require consultation prior to announcement. Examples of these included measures responding to the global financial crisis, those providing a concession or making technical amendments to restore the policy intent.

Where consultation prior to announcement is undertaken, it need not always occur through the Tax Design Advisory Panel. These forms of consultation are not captured within the Board of Taxation data.

For GST measures, which are approved by the States and Territories, the Ministerial Council on Federal Financial Relations has agreed to a protocol for consultation and agreement over legislative proposals to change the GST base. Under the protocol the Australian Government has agreed where possible to consult the States on proposed measures that change the GST base at the initial policy design stage, prior to any Government announcement.

The protocol also provides that the Australian Treasurer will write to the State Treasurers seeking their formal agreement to proposed measures to change the GST base. For Budget measures, approval would be sought as a package immediately after Budget. For other

measures, wherever possible, approval would be sought prior to any Commonwealth Government announcement.

In practice Government approval to consult with the States over measures announced in the last two budgets prior to announcement has generally been granted. With one exception, approval for those measures that involve a change to the base and therefore required approval has been obtained via a Budget night letter from the Treasurer to State Treasurers. The exception was a measure to reform arrangements for exemption taxes, fees and charges from GST which was a result of a Commonwealth-State review and therefore approval of the States and Territories was received for this measure prior to Government announcement.

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 consultation to ensure that all stakeholders have the opportunity to contribute to the process.

Public consultation post-announcement enables as broad a group of people as possible to input their views, thereby helping to improve the legislated policy. However, in areas of very specific tax fields, active consultation is often better targeted at organisations or industries affected by the changes.

Of the 57 measures announced and introduced during the review period, 26 (46 per cent) were the subject of post-announcement consultation on the design of the announced policy and 39 (68 per cent) were the subject of consultation on the draft legislation. As noted by the Board of Taxation, the 11 measures that were not consulted on at either the post-announcement or draft legislation stage were minor, administrative or concessional measures.

For the remaining 20 measures that were identified as not consulted on at the post-announcement stage, the majority were implementing Board of Taxation recommendations accepted by the Government; technical amendments; straight forward policy changes; or were time critical.

The Board notes that in the vast majority of cases where consultation has occurred at the post-announcement or draft legislation stage, it has involved public consultation. Of the measures the Government consulted on following announcement, only one involved no public consultation at either of these stages; however this measure did involve confidential 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.

Following consultation and on or before the date the legislation is introduced into Parliament, the Government posts a consultation summary on Treasury's website. The consultation summary provides feedback on the main suggestions raised in submissions, the extent of changes made to the policy and/or draft legislation, and (where relevant) the reasons why they have not been adopted.

Consultation summaries were posted for 38 of the 41 measures consulted on during the review period. Of the three for which consultation summaries were not posted, one involved a confidential consultation process and one received no formal submissions.

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 provided to OPC. The separate document should describe the consultation timetable and include the details of the Treasury contact for the measure.

Consistent with the TDRP recommendations, the Government seeks to release a discussion paper at or shortly after the time of announcement. In some cases the nature of the measure does not warrant the release of a discussion paper, such as minor, administrative or mere rate changes. Where special circumstances arise, as was the case in responding to the global financial crisis, a trade-off will exist between the time available for consultation and the preparation of a detailed discussion paper.

As noted by the Board of Taxation, 40 of the 90 measures announced during the two-year review period were accompanied by a discussion paper. Discussion papers for a further 10 measures were pending at the time of the Board of Taxation's report being compiled.

The Board of Taxation notes that of the measures not accompanied by a discussion paper and introduced into Parliament, 11 were minor, administrative or concessional measures. Of the outstanding measures, a further 8 were straightforward, administrative or technical in nature, and one was implementing the Board of Taxation's recommendations.

In more than half of the cases where a discussion paper was or will be released (27 of 50) this occurred or will occur sometime after announcement of the measure. Of these, 18 were Budget measures requiring further policy development prior to the release of a detailed discussion paper. Treasury, the ATO and private sector specialists work closely on the detail of the design. For some measures a discussion paper is released at the time of the announcement.

In some cases the Government makes an announcement which is later followed by a discussion paper. Where measures are complex, the detail required for the release of a discussion paper can take some time.

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.

Undertaking two or more rounds of consultation on each measure improves the quality of the legislation that is introduced into Parliament. However, it almost invariably adds to the time between announcement and introduction into Parliament.

There is, therefore, a tension between the two aims of the recommendations of the TDRP. This tension is evident in the issues raised by stakeholders: on some issues they may be keen to see the measure take effect as soon as possible; on other issues they may be keen to make sure that there are no unintended consequences in the legislation and so seek longer periods for consultation or additional rounds of consultation. In some cases Parliamentary time constraints mean that a small delay on introduction could translate into a very large delay before enactment, so a period for consultation may deliberately be truncated. Assessment of the time allowed therefore requires a balanced judgement between a range of potentially conflicting factors.

The Board of Taxation's analysis indicates that, on average, consultation on tax measures over the period has been broadly in line with this TDRP recommendation. Where consultation has been much shorter than recommended the following observations can be made. One measure announced in the Budget required legislation prior to 1 July in the same year. In several instances the shortened periods of consultation had been preceded by lengthier consultation at an earlier stage or reflected a second round of consultation at that stage. In several instances substantial discussions were undertaken with stakeholders outside the formal process; these instances are not reflected in the Board of Taxation data.

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.

Ultimately this is a matter for Government and will be determined by the Government's overall legislative priorities.

The Treasury Portfolio bids for the Office of Parliamentary Counsel's (OPC) drafting resources for each parliamentary sittings and the bid reflect the priority attached to each measure. The bids from all portfolios are considered by the Parliamentary Business Committee, which then sets OPC's priorities. Measures that are to be drafted and introduced in the next sittings are given a higher priority than those to be drafted for consultation.

The drafting of bills for consultation late in the sittings is taken into account when setting a timetable for the introduction of a measure. When Government priorities change or particular difficulties arise in the drafting of a tax measure, this can cause delay or reduce the time available for consultation.

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.

This recommendation has been adopted as part of an ongoing approval process for taxation measures. Simultaneous approval has assisted the consultation processes being managed in a timely manner.

Involvement of the private sector

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.

As noted by the Board of Taxation, consultation during the review period involved the use of tri-partite teams comprising Treasury, the ATO and private sector experts on seven occasions. Following further analysis, Treasury has since identified another four measures

which involved the use of tri-partite teams. For a range of other measures consultation occurred through direct contact with stakeholders or between the Treasury and the ATO on the design and implementation of the measure.

The Treasury, along with the ATO, engages through a range of consultation forums with tax practitioners, industry and other community stakeholders (or their representatives) as part of its approach to ensuring the effective operation of the tax system. This enables early identification of issues and a means through which direct communication about the issue and potential responses can arise. The Tax Issues Entry System provides another mechanism for raising awareness of issues and a channel for communication with stakeholders.

Much of the Government's pre-announcement consultation is now conducted with members from the Tax Design Advisory Panel (TDAP). The TDAP consists of 13 accounting, legal and economic research organisations. It provides a source of paid expertise to help inform Treasury's advice to Government on issues such as impacts on taxpayers, compliance costs, industry structures and commercial practices.

For pre-announcement consultation, the Treasury may approach the whole Panel, or a subset of the Panel, with a particular task (for example, economic modelling or quantitative tasks would be offered to Panel members with that expertise). The Treasury then selects one or more experts on 'value for money', which takes into account the tendered price as well as the relative expertise of the proposed personnel.

However, there are occasions when other forms of engagement are more appropriate for some measures. For example, direct engagement with specific stakeholders or stakeholder representatives may provide a greater information exchange in a more timely and efficient manner when dealing with measures that affect a specific set of taxpayers or that require highly specialised knowledge from industry participants. In other cases, such as on GST-related matters, broader consultation enables a wider range of the implications of a measure to be identified than might be possible when drawing upon a small number of specialist advisers.

The Board of Taxation can also be an efficient means of undertaking consultation. There are many benefits from the Board of Taxation undertaking pre-announcement consultation. The Board operates independently; it consults extensively with lengthy reporting periods, often involving open public consultation; and the submissions are publicly available on its website. The Board of Taxation utilises its extensive Advisory Panel; Working Groups, including identified topic experts; Treasury and ATO officers; and paid consultants, which allow a wider cross section of contributions to its reviews.

In terms of monitoring implementation of new law, the ATO has in place arrangements for monitoring the effectiveness of enabling legislation in the post enactment period. This includes the NTLG and its sub-committees which focus on significant or specific areas of tax and superannuation administration. Whilst the administration of enacted law is a matter within the purview of the Commissioner of Taxation, the NTLG and its sub-committees provide one mechanism for private sector, ATO and, ultimately, Treasury and Government to examine and monitor implementation of new law.

Other 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.

During the review period, the Board of Taxation undertook three post-implementation reviews. Treasury notes that for changes involving major policy initiatives there may be merit in conducting a review after two years to pick up small concerns with the policy that may not have been addressed by the ATO. However allowing a longer time might enable the measure to be fully bedded down and provide greater certainty within the community.

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.

Treasury has no additional comments to those outlined in the Board of Taxation's discussion paper.