

**BETTER TAX DESIGN AND
IMPLEMENTATION**

**A REPORT TO THE ASSISTANT TREASURER
AND MINISTER FOR COMPETITION POLICY AND
CONSUMER AFFAIRS**

TAX DESIGN REVIEW PANEL

30 APRIL 2008

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INTRODUCTION

ESTABLISHMENT OF THE TAX DESIGN REVIEW PANEL

On 8 February 2008, the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, 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. In his press release, the full text of which is at Appendix A, the Minister indicated that the review formed part of an election commitment to streamline the process of introducing tax legislation.

The members of the Review Panel are listed at Appendix B.

TERMS OF REFERENCE

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 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.

The Review Panel was asked to report to Government by 30 April 2008.

METHODOLOGY

In reaching its findings, the Review Panel used data on the volume and progress of tax measures, consultation with stakeholders and their written submissions, and case studies of tax projects highlighting situations where delays had occurred or where measures had been introduced in relatively short timeframes. The Panel also drew on work done in the past by the Board of Taxation and the Review of Business Taxation.

THE REVIEW PANEL'S RECOMMENDATIONS

The Review Panel's complete set of recommendations is as follows:

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 (eg, 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Recommendation 13: Treasury’s project management approach

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

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.

Recommendation 15: No change to the location of drafting resources

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

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.

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.

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.

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.

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).

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.

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.

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.

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.

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.

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.

CHAPTER 1: AUSTRALIA'S TAX DESIGN PROCESS

HISTORY AND BACKGROUND

'Legislation by press release'

1.1 The expansion of the tax avoidance industry in the 1970s, and its growing effect on the revenue, led to a number of government responses, including an increasing use of retrospective legislation (ie, legislation that applies from a date before its enactment).

1.2 The unfairness inherent in legislating to make ineffective things that were effective when done was dealt with by publicly announcing that the law would be amended to counter a particular scheme, or class of scheme, with effect from the date of the announcement. Taxpayers were then on notice that any such arrangements they entered into might not work in the same way as the law at the time would suggest.

1.3 Since that time, announcing that the law will be changed from a point before the amending legislation is enacted (so called 'legislation by press release') has become a common feature of the Australian tax landscape.

1.4 Sometimes retrospective legislation applies from a date before it was publicly announced. Some of that legislation makes amendments that benefit taxpayers (eg, some amendments restore the law to the way taxpayers had assumed it to be before an unexpected court decision). In some cases, such legislation is used to target tax avoidance schemes that pose a grave risk to the integrity of the whole tax system. Such legislation, applying from before it was announced, has been relatively rare in cases where taxpayers have been adversely affected.

1.5 Even though most retrospective legislation only operates from the date it was announced, there are still legitimate reasons for concern (eg, that the change might affect transactions already in train, that particular taxpayers might not be aware of the announcement, or that the announcement was not clear about what was to be proscribed). For measures that deal with integrity risks to the tax system, these concerns are given less weight than the revenue consequences of allowing a scheme to continue until corrective legislation could be enacted. For measures that benefit taxpayers, the concerns are given less weight than quickly advising taxpayers of the change in Government policy.

Recent examinations of tax law development

1.6 The processes of policy development, legislation and administration of business taxes were examined by the Review of Business Taxation in the late 1990s.¹ The Review found that tax policy and legislation were usually developed through a step by step process, with each step performed as a separate function by one of three different government agencies (the Treasury, the Australian Taxation Office (Tax Office) and the Office of Parliamentary Counsel (OPC)), lacking both specific accountabilities and sufficient integration. It also reported that there was ineffective consultation with the ultimate users of the system, the taxpayers, when changes were being developed.

1.7 In 2000, the Board of Taxation was appointed to advise the government on the design and operation of Australia's tax laws and the processes for their development, including community consultation and tax design. Therefore, an important role of the Board is to monitor the effectiveness of community consultation in the design and implementation of tax legislation.

1.8 In March 2002, the Board of Taxation reported to the government on an investigation it had conducted into processes for community consultation on developing tax laws. In May of that year, the government announced a number of changes to improve community consultation, largely adopting the Board's recommendations.² The then Treasurer said that, 'during the development of future tax measures [the government] would be working from an in-principle position of:

- consulting on all substantive tax legislation initiatives, except where there is commercial, market, revenue or tax avoidance sensitivity or where the flexibility government requires in managing the timing of policy change limits the extent and form of consultation that can be undertaken;
- seeking early external input in the identification and assessment of high-level policy and implementation options;
- seeking technical and other input from external stakeholders (including the Board of Taxation) in the development of policy and legislative detail;
- thoroughly road-testing draft legislation and related products prior to implementation;
- ensuring policy intent for each new measure is clearly established and described by public announcement;
- announcing for each new substantive tax measure, a consultation process, with roles and responsibilities specified;
- releasing an indicative forward program of tax legislation; and
- providing better feedback to external participants in consultation processes.'

¹ Review of Business Taxation, *A Tax System Redesigned*, July 1999.

² See Treasurer's press release No. 22 of 2 May 2002.

1.9 At the same time, the government decided that responsibility for the design of tax laws would be relocated from the Tax Office to the Treasury to bring accountability for tax policy and legislative design more directly under ministerial control. The change in responsibility was also made to reinforce the need for whole-of-government perspectives to be taken into account in tax law design processes.

1.10 In 2007, the Board of Taxation examined consultation processes in other countries to identify possible improvements to Australia's tax consultation processes, particularly in relation to non-controversial technical or minor policy amendments. The Board noted that there had been significant improvements in tax consultation arrangements since 2002 and that they were now consistent with international practice, generally functioning well and supported by the community. As a result, the Board recommended only incremental changes to the tax consultation system. The government endorsed the Board's recommendation.³

1.11 The Board of Taxation conveyed to the Review Panel that it had been considering an idea for a Consultation Centre, which would involve a semi-permanent group of experts who would be available to advise Treasury on the development of tax legislation. This idea, which would provide Treasury with a source of advice in addition to its normal consultation processes, was similar to a New Zealand practice the Board had examined.

1.12 While there have been some shortcomings in the full implementation of past recommendations for improving the development of tax law, it is evident from the history of Australia's tax design process that governments have increasingly accepted a more open, inclusive and consultative approach to the development of policy and legislation. However, it is also evident that further improvements are possible, particularly around delays that arise between announcements and introduction of legislation. It is in this context that the Review Panel has been asked to examine the present Australian tax design process and to recommend changes to further improve it.

CURRENT LEGISLATIVE DEVELOPMENT PROCESS

Executive government responsibilities

1.13 Under Australia's parliamentary system, the government usually determines policy and proposes new laws. The Cabinet determines the government's policy agenda (including tax policy) to which Commonwealth resources are allocated. Ministerial responsibility for implementing the tax elements of the government's agenda lies with the Treasurer (supported by the other Treasury portfolio ministers).⁴ The power to make the laws that give effect to the government's policy ultimately rests with the Parliament.

³ See Treasurer's press release No. 76 of 16 August 2007.

⁴ Currently, these are:

- the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs; and
- the Minister for Superannuation and Corporate Law.

Government agencies

1.14 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 tax system.

1.15 Treasury has primary responsibility for advising the Treasury ministers on tax policy and the design of tax laws.

1.16 The Commissioner of Taxation is responsible for administering the tax laws and interpreting them for that purpose.

1.17 Tax policy, legislation and administration are related and interdependent. Therefore, it is important that the Tax Office contributes its administrative, compliance and interpretive experience to the development of policy and legislation. The Treasury and the Tax Office have established a protocol which outlines the working arrangements that are in place to ensure this occurs (see Appendix C).⁵

1.18 OPC has primary responsibility for drafting the legislation to implement the government's policies.

1.19 Treasury is a significant user of OPC's services, and most Treasury work OPC does relates to tax measures. In 2006, the Government introduced 17 tax bills, totalling 809 pages.⁶ This represented about one-sixth of all pages of legislation introduced by the Government in that year and was the largest legislation program for any single area of the Government. To manage this significant program, OPC and Treasury meet regularly to monitor the timetabling and progress of tax legislation.

Parliamentary involvement

1.20 The process by which Parliament deals with legislation is beyond the scope of the Review Panel's terms of reference. However, the following information provides useful context for the Panel's considerations.

1.21 Parliament considers many pages of new tax law each year.

1.22 In recent years, a substantial proportion of tax bills have been referred to the Senate Standing Committee on Economics.⁷ In its inquiries, the Committee takes evidence from a range of witnesses and makes recommendations to the Senate about whether the bill should be supported or opposed. That process can take anywhere from a few days to a few months and, in practice, often extends the Senate's consideration of a bill. As an outcome of its inquiries, the Committee has often recommended amendments to a bill. Commonly, those amendments relate to only one

⁵ An updated version of this protocol was issued on 6 March 2008.

⁶ 2006 has been chosen as the most recent normal year. The federal election in 2007 reduced the figures for that year below the normal level.

⁷ The Committee examined 50 per cent of the tax bills enacted in 2004; 23 per cent of those enacted in 2005; 50 per cent of those enacted in 2006; and 52 per cent of those enacted in 2007.

measure within a bill that might contain many different measures. This can delay the whole bill because of issues associated with just one of its measures.

1.23 The Joint Committee of Public Accounts and Audit (JCPAA) also monitors the operation of the tax system. The role of the JCPAA is to hold Commonwealth agencies to account for the lawfulness, efficiency and effectiveness with which they use public money. As part of this role, the JCPAA has monitored the administration and general operation of the tax system.⁸

Consultation processes⁹

Community consultation and liaison

1.24 Australian taxpayers have a relatively high level of involvement in influencing the shape of Australia's tax laws. Tax issues are often debated in the media and in discussions between the government and the community. Peak industry, tax and community representatives publish papers on tax issues. Those representatives meet frequently with government officials and ministers. Each year the Treasurer invites the community to make suggestions for ideas they would like to see included in the Budget.¹⁰

1.25 Treasury and the Tax Office have active consultation programs. Treasury consults on tax policy and legislation on behalf of the Government. The Tax Office consults on the interpretation and administration of the tax laws. The Tax Office is generally included in Treasury's consultation arrangements, and Treasury participates in many of the Tax Office's consultation forums.

1.26 Those programs include consultation on the policy design, the legislative drafting, and the administrative implementation of tax proposals but they also include regular liaison with community and taxpayer representatives. For example, once each quarter the Tax Office hosts the National Tax Liaison Group, a meeting of the tax, accounting and legal professions that discusses administrative problems in the tax system. The Treasury meets with the tax professional and industry peak bodies twice each year for similar purposes.

1.27 This consultation builds and maintains relationships with the community and the tax profession, ensuring that the Tax Office and Treasury have earlier access to emerging issues with the operation of the tax system. This consultation also allows Treasury to gain a deeper understanding of how taxpayers are affected by the tax

⁸ For example, in the early 1990s, the JCPAA recommended that the income tax law be rewritten. It monitored the subsequent Tax Law Improvement Project. In 2005, the JCPAA inquired into 'Certain Taxation Matters', with particular reference to the operation of the fringe benefits tax and the administration by the Tax Office of the income tax law. From April 2007, the JCPAA has conducted twice-yearly public hearings into the Tax Office in the interests of greater public accountability and transparency of the administration of the tax system.

⁹ This section draws upon material from the Board of Taxation's February 2007 report to the Treasurer *Improving Australia's Tax Consultation System* and from the 2003 Treasury publication *Engaging in Consultation on Tax Design*.

¹⁰ For instance, over 5,000 submissions were made in advance of the 2008-09 Budget, of which a significant proportion were in relation to tax.

system, improving its ability to provide accurate and relevant advice to the government.

Consultation on announced tax measures

1.28 Since the then Treasurer announced, in May 2002, that the then government would aim to consult on all substantive tax measures, most tax measures have benefited from consultation of some sort. Where consultation did not occur, the reason was usually that the measure was a minor or technical change to the law or that timing restrictions made useful consultation impractical.

1.29 The scope of the consultation processes used has varied from measure to measure. In some cases, the government has announced a public review of an area of taxation, invited submissions and conducted consultations to develop a policy position. More commonly, the government has announced the broad outline of a policy and asked Treasury to consult on legislation to implement it.

1.30 Consultation sometimes occurs on both policy and legislative development. In other cases (particularly where there are market or revenue sensitivities), the specific policy is largely settled by the time of a public announcement and there is either no consultation or consultation is limited to establishing whether the proposed legislation reflects the policy intent.

Forms of consultation

1.31 Consultation on announced measures takes one of three forms:

- open public consultation;
- targeted public consultation; or
- targeted confidential consultation.

The consultation for a given measure sometimes involves more than one of these approaches.

1.32 Public consultation is open to anyone who is interested. Such consultation may be advertised in newspapers and on the Treasury website. For open public consultation, discussion papers and exposure drafts of legislation and explanatory material are generally made available. Submissions in response to this material are usually posted on the Treasury website.

1.33 Targeted public consultations are still open to all taxpayers but submissions are also specifically invited from stakeholders most likely to be affected by, or with a particular interest or expertise in, the measure in question.

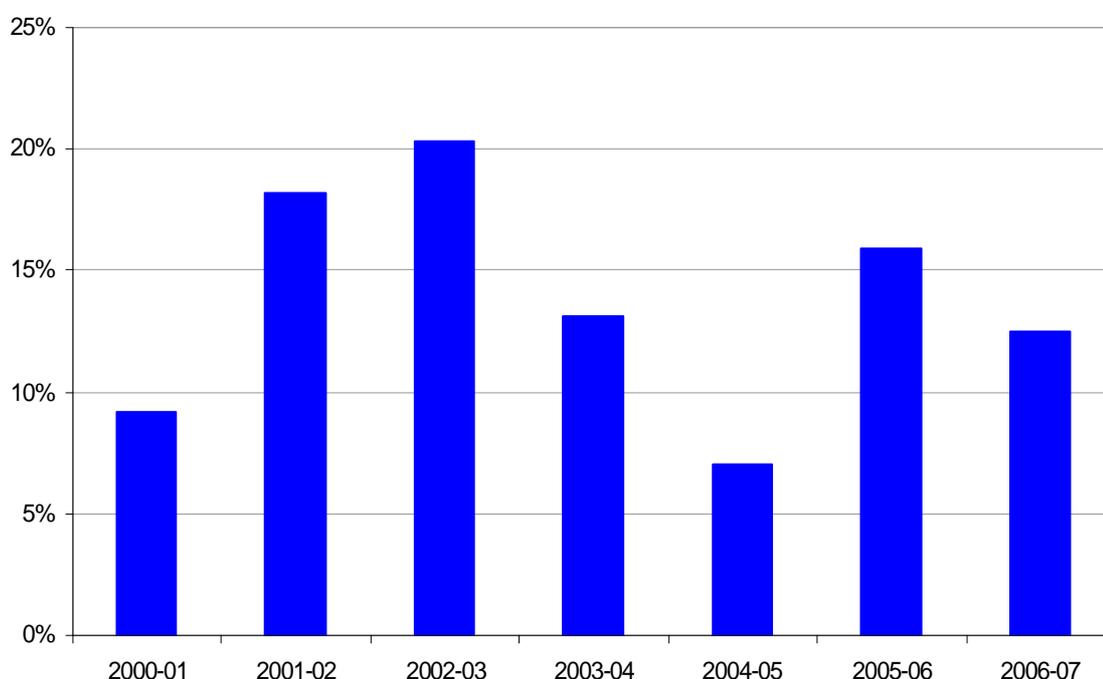
1.34 Targeted confidential consultation is limited to those stakeholders the government believes will be most able to improve the policy or its legislative and administrative implementation. These stakeholders are usually those most affected by the proposed measure or those who have a special expertise in the affected area. Consultation may be limited to those groups because of the political, revenue or other

sensitivities of the proposed measure (eg, because wider advance knowledge of the measure could distort commercial behaviour), or where confidentiality is an essential element of the measure (eg, because a measure is to implement an international agreement that has not yet been finalised). Participants in confidential consultation are required to sign an undertaking not to divulge the details of the consultation.

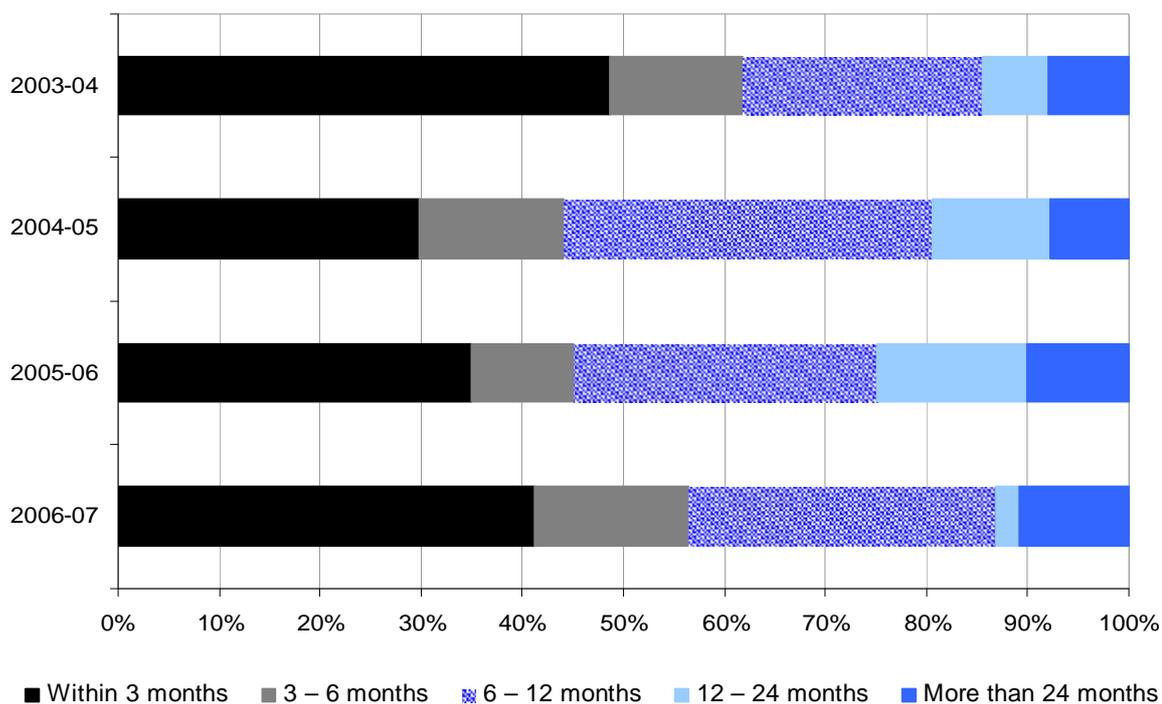
Tax design timeframes

1.35 Many tax measures are introduced each year. In the last seven years more than 6,000 pages of new tax legislation were introduced. Chart 1.1 illustrates that tax law represents a significant proportion of the government's total legislation program.

Chart 1.1: Pages of tax legislation as a proportion of all pages of Commonwealth legislation introduced, 2000-01 to 2006-07



1.36 In recent years, the vast majority of tax measures were introduced within 12 months of announcement. The average time between a change being announced and legislation being introduced was about 8½ months. However, there were substantial delays for some measures. Chart 1.2 illustrates the time between the announcement and introduction of measures enacted in recent years.

Chart 1.2: Time between announcement and introduction of measures enacted in 2003-04 to 2006-07

1.37 Delays have been more significant in the area of business tax. For legislation enacted in 2006-07, the average time between a change to the business tax system being announced and legislation being introduced was about 12 months. This may reflect the greater complexity of business tax laws and the arrangements to which they apply. There has also been more consultation on business tax changes than on other changes to the tax law, which has added to the time taken to settle the policy and finalise the legislation.

Retrospective measures

1.38 Delays in introducing tax legislation are usually of more concern when the measure is retrospective. Table 1.1 shows the number of measures enacted in recent years that have applied retrospectively.

Table 1.1: Nature of measures enacted in 2003-04 to 2006-07¹¹

	2003-04	2004-05	2005-06	2006-07
Prospective measures	4 (5%)	24 (31%)	12 (21%)	19 (41%)
Retrospective measures	72 (95%)	53 (69%)	45 (79%)	27 (59%)
Totals	76 (100%)	77 (100%)	57 (100%)	46 (100%)

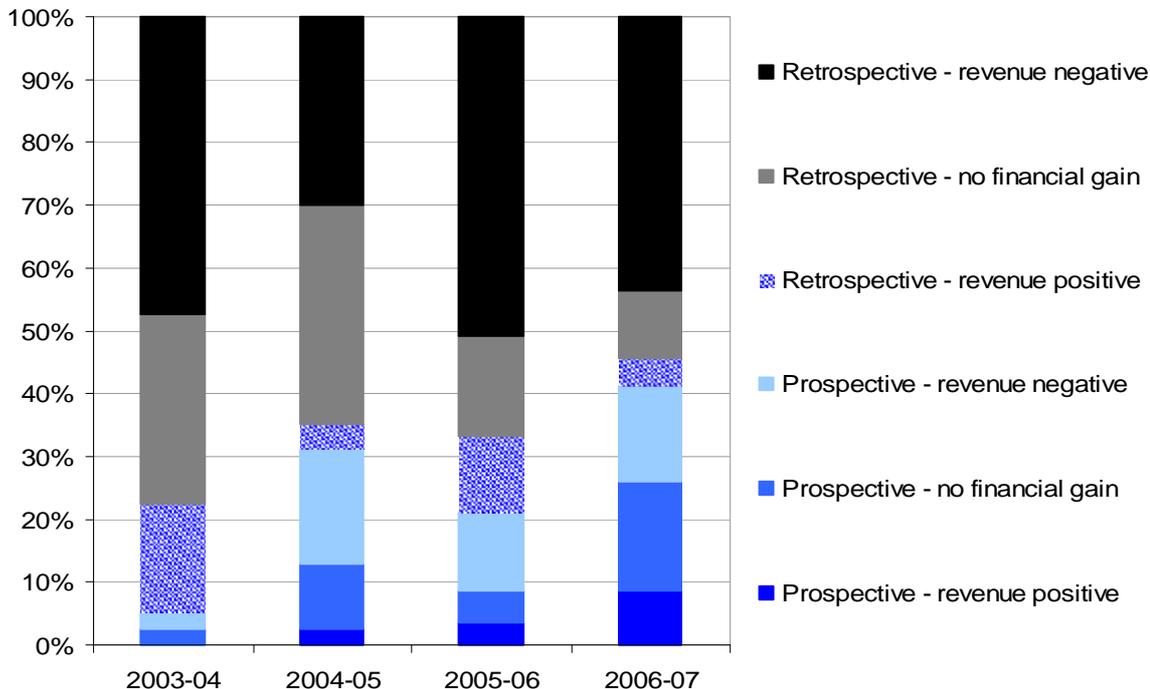
¹¹ This list excludes measures relating to listed deductible gift recipients and technical corrections.

1.39 A retrospective measure does not always disadvantage taxpayers. In fact, the majority of retrospective measures in recent years have been revenue negative (ie, they reduce government revenue), and have therefore benefited taxpayers. Table 1.2 and Chart 1.3 illustrate this by dividing the measures enacted in those years into those which were revenue positive (ie, they raise government revenue), those which were revenue negative, and those which had no revenue impact.

Table 1.2: Nature of measures enacted in 2003-04 to 2006-07¹²

	2003-04	2004-05	2005-06	2006-07
Prospective - revenue positive	0 (0%)	2 (3%)	2 (4%)	4 (9%)
Prospective - revenue neutral	2 (3%)	8 (10%)	3 (5%)	8 (17%)
Prospective - revenue negative	2 (3%)	14 (18%)	7 (12%)	7 (15%)
Retrospective - revenue positive	13 (17%)	3 (4%)	7 (12%)	2 (4%)
Retrospective - revenue neutral	23 (30%)	27 (35%)	9 (16%)	5 (11%)
Retrospective - revenue negative	36 (47%)	23 (30%)	29 (51%)	20 (43%)
Totals	76 (100%)	77 (100%)	57 (100%)	46 (100%)

Chart 1.3: Nature of measures enacted in 2003-04 to 2006-07



¹² The revenue impacts are based on the financial impact recorded in the explanatory memorandums that accompanied the measures when introduced into Parliament.

1.40 In addition to the substantial flow of recent tax legislation, the previous government had not introduced into the Parliament a stock of measures before calling the 2007 federal election. The average time from when these measures were announced was over two years. Five measures were announced more than five years earlier, and 13 were announced between three and five years earlier. Table 1.3 separates those measures into prospective and retrospective and identifies for each which would be revenue positive and which revenue negative.

Table 1.3: Nature of unenacted measures as at 17 October 2007¹³

	Revenue positive	Revenue neutral	Revenue negative	Totals
Prospective	2 (10%)	11 (58%)	6 (32%)	19 (100%)
Retrospective	0 (0%)	8 (38%)	13 (62%)	21 (100%)
Unknown¹⁴	0 (0%)	7 (70%)	3 (30%)	10 (100%)

¹³ This list reflects all the tax measures that had been announced, but not enacted, as of 17 October 2007, the day the writs were issued for the 2007 federal election. It excludes announcements relating to specifically listed deductible gift recipients, announcements about proposed tax treaty negotiations and some announced measures that were subsumed by the Board of Taxation's review of Australia's anti-tax deferral regimes. The revenue impacts are taken from various budget and mid-year economic and fiscal outlook statements or from the 2007 pre-election economic and fiscal outlook statement.

¹⁴ The previous government announced some measures without stating whether they were to operate prospectively or retrospectively.

CHAPTER 2: STAKEHOLDER VIEWS

CONSULTATION UNDERTAKEN BY THE REVIEW PANEL

2.1 The Review Panel hosted consultation meetings in Sydney and Melbourne. A list of the firms, professional bodies and industry associations who attended these meetings is at Appendix D. The Panel also met individually, or had telephone discussions, with other interested stakeholders, including the Board of Taxation and the Inspector-General of Taxation.

2.2 The Review Panel received 19 written submissions. A list of submissions is at Appendix E. Those submissions are available on the Treasury website.¹⁵

KEY THEMES RAISED IN CONSULTATION

Announcement of tax changes

2.3 Participants in consultation said they did not think that the practice of 'legislation by press release' generally led to good outcomes, but there are some situations where it is necessary, such as:

- to clarify or amend a tax law to give effect to existing tax policy, where there is a positive or neutral outcome for taxpayers;
- where there is a significant risk to the integrity of the whole tax system because of an avoidance scheme that cannot be dealt with under existing anti-avoidance provisions; or
- to reduce uncertainty when a judicial decision has interpreted the law in a way that was not intended or foreseen by Parliament.

2.4 Retrospective changes that increase the liability of taxpayers were strongly opposed. Less concern was expressed about delays in introducing legislation to implement measures that have only a prospective operation.

2.5 Stakeholders reported that the biggest problems arise when announcements do not clearly articulate the issue that is to be addressed, and the progression from issue to policy response to legislative remedy is not clear. Many saw benefits in the policy being more developed before it is announced, so that draft legislation or drafting instructions (or similar) can accompany the press release.

¹⁵ Submissions are available at: <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1342>.

2.6 Stakeholders suggested timeframes of six to 12 months for the introduction of prospective measures, depending on the complexity of the measure, and three to six months for the introduction of retrospective measures. Periods of up to two years were contemplated for significant new policy, such as the introduction of the GST.

Consultation

2.7 There was general satisfaction with the amount of consultation for larger policy projects. However, there were calls for regular, formal post-implementation reviews on the basis that this could relieve the pressure on getting everything 100 per cent correct up front, which can be a source of delay, and assist in getting priority for amendments to remedy faults that only become apparent after implementation.

2.8 Stakeholders were strongly in favour of more consultation earlier in the process, including before the policy is publicly announced. They believed this could improve the quality of the policy, and avoid the current perception that Government becomes locked-in to the policy as announced, and is reluctant to make changes to refine and improve it. Stakeholders are keen to be involved before it is too late to influence the outcome. There was support for a formal tri-partite ownership group (involving Treasury, the Tax Office and the private sector) to ensure that consultation and policy development take place prior to any government announcement. Stakeholders would also like the same experts to be involved throughout the development and early implementation of measures, which would include working on any legislative amendments and corrections.

2.9 Stakeholders suggested that there should be more early input from the private sector on government initiated changes and recommended that consultation should contemplate whether a policy change is actually necessary. There was a suggestion that announcements include some flexibility for a change in the policy if new issues or information arise during consultation; announcements should identify outcomes but be flexible about how those outcomes can be achieved.

2.10 Suggestions of things that have a positive impact on the efficiency and outcomes of tax design are:

- involving participants with a breadth of expertise from the accounting, legal and tax professions;
- having full public consultation, even if some confidential consultation takes place prior to the announcement of a policy;
- consulting with more small-medium enterprises; and
- always allowing public consultation on exposure draft legislation.

2.11 Stakeholders provided feedback about timeframes for consultation and for making submissions. There was a view it would be ideal if stakeholders were advised in advance that material would be published, so that they could allocate their resources effectively and have the most suitable expert ready to respond to the paper when it is released.

2.12 Some stakeholders suggested various minimum periods (ranging from two to six weeks) would be required to allow them to make effective, considered submissions. Others thought that the required period would vary according to the complexity of the measure.

2.13 A number of stakeholders advised that it would be useful and encouraging for them to receive feedback on their submissions and to be given reasons why their suggestions had been accepted or rejected. This would help them to be more effective participants in future consultation, and avoid delays that might arise if they continued to lobby for proposals that have no hope of succeeding.

2.14 Some stakeholders questioned the necessity of securing the Prime Minister's approval for small changes in policy direction that occur as a result of consultation. They suggested that laws could be drafted more quickly if the Minister were delegated the authority to fine tune legislative design details, where the policy intent has already been approved by Cabinet or the Prime Minister.

Government priorities

2.15 A view was strongly advanced in consultation that Treasury and OPC do not have the resources to deliver the required volume of tax legislation.

2.16 Stakeholders also suggested Treasury lacked the skills and experience to cope with the complexity of the tax law and to understand practical compliance issues.

2.17 Stakeholders questioned the existing criteria for prioritising tax measures and expressed frustration at unexpected changes in priority. Many saw this process as ad hoc and not meeting their expectations.

2.18 There was a commonly held perception that government officials lack any incentive to progress policy changes initiated outside government. There were calls for a register of issues proposed by the private sector for government consideration.

2.19 There were calls for the Government to allocate more resources to tax design, with suggestions including:

- permanently increasing funding for OPC, Treasury and the Tax Office to address resource constraints;
- outsourcing some tax drafting;
- increasing funding in the short term to employ private sector experts to deal with the backlog of tax law issues;
- increasing the time devoted by the Government and Parliament to passing changes to the tax law (including prioritising the allocation of drafting resources to tax bills); and
- appointing panels of private and public sector experts to identify and prioritise issues in the tax law.

2.20 A few stakeholders suggested that further major policy changes should be withheld until current issues with the tax law have been resolved.

2.21 There was also a proposal that more issues could be rectified through regulations, rather than through the more time-consuming legislative process.

Maintenance of the tax system

2.22 A large number of stakeholders were strongly in favour of instituting routine care and maintenance measures for the tax system. There was some support for an annual technical corrections bill, supported by an open register where practitioners and taxpayers could record issues, and an independent body to review and prioritise those issues.

2.23 There was also some support for the Commissioner of Taxation being given powers to grant extra-statutory concessions. The suggestion was that this would allow the Commissioner to give taxpayers the benefit of fairer or more practical outcomes.

2.24 There was some backing for more community input into the prioritisation of tax law changes. While stakeholders acknowledged that they currently have some opportunities to inform the Government's priorities, many considered that this role should be enhanced and more explicitly recognised.

2.25 The process could start with a consideration of the stock of unenacted measures, which could include 'unannouncing' measures that are not to proceed, and publishing a timetable for implementing those that are to proceed.

Ownership, accountability and transparency

2.26 There was concern about a lack of transparent ownership throughout the life of new tax projects. In particular, not having Treasury contact details on announcements meant that external stakeholders had little confidence in the accountability and implementation plan for particular measures. When measures are delayed, it is not clear what has caused that delay.

2.27 Stakeholders want to have access to information about the prioritisation and progress of tax measures, including information about:

- what issues will be addressed in upcoming sittings;
- what stage of the design or drafting stage measures have reached;
- if there are delays, what caused them, and when is work likely to resume; and
- who is working on which measure.

2.28 There was support for the idea that listing the people responsible for the delivery of the measure on the press release would improve accountability. Announcements should also indicate the timetable for implementing the measure, and formal post-implementation reviews should be routine.

2.29 Once a project plan has been established, stakeholders suggested that the Government should commit to a set of indicative priorities, at least over a certain period (say six months). These priorities could be informed by consultation conducted by the Board of Taxation, which would then recommend priorities to the Government. The Government would publish those priorities once it had considered the Board's advice.

Culture

2.30 An overarching impression from consultation was that there was insufficient trust between the various participants in the process. In particular, some expressed the view that tax policy debates were unnecessarily adversarial and that some stakeholders tend to focus on differences of view rather than areas of agreement.

2.31 The Tax Office is seen as integral to ensuring that practical administration issues are considered in the design of policy and law. There is a perception that the Tax Office is not properly engaged in the tax design process, particularly in the immediate aftermath of the 2002 transfer of the legislative function. OPC is seen as being disengaged from the broader process.

2.32 Many stakeholders expressed a view that tax laws were aiming to be too comprehensive in their coverage and that an '80/20 rule' should be adopted to ease complexity and improve timeliness. Stakeholders considered that both Treasury and the private sector were responsible for 'chasing' certainty through overly prescriptive legislation and that a deep cultural shift is required on all sides, including a more pragmatic administration of the law by the Tax Office. Stakeholders felt that certainty was improved when law design and administration remained consistent with the economic principles that the taxes are based on.

2.33 Some stakeholders suggested that Treasury should follow through on its stated commitment to principles-based legislation. While most stakeholders supported this view, others suggested that delays were acceptable if the result was clearer and more certain legislation, which they associated with a more prescriptive approach. Some stakeholders did not have faith in the Tax Office's commitment to the purposive interpretation needed to support principles-based legislation.

2.34 Stakeholders generally supported the view that anything more than a trivial amendment to the Australian tax system now requires careful review. The system is so complex that it has reached a 'tipping point', beyond which any change is as much about dealing with the interactions between the change and the existing system, as it is about the change itself. Good quality consultation helps to identify, properly consider and manage these interactions.

CHAPTER 3: REVIEW PANEL FINDINGS AND RECOMMENDATIONS

3.1 In reaching its findings, the Review Panel used data on the volume and progress of tax measures, consultation with stakeholders and their written submissions, and case studies of tax projects highlighting situations where delays had occurred or where measures had been introduced in relatively short timeframes. The Panel also drew on the work that has been done in the past by the Board of Taxation and the Review of Business Taxation.

3.2 Notwithstanding the improvements made in recent years, particularly since 2002, the Review Panel heard significant calls for further improvements. Delay in implementing tax legislation causes uncertainty for taxpayers and their advisers and imposes a net cost on taxpayers. The Panel also found that frustration about uncertainty is exacerbated by a lack of transparency about the reasons for the delay. The majority of those consulted by the Panel said that these problems would be significantly ameliorated by better information about the reasons for the delay or about when the legislation was likely to be introduced into Parliament. The Panel has made a number of recommendations to improve the transparency of the tax design process and has proposed an implementation strategy to put these improvements into practice.

CONSULTATION PRIOR TO GOVERNMENT ANNOUNCEMENT

3.3 The Review Panel believes that the quality and timeliness of new tax legislation reflects the quality of the initial policy design. The recursive process of making policy refinements after a Government announcement (often to address issues identified from consultation), and then seeking additional Government approvals for each change, imposes costs on taxpayers through uncertainty and delays in introducing legislation.

3.4 The Review Panel recommends that the Government consult on new tax proposals at the initial policy design stage. This would allow the early input of private sector ideas and expertise to analyse the policy issue and find an appropriate and workable policy response. Clarity about the intent of the policy would make it easier, and quicker, to draft the legislation to give effect to the policy.

3.5 The Review Panel considered that this type of consultation had worked well for some large policy changes. Two examples cited in consultation were the Board of Taxation's review of international tax arrangements and the Treasury's review of income tax self assessment. These reviews featured broad public consultation on policy design before any Government announcement of the policy solution. The Panel also noted some cases where this did not occur, which had resulted in less successful outcomes.

3.6 For smaller tax policy changes, the Review Panel recommends that Treasury engages one or more private sector experts on a confidential and fee-paying basis to provide advice prior to the announcement. Engaging private sector advisers on commercial terms would impose fiduciary obligations that would ensure professional advice is provided in the national interest as well as providing commercial focus for the advisers.

3.7 The Review Panel notes 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 or on changes to tax rates (as opposed to tax base changes).

3.8 The Review Panel considered a proposal previously advanced by the Board of Taxation for a Consultation Centre, comprising tax experts nominated by tax professional bodies, to provide advice to Treasury and to identify private sector experts to be engaged by Treasury on specific projects. The Panel concluded that Treasury, with the support of the Tax Office and the Board of Taxation, was already well placed to identify experts it could engage for professional advice. Rather than establish a new body, the Board of Taxation's Advisory Panel could assist with identifying experts if required.¹⁶

3.9 The States and Territories are concerned that their agreement to changes to the GST base is not being sought before those changes are announced. Pre-announcement consultation would enable them to participate in discussions on GST changes, which may lead to more expedited processes for seeking their agreement. Given that the approval of the States and Territories is required before GST changes can be made, the Review Panel considers that pre-announcement agreement with them on GST changes is something that should be sought whenever possible.

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 (eg, 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.

¹⁶ The Board of Taxation's Advisory Panel draws together some of Australia's leading tax professionals who have volunteered their knowledge and expertise to help the Board with its work. Panel members are appointed on the basis of their individual capabilities and expertise, rather than as representatives of particular interest groups.

TRI-PARTITE DESIGN TEAMS

3.10 In addition to pre-announcement consultation on initial policy design, the Review Panel believes there should be more private sector involvement *throughout* the tax design process. The private sector can provide information about practical and commercial issues which Treasury and the Tax Office may not be aware of.

3.11 The Review Panel considers the tax design process would be improved by establishing teams to see ‘substantive’ tax measures from the design and legislative stages through to the end of a reasonable implementation period (see Recommendation 22).

3.12 ‘Substantive’ tax measures in this context would 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 Treasury (reflecting its formal role in developing tax policy and legislation) and would include tax officers and private sector experts 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.

3.13 The other government agency involved in tax design is OPC, which drafts all Commonwealth legislation. OPC drafters specialise in translating policy into legislation and, for tax legislation, generally join the process once policy is substantially developed. While there may be benefits in OPC drafters being involved earlier, these benefits need to be weighed against the cost of committing their highly specialised skills outside their primary drafting role. The Review Panel noted that Treasury has senior staff with extensive legislative drafting experience who bring similar skills to projects. Nevertheless, the Panel thinks there is merit in OPC drafters being involved during the early policy development phase. This already occurs on some large or urgent projects, such as the recently implemented superannuation reforms.

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, OPC should also be involved at the policy design stage.

GOVERNMENT ANNOUNCEMENTS AND TIMING OF RELATED LEGISLATION

3.14 The Review Panel considers that there continues to be a role for policy announcements in the Australian tax system prior to legislation being released. Such announcements give the Government the flexibility to respond to emerging issues and to foreshadow changes in a way that can provide taxpayers with some comfort and

certainty as to the future shape of the tax system. However, taxpayers are entitled to rely on the statute book, rather than press releases, when arranging their affairs.

3.15 Changes to the tax law can be announced to apply:

- prospectively;
- retrospectively from the date of the announcement; or
- retrospectively from a date before the announcement.

3.16 Prospective announcements are those advising that the law will change on a future date. This future date may be specified (eg, 1 July 2012) or unspecified (eg, date of Royal Assent to the legislation). In some cases a delay in enacting a change that was announced with a specified future start date can mean that the legislation applies retrospectively. Retrospective announcements are those advising that the law will change from the date of announcement (but before enactment of legislation) or from an even earlier time.

Prospective changes

3.17 The Review Panel considers that tax measures announced by the Government should generally operate prospectively (ie, take effect only after they are enacted). This would enable taxpayers to structure their affairs according to the enacted law and respect the role of Parliament to make the laws.

3.18 Where announcements are made prospectively there is less concern about delays in introducing the legislation and submissions to the Review Panel preferred thorough consultation to ensure better law, rather than quicker law. Nevertheless, unreasonable delay between the announcement and the introduction of legislation should be avoided. The Panel considers that, for the vast majority of prospective measures, legislation should be ready for introduction within 12 months of announcement. However, it is acknowledged that some major policy initiatives could take up to two years to be developed and implemented.

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.

Retrospective changes

3.19 While it may occasionally be appropriate to announce measures that apply before legislation is enacted, these should be kept to a minimum. Where amendments

apply before the legislation is enacted, the announcement should clearly state why retrospective application is necessary.

3.20 In recent years, a substantial proportion of the retrospective changes have benefited taxpayers from the date of their announcement.¹⁷ It is reasonable for the Government to exercise this flexibility in accordance with its own priorities and in some cases it is necessary that these changes take effect from the date of the announcement rather than a later time. For example, it is often necessary for an investment allowance to apply from the date of announcement so as to avoid an investment deferral whilst waiting for the incentive to begin.

3.21 In some rare cases it may be appropriate for a change to apply retrospectively to a date before the announcement. For example, it may be appropriate to rectify technical deficiencies from the date the original legislation came into effect. It may also be appropriate where there is a serious risk to the revenue.

3.22 There is undoubtedly greater community concern over delays in introducing retrospective legislation. The Review Panel considers that most retrospective legislation should be introduced within six months of announcement. However, the Panel recognises that, if this timetable is to be met, taxpayers would need to accept that the time available for consultation may be less than is available for prospective changes (see further discussion at paragraph 3.33 and Recommendation 8).

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.

Content and timing of Government announcements

3.23 The Review Panel considers that uncertainty could be reduced by announcing the policy intent for each new measure in sufficient detail. While it may be more time consuming to refine a policy before it is announced, making the intent of the policy clear enables more focused consultation and helps drafters to translate the policy into legislation. Having said this, the announcement should describe the parameters of the policy but leave flexibility for the policy to change if consultation reveals that this is necessary.

3.24 The Review Panel considers that Ministers' press releases are messages for the media, so do not necessarily contain the level of detail that taxpayers and their advisers find useful. As a consequence, the technical detail of a tax policy announcement should be presented in a form that can be used by taxpayers and their advisers. Such

¹⁷ See paragraph 1.39 and Table 1.2.

announcements, whilst issued at the same time as the Minister’s press release, should be a separate Treasury document that includes a description of how the announced change would operate at a level of detail similar to that in the drafting instructions that Treasury provides to OPC. It should indicate the type of consultation to be undertaken and the timetable for that consultation. It should also include a Treasury contact for the measure so that tax professionals can seek information directly about the technical content of the measure or the consultation process.

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.

CONSULTATION ON ANNOUNCED MEASURES

3.25 Consultation takes time and can be a cause of delay but it can improve the quality of tax changes by integrating the practical experience, skills and knowledge of the private sector into the tax design process. To support this level of engagement, consultation must be accessible, inclusive and transparent. Stakeholders should be given information relevant to their participation, time to reflect and respond, and feedback on their contributions and the contributions of others.

Two-stages of consultation after announcement

3.26 The Review Panel considers that consultation on announced substantive measures should take place at two stages: on the announced policy design; and again on the draft legislation.¹⁸ This is in addition to pre-announcement consultation (see Recommendation 1).

3.27 Consultation on announced policy design should start as early as possible by consulting on the details of a proposal and how it is to be implemented. This would enable many policy issues to be identified and addressed before a drafter is engaged, and make drafting easier.

3.28 There should also be consultation on draft legislation, in recognition of the complexity of the tax law and the difficulties that can arise with translating policy into legislation that interacts appropriately with the existing body of law. In most cases a single exposure of the draft legislation would be sufficient.

¹⁸ What the Review Panel means by a ‘substantive measure’ is explained in paragraph 3.12.

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.

Public versus confidential consultation

3.29 Since 2002, there has been either public or confidential consultation on most substantive tax changes after they have been announced by government.

3.30 In confidential consultations participants undertake not to disclose the matters being consulted on. In many cases this unnecessarily limits the range of views and experience brought to an issue. The Review Panel considers that there are only limited circumstances in which confidential consultation is necessary, such as where there are significant political, revenue or commercial sensitivities. However, the Panel found that confidential consultation is often used in circumstances where public consultation would be appropriate, and recommends that all post-announcement consultation should be public unless there are significant sensitivities.

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.

Timeframes for consultation

3.31 Many stakeholders raised concerns with the Review Panel about the short periods allowed for comment on some draft legislation. On a number of occasions this period was as short as 24 hours. It is not surprising that these stakeholders found it difficult to make a meaningful contribution in these cases. Stakeholders were also sceptical about whether their views were given proper consideration in those short timeframes.

3.32 The Review Panel considers that the minimum time for consultation should be four weeks on the announced policy and four weeks on the draft legislation. This period would give all participants a reasonable opportunity to acquaint themselves with the issues, consider their own position and to communicate those views to the Government. While the Board of Taxation recently identified an ideal consultation period to be six weeks, the Panel has recommended an additional stage of consultation on announced policy design. The Panel considers that the combination of four weeks of consultation on announced policy design and four weeks on draft legislation provides an adequate opportunity for stakeholders to contribute their views. In

addition, the Panel expects that the publication of a forward work program will help stakeholders to plan and organise their contribution within the four week periods allowed for consultation (see Recommendation 19).

3.33 There will generally be a tension between the time allowed for consultation and the timeliness with which the legislation can be introduced. Although the Review Panel generally favours maintaining the minimum consultation periods, it acknowledges that in some cases shortening the time allowed for consultation may be preferable to lengthening the time until legislation is introduced. On other occasions, it may be preferable to delay introduction in order to resolve outstanding issues through further consultation. The Panel considers there should be flexibility for these trade-offs to be made on a case-by-case basis. The Panel also considers that implementing its recommendations to improve the transparency of the tax design process will help to ease concerns about the delay in implementing measures.

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.

Drafting legislation for consultation purposes

3.34 Currently OPC drafting resources are allocated according to whole-of-government priorities and largely according to the timetable for the introduction of legislation. This reflects the process of bidding for drafting resources, which is in part driven by the scheduled date of introduction and does not always take sufficient account of the time taken to prepare tax legislation and, in particular, the time needed to consult.

3.35 While there is a process for seeking drafting resources to prepare legislation for consultation, the Review Panel found that there has been difficulty getting sufficient priority for these ‘drafting only’ bids. If the consultation periods in Recommendation 8 are to be achieved, it may be necessary in some cases for legislation to be drafted further in advance of its introduction than is currently the case. Accordingly, where a minister bids for drafting resources for legislation that is to be the subject of consultation, the category accorded to the bill and the allocation of drafting resources should take account of the required consultation period.

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.

Feedback

3.36 A transparent process is crucial to engendering trust and promoting valuable participation in consultation. An important part of a transparent process is to provide participants with feedback on their views and on the progress and outcomes of the consultation.

3.37 The Review Panel considers that it is reasonable for participants in consultation to receive feedback on their submissions. This would go a long way to ensuring the process is accepted as a genuine attempt to collect and take account of private sector views. In particular, effective feedback would help reassure external participants that Treasury officials understood their views and adequately represented them to the Government. Where possible, it would also explain why the chosen options were adopted.

3.38 As the Board of Taxation found in 2002, this depends on the development of, and commitment to, a consultative approach by the Government. Given the significant resources that would be required to provide individualised feedback on an issue with many submissions, a way the Government could give effect to this commitment would be by publishing a summary of the outcomes of consultation. This consultation summary would explain the issues raised in consultation, the options considered, whether those options were adopted, and if not, why not. This summary could be posted on the Treasury website at the time the measure was introduced into Parliament.

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.

GOVERNMENT APPROVAL PROCESSES

3.39 The Prime Minister is responsible for ensuring that policy positions of all ministers are consistent with the Government's overall policy position. The approval of the Prime Minister (or the Cabinet for major policy matters) is therefore required for all new policy, including tax policy. Prior to the introduction of any legislation, the Department of the Prime Minister and Cabinet (PM&C) briefs the Prime Minister to confirm that the legislation complies with approved policy. In preparing that advice, PM&C relies to a large extent on OPC's view as to whether any provisions require further policy approval by the Prime Minister.

3.40 The Prime Minister's approval is also required prior to public consultation on draft legislation. Such approvals are routine and delays would generally only occur if the draft bill contains new policy of some complexity. Where draft legislation includes new policy, the Prime Minister's approval for the new policy content is required before the bill can be released. This ensures that individual ministers do not pre-empt the Prime Minister's consideration of policy changes and avoids taxpayer confusion by

ensuring that any policy differences between ministers are resolved before a government position is presented publicly.

3.41 The Review Panel found that, due in part to the complexity of the issues involved in tax policy, the process for approving draft legislation for public consultation can be a source of delay in introducing legislation. While these processes provide an important governance role, the Panel considers that the approval process could be streamlined if, when the Minister seeks policy approval from the Prime Minister or Cabinet, he or she also sought approval to release draft legislation for public consultation. That the draft is consistent with approved policy will be assured by OPC, which already assesses whether draft legislation meets that requirement.

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.

RESOURCES

3.42 The Review Panel heard broadly held views that resource constraints in Treasury and OPC cause delays. The Panel considers that it is a matter for the Government to allocate resources according to its priorities. While it may be the case that more tax design resources could improve the quality and timeliness of tax changes, the Panel has focused its findings on ways to make better use of the resources currently allocated to the tax design process.

Tax design resources

3.43 Before 2002, the Tax Office was responsible for developing tax legislation and instructing OPC drafters. In 2002, this function was transferred to the Treasury, which already had responsibility for tax policy.

3.44 The Treasury faces a challenge in maintaining the required skill mix among its staff. The transfer of officers from the Tax Office to Treasury brought considerable experience in developing and interpreting tax legislation. Treasury's challenge going forward is to maintain these skills and complement them with its economic, legal and policy advising skills.

3.45 Treasury could increase its use of external consultants to bring in more expertise on tax legislation, industry structures and commercial practices. Although the greater use of consultants would be worthwhile, it can be costly and resource constraints may be an issue in routinely engaging private sector advisers for all substantive tax measures. However, in line with Recommendation 1, the Review Panel

considers that the use of paid private sector consultants to assist in policy design prior to Government announcement is an appropriate investment.

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.

3.46 The Review Panel also heard perceptions that poor project management by Treasury was a source of delay. The Panel found evidence of extensive project planning by Treasury (indeed, OPC considers Treasury's Revenue Group to be one of the best organised of its instructors) but believes this should be made more transparent through the publication of a forward work program and by being as open as possible in advising on reasons for any delay in the design and legislative process (see Recommendation 19). Treasury should also continue to explore any opportunities to improve its project management.

Recommendation 13: Treasury's project management approach

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

Tax drafting resources

3.47 Many stakeholders saw a shortage of OPC resources allocated to tax drafting as a cause of delay. The Review Panel considered case studies of projects that had taken some time to complete. In these, a lack of access to OPC's resources was not a cause of delay. Instead, major sources of delay were found to be the initial policy not being settled and the consequent need to revisit policy repeatedly during the drafting process. The Panel heard that this was a problem that exists for other areas, not just for tax. The Panel concluded that, while the level of OPC resources placed a ceiling on the volume of tax legislation that can be drafted, OPC resources were not generally the cause of long delays in projects. However, if more OPC resources were available to draft tax legislation, more could be drafted.¹⁹ If the Government's priority was to draft more tax law, OPC could transfer drafters from other projects and Treasury could move staff from other areas to instruct on tax changes. The Panel acknowledges that these are matters for Government to determine.

3.48 It was suggested to the Review Panel that delays could be avoided if more issues were addressed through regulations. However, the Panel noted that this was unlikely to save any time as all elements of the design process, including consultation,

¹⁹ The Review Panel did note that it takes about seven years to fully train a drafter and that this would place a limit on the extent to which the total drafting resources available to the Government could be expanded in the short term.

are equally important when making regulations. Accordingly, the Panel considers that no change of approach is necessary in this area.

Use of private sector drafters

3.49 A small number of those consulted suggested that drafting work could be outsourced from OPC or that ‘lay-drafts’ of legislation should be provided.

3.50 The Review Panel does not believe that the use of private sector drafters is likely to result in a quicker or more effective production of legislation. OPC would still need to ensure that legislation was effective, was consistent with Government policy and was in keeping with standards applying to all Commonwealth legislation. The checking of lay-drafts by OPC would result in costly duplication as OPC would need as detailed an understanding of the history, objective and development of the legislation as the lay-drafter. In addition, private sector drafters may not have the same quality of legislative drafting skills and broad policy perspective that OPC’s drafters possess. Finally, private sector and OPC drafters would need to be aware of each other’s activities to minimise inconsistency and duplication. Private sector drafters would consequently require access to OPC’s systems and the bills of other agencies, which would raise security issues.

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.

Drafters within Treasury

3.51 When the Board of Taxation recommended that the Government shift the tax design function from the Tax Office to the Treasury in 2002, it also noted that the Government could consider bringing legislative drafting together with tax policy and legislative design, but it did not regard this as essential.

3.52 Locating tax specialist drafters within Treasury could facilitate closer interaction between drafting and tax policy design, which is an iterative process. However, it would limit the capacity for a whole-of-government prioritisation of drafting resources. Indeed, it could even slow tax legislation when the demand for tax drafters exceeded the in-house drafting capacity. At other times when there is less demand for tax legislation it could be difficult to fully utilise dedicated tax drafters. There would also be difficulty in recruiting appropriately experienced drafters as the range of work and career prospects would be more limited than in OPC. Such a move would also affect the consistency and quality of Commonwealth legislation, as it would remove the centralised control and monitoring of drafting that exists now in OPC.

3.53 The Review Panel has found that there is no sound basis for establishing a dedicated tax drafting resource within the Treasury. However, the Panel has recommended that, where appropriate, OPC drafters should be involved during the

early policy development phases of new tax measures (see Recommendation 2). In making this recommendation, the Panel again noted that Treasury has senior staff with extensive legislative drafting experience who also bring similar skills to projects.

Recommendation 15: No change to the location of drafting resources

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

PRIORITIES, PLANNING, MONITORING AND REVIEW

Greater priority for the care and maintenance of the tax system

3.54 The tax system is an important community asset. In the past, significant efforts have been made to improve the system by adding new features to it. However, there has been less investment in the ongoing care and maintenance of the system. The Review Panel found that technical defects, anomalies and unintended outcomes in the tax law are a major source of frustration and uncertainty for taxpayers. This is exacerbated when there are delays in remedying identified problems. For example, in consultation, stakeholders expressed concern that announced amendments to the consolidation regime seemed to have a low priority, reflected in delays in introducing legislation. The Panel considers that greater priority needs to be given to the ongoing care and maintenance of the tax system to ensure it continues to operate effectively.

3.55 In this context, ‘care and maintenance’ measures are those which ensure the existing law operates in the way it was intended to operate by correcting technical or drafting defects, removing anomalies or addressing unintended outcomes. In so doing, ‘care and maintenance’ could involve minor policy changes, provided they do not have a significant revenue impact.

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.

Tax Issues Entry System

3.56 Several stakeholders suggested to the Review Panel that an annual technical corrections bill was needed to ensure priority is given to care and maintenance amendments. Currently, these amendments are included in one or more of the six to eight omnibus tax bills introduced into Parliament each year. The Panel considers that this provides ample opportunity and flexibility to progress amendments of this kind.

3.57 In 2007, the Board of Taxation found that the key issues in dealing with minor amendments are the way they are identified, analysed and prioritised rather than the parliamentary process for implementing them. Accordingly, the Board recommended piloting a new ‘Tax Issues Entry System’ (TIES) to provide a transparent and accessible process for identifying, prioritising and providing feedback on, minor tax system issues requiring an administrative or legislative change.

3.58 The key features of TIES proposed by the Board of Taxation included:

- joint ownership by Treasury and the Tax Office to provide a single point for the community to raise minor policy and administrative issues;
- accessible arrangements for raising issues, including via phone or email; and
- a focus on providing feedback on the progress and final outcome of issues raised.

3.59 The Review Panel agrees that TIES should be piloted for issues relating to the care and maintenance of the tax system, with the Board of Taxation to review its operation after 12 months. As part of the pilot, new collaborative tools could be explored to assist in sharing, testing and refining issues raised under TIES.

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.

3.60 Subject to the volume of issues raised through TIES, the Review Panel also sees a role for the Board of Taxation (or a sub-committee of the Board) to consult with the community and provide advice to the Government on how the issues should be prioritised. In the interests of transparency, the Panel considers that this advice to the Minister should be made public.

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.

3.61 The Review Panel considers that issues, other than those relating to care and maintenance, should continue to be referred to the Government through existing processes rather than through TIES. However, in the same way that TIES will be a register of community ideas relating to the care and maintenance of the tax system, the

Panel considers that further thought should be given to a system which would allow the community to log other policy ideas on a transparent and accessible register.

Forward work program

3.62 The Review Panel believes that there needs to be a more open and transparent approach to the planning and prioritisation of announced tax changes. A significant step in that approach would be the publication by the Government of an indicative forward work program for announced tax measures. This would increase certainty and ease concerns about delays in introducing tax changes.

3.63 The Review Panel noted that Treasury already publishes a report three times a year that lists all unenacted tax measures, the Treasury contacts, and a broad statement on the consultation approach adopted for each measure. The forward work program envisaged by the Panel would build on this report to add more detail about the consultation timetable for each measure, reflecting the information included with the original announcement of the measure (see Recommendation 5). The program would also indicate which legislation was planned to be introduced in the next parliamentary sittings. This would provide more detailed and timely information on legislative programming than that currently published by PM&C before each parliamentary sittings.

3.64 In accordance with its general view that tax design and legislative processes should be as transparent as possible about delays, the Review Panel believes that the forward work program should be amended whenever there is a delay and that it should explain the reasons for that delay.

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.

Stock of unenacted measures

3.65 There is considerable uncertainty in the community about the stock of measures announced by the previous Government. The Review Panel considers that this uncertainty would be addressed by the Government moving quickly to announce its position on these measures, and the timetable for implementing those that are to proceed.

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).

3.66 The Review Panel has made a number of recommendations that are aimed at implementing tax measures in a more timely way. However, to the extent that a stock of unenacted measures remains, the Panel believes uncertainty could be alleviated if, in the process of updating the forward work program (see Recommendation 19), the Government took the opportunity to review the need for each announced measure and to announce any measure it no longer plans to implement.

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.

POST-IMPLEMENTATION MAINTENANCE AND REVIEW

3.67 The Review Panel found that delays can arise when the design process is protracted in the quest for 'perfect' legislation. The tax law, and the commercial environment in which it operates, are inherently complex. It is therefore unrealistic to expect that, at the time a large policy change is introduced, the legislation will cover all possible scenarios and that all potential issues will be identified and resolved. Legislation should not be considered flawed or incomplete simply because further legislative refinement is required. While the Commissioner's administrative practice cannot be used to remedy defects or fill in gaps in the law, the law should also not be considered flawed or incomplete because there is a need for administrative or interpretive guidance after the legislation is introduced.

3.68 The Review Panel believes that stakeholders (including politicians) should accept that refinements to complex legislation will be required even after the legislation has been enacted. New issues will inevitably surface as the legislation is applied to real-life transactions, often not contemplated during the legislative design phase despite the best efforts of all involved. The need for such changes should not be held up as evidence of fault or the subject of blame. Rather, it is a necessary and healthy part of maintaining a complex system.

3.69 For these reasons, the Review Panel believes there is a need for more formalised review processes following the enactment of legislation.

3.70 To assist the bedding down of legislation, the Review Panel recommends that the tri-partite design team (see Recommendation 2) should monitor new law to ensure it is operating as intended by identifying any legislative refinements that are needed and ensuring that administrative products and guidance material are in place.

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.

3.71 One of the functions of the Board of Taxation is, on request from the Government, to review the implementation of a measure after it has been in place for a time to establish if it is having its intended effect and whether its implementation could be improved. To date, the Board has undertaken two of these post-implementation reviews — in relation to small business capital gains tax concessions; and non-commercial losses — which have led to legislative and administrative improvements. The Review Panel considers that further major policy initiatives should be formally reviewed by the Board to ensure that the announced policy has been effectively implemented. An appropriate time to conduct such reviews would usually be after two to three years of operation. This would provide a reasonable period of practical experience and allow tax return data to be taken into account.

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.

OTHER ISSUES

Principles-based legislation

3.72 The Review Panel considers that a significant source of complexity in tax changes, and hence of delay in implementing them, is overly prescriptive legislation. The attempt to deal specifically with every issue is producing laws that are long and complex and that take an unacceptable amount of time to finalise.

3.73 It was suggested to the Review Panel that one way to deal with these problems is to make greater use of principles-based legislation: to express the intended outcome in a principled way, with less detail about the mechanism to achieve that outcome. While there are provisions in the current tax laws that express the

underlying principles, much of the legislation is expressed using a black-letter approach.

3.74 While principles-based legislation is not a panacea for the complexity inherent in the tax laws, it is suggested as one means for addressing concerns about the sustainability of those tax laws. The Review Panel found that principles-based legislation is conceptually promising, but that it has not been universally accepted, as many stakeholders have continued to pursue certainty through prescriptive detail. To succeed, there would have to be general acceptance that the long-term costs — to all involved — of continually adding more detail to the law outweigh the short-term benefits that particular stakeholders get from having the law deal explicitly with their fact situations.

3.75 Consequently, the Review Panel does not consider that, at present, a more general use of principles-based drafting in taxation law would make any difference to the delays in the current tax design and legislative process.

Powers of the Commissioner of Taxation

3.76 The Review Panel heard views in consultation that a large amount of legislation involves relatively minor amendments to ensure the law operates as intended. It was suggested that many of these measures would not be needed if the Commissioner of Taxation had greater power to administer the law in a flexible way that would deliver sensible and pragmatic outcomes. Submissions suggested that this flexibility could be provided by granting the Commissioner a power to make ‘extra-statutory concessions’ for taxpayers.

3.77 There are advantages and disadvantages to such a proposal. Advantages might include giving relief more quickly than by legislation and with greater certainty than by press release. It may also facilitate changes that improve the care and maintenance of the existing tax law (see also Recommendations 16-18). Disadvantages might include the increased burden on the Commissioner and the weakening of the rule of law that delegating such a power entails.

3.78 The Review Panel notes that there are precedents for powers of this sort. Such a practice exists in the United Kingdom. There are also some Australian statutory precedents. For instance, the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission may exempt people from certain provisions of the *Superannuation Industry (Supervision) Act 1993* and the *Corporations Act 2001* respectively.²⁰ The Commissioner also has a power under the *A New Tax System (Goods and Services Tax) Act 1999* to determine certain things to ensure certain provisions apply in a way that is appropriate in the circumstances.²¹

3.79 The Review Panel has not had the time to examine this issue in detail. In particular, it has not considered the extent of the Commissioner’s existing powers and has not examined how existing statutory powers of the above sort have worked. Accordingly, the Panel has not reached a fixed view on the proposal.

²⁰ See Part 29 of the *Superannuation Industry (Supervision) Act 1993* and section 741 of the *Corporations Act 2001*.

²¹ See section 29-25 of the *A New Tax System (Goods and Services Tax) Act 1999*.

3.80 Whilst the Review Panel does not have a fixed view as to the best way to proceed, it considers that this is an issue which warrants further investigation.

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.

IMPLEMENTATION OF PROPOSED TAX DESIGN PROCESSES

3.81 The Review Panel believes that its recommendations could significantly improve the tax design process and address issues raised in the Panel's terms of reference. However, the Panel is mindful that recommendations from previous reviews of this kind, even when accepted in principle, have not always been implemented in practice. The Panel sees merit in ensuring there is a mechanism in place to drive the implementation of its proposed tax design process.

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.

3.82 In addition, the Review Panel considers that, after two years, the Board of Taxation should be asked to review the tax design process and report to the Government on the extent to which there are demonstrated improvements arising from the Panel's recommendations.

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.

3.83 The Review Panel's recommended process for developing tax measures is illustrated in the diagram in Appendix F.

APPENDIX A: PRESS RELEASE OF THE ASSISTANT TREASURER AND MINISTER FOR COMPETITION POLICY AND CONSUMER AFFAIRS²²

TAX DESIGN REVIEW PANEL TO LOOK AT WAYS TO STREAMLINE PROCESS FOR CHANGING TAX LAWS

The Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, today announced the appointment of a Tax Design Review Panel that will be charged with examining how to reduce delays in the enactment of tax legislation and improve the quality of tax law changes.

This forms part of a key election commitment to streamline the process of introducing tax legislation and comes in response to community and business concern on the lack of certainty created by the former government's failure to implement announced changes to taxation law in a timely fashion.

"Delays in implementing announced changes to tax laws have been a source of frustration to taxpayers and tax professionals, not to mention the lack of certainty they create for business investment," Mr Bowen said.

"There were too many occasions where the previous government would publicly declare its intention to change the tax laws but failed to introduce such changes into the Parliament years down the track.

"Taxpayers should be able to have confidence that the tax laws reflect stated Government policy."

"Improved consultation at the earlier stages of tax laws changes will result in better law."

In conducting the review, the Panel will examine:

- options to reduce the delay between the announcement of proposed changes to tax laws and the introduction into 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.

²² The press release is available at:
<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/006.htm&pageID=003&min=ceb&Year=&DocType=>

The Tax Design Review Panel will be chaired by Mr Neil Wilson of PriceWaterhouseCoopers and comprises Mr Duncan Baxter of Blake Dawson and Mr John Morgan of the Victorian bar along with representatives from the Department of the Prime Minister and Cabinet, Treasury, Australian Taxation Office and the Office of Parliamentary Counsel.

The Panel will meet with various stakeholders to garner views and welcomes comments from interested parties.

The Minister encourages all interested parties to submit their views to the Panel at taxdesignreview@treasury.gov.au.

The Panel will report its findings to Government by 30 April 2008.

8 February 2008

APPENDIX B: TAX DESIGN REVIEW PANEL MEMBERS

The Tax Design Review Panel consisted of:

- Neil Wilson, Partner, PricewaterhouseCoopers (Chair)
- Duncan Baxter, Partner, Blake Dawson
- F. John Morgan, Barrister at Law – Melbourne
- David Macgill, Assistant Secretary, Department of the Prime Minister and Cabinet
- Peter Quiggin PSM, First Parliamentary Counsel, Office of Parliamentary Counsel
- Bruce Quigley, Second Commissioner of Taxation, Australian Taxation Office
- Nigel Ray, Acting Executive Director, Revenue Group, Treasury

The Review Panel was supported by a Treasury secretariat.

APPENDIX C: AUSTRALIAN TAXATION OFFICE / TREASURY PROTOCOL²³

AUSTRALIAN TAXATION OFFICE / TREASURY PROTOCOL — TAX POLICY AND LEGISLATION

This protocol provides an agreed framework for working arrangements between the Treasury and the Australian Taxation Office for delivering advice to government on tax policy and on the design and development of legislation and related administrative guidance material and products to implement the government's policy. This protocol covers all laws administered by the Commissioner of Taxation and is also relevant to the Commissioner's role as Registrar of the Australian Business Register.

OBJECTIVES OF THE TAX DESIGN PROCESS

The objectives of the tax design process are to provide the government with the best possible advice for making tax policy decisions, as well as producing law and administrative products that give effect to the policy intent set by the government in a way that meets the needs of users of the tax system.

Tax policy, legislation and administration are integrally related and interdependent. Recognising this, the tax design process aims to ensure that the administrative, compliance and interpretive experience of the Tax Office fully contributes to those policy and legislation processes and that there is a high level of integration across the policy, legislative and administrative aspects of tax changes.

ROLES OF BOTH AGENCIES IN THE TAX DESIGN PROCESS

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

The Commissioner of Taxation, as statutory head of the Tax Office, is responsible for the interpretation and administration of tax laws.

Treasury and the Tax Office will work cooperatively to provide high quality advice to the government on tax system issues, consistent with the integrated design approach outlined above. Subject to government and legal requirements, both agencies will share information at all stages of the process.

TAX OFFICE AND TREASURY RESPONSIBILITIES

In designing new tax policies and laws

In meeting its accountability for advising on tax policy, Treasury formulates and provides advice

²³ The protocol is available at: <http://www.treasury.gov.au/contentitem.asp?NavId=022&ContentID=1362>.

to government on options, prepares official costings, and produces regulation impact statements where required.

In designing tax laws, 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.

The Tax Office contributes its views and experience to all stages of the tax policy and legislation design process. To meet this accountability and role in the law design function, the Tax Office will provide advice to Treasury on:

- the administrative and interpretive aspects of tax design;
- material that may form the basis of official costing of tax proposals, including administrative costs and the compliance implications of policy advice; and
- issues that emerge through its experience in administration, including compliance costs and other issues that may arise for taxpayers in complying with proposed tax laws.

To the extent that interpretation of proposed legislation is required prior to enactment, Treasury will provide the Tax Office with the policy intent and outcome intended in relation to a particular matter, and the Tax Office will provide its views as to whether the provisions achieve that end, recognising that, formally, it is the Office of Parliamentary Counsel which is to be satisfied that legislation is legally effective to implement government policy.

Advice to the Minister

Treasury and the Tax Office will seek to reach agreement on tax policy and legislation matters wherever possible. Where agreement cannot be reached, Treasury will ensure that the Tax Office view is provided to the Minister in a form agreed by the Tax Office, or the Tax Office may advise the Minister separately in consultation with Treasury.

For enacted law

The Tax Office has the role of interpreting enacted tax law (subject to the courts) in order to administer them.

In forming its view on the interpretation of enacted law, the Tax Office routinely consults Treasury, the professions, affected taxpayers and the public.

Circumstances in which the Tax Office may consult Treasury during the course of its interpretation of enacted law include:

- (i) ***Where more than one possible interpretation is open.*** In these circumstances the Tax Office may invite Treasury's comments on the purpose or object of the legislative provisions in question.
- (ii) ***Where, having settled on its interpretation, the Tax Office is concerned that the law may give rise to***

unintended consequences, for example, unnecessary compliance costs or inappropriate outcomes. In these circumstances the Tax Office may notify Treasury and Treasury may advise the Minister accordingly, or the Tax Office may advise the Minister directly in consultation with Treasury where appropriate.

What weight can be given to Treasury's views on purpose or object?

Any comments Treasury provides to the Tax Office are not determinative. The Tax Office can, nevertheless, consider Treasury's view along with the views of other stakeholders in arriving at an interpretation which, as far as possible, is consistent with the purpose or object of the law, given the words of the law and its statutory context.

Communications between the Tax Office and Treasury on tax and superannuation matters are confidential as they are, effectively, in the nature of communications between an agency and the government.

To facilitate the purposive approach to interpretation, when developing legislation and treaties, Treasury will seek to ensure the purpose or object of provisions is explicitly outlined on the face of the law or tax treaty and reinforced in publicly available extrinsic material, such as explanatory memoranda and second reading speeches.

Advice to the Minister

The Tax Office will advise the Minister on administration matters in consultation with Treasury.

MONITORING AND REVIEW OF PROTOCOL

The Taxation Policy Coordination Committee (TPCC), comprising senior leadership of each agency, will oversee the operation of this protocol. The TPCC will review the protocol from time to time, and may agree to amend it at any time for the benefit of effective working relationships.

A Tax Office and Treasury Liaison Committee will monitor work flows between the agencies. Both agencies will further develop and enhance the design of tax laws and provide the underlying working mechanisms to support this protocol.

RELATED MATERIAL:

Tax Office Practice Statement Law Administration PS LA 2004/6

Date: 6 March 2008

APPENDIX D: CONSULTATION MEETINGS

The Review Panel invited stakeholders in the tax design process to consultation meetings in Sydney and Melbourne. Members of the public were also given the opportunity to meet with the Panel in these cities. In addition, a video conference was held with Canberra-based industry bodies. The following firms, professional bodies and industry associations attended the Panel's consultation meetings:

- Association of Superannuation Funds of Australia
- Association of Taxation and Management Accountants
- Australia and New Zealand Banking Group Limited
- Australian Bankers Association
- Australian Chamber of Commerce and Industry
- Australian Financial Markets Association
- Australian Petroleum Production and Exploration Association Limited
- Commonwealth Bank of Australia
- CPA Australia
- Deloitte Touche Tohmatsu
- Ernst and Young
- Greenwoods & Freehills
- Institute of Chartered Accountants of Australia
- Insurance Council of Australia
- KPMG
- Law Council of Australia
- Law Institute of Victoria
- Minerals Council of Australia
- Minter Ellison
- National Institute of Accountants
- PricewaterhouseCoopers
- Rio Tinto Limited
- Tax Institute of Australia
- Taxpayers Australia
- Westfield Group
- Westpac Banking Corporation
- Woodside Petroleum Limited

APPENDIX E: LIST OF SUBMISSIONS

Interested parties were invited to make a submission to the Review Panel by 20 March 2008. The following firms, professional bodies, industry associations and individuals made submissions to the Panel:²⁴

- Australian Petroleum Production & Exploration Association Limited
- Brassil, Paul
- Cahill, Greg
- Caldwell, Rod
- CPA Australia
- Deloitte Touche Tohmatsu
- Ernst & Young
- Friendly Societies of Australia
- Institute of Chartered Accountants in Australia
- Law Council of Australia
- Lee, Tim
- McMillan, Jim
- National Institute of Accountants
- O'Rourke, Kevin
- Pitcher Partners
- Shaddick & Spence
- State and Territory GST Administration Subcommittee
- Taxation Institute of Australia
- Trustee Corporations Association of Australia

²⁴ Submissions are available at: <http://www.treasury.gov.au/contentitem.asp?ContentID=1363&NavID=037>.

APPENDIX F: PROPOSED TAX DESIGN PROCESS

