



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

28 March 2011

Dear Sir / Madam

Post-Implementation Review of the Tax Design Review Panel Recommendations

PricewaterhouseCoopers welcomes the opportunity to provide comments to the Board in respect of its review of the tax design review process as recommended by the Tax Design Review Panel.

PwC has participated in a number of consultations involving tax law changes, either directly or indirectly for and on behalf of our clients and/or professional and industry bodies. In addition, we have a range of collective experiences covering the two-year period for which the Board has obtained data for conducting its review as well as periods which precede or extend beyond that two-year period.

At the outset, it is our welcome observation that there has been greater consultation by Government with the tax community in the development of tax legislation since the Tax Design Review Panel's recommendations were adopted by Government. However, there continues to be room for improvement in respect of the timing of the consultative process, engagement with relevant stakeholders and prioritisation of proposed legislative measures.

We have set out our comments and observations in respect of specific matters raised in your Discussion Paper in the attached appendix.

If you have any questions or seek further comments, please contact me (02 82662802) or Lynda Brumm (02 82665078).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ian Farmer', written over a light blue horizontal line.

Ian Farmer
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Timing of legislation

The Board observes that the proportion of legislative measures that have been applied on a prospective basis (as opposed to a retrospective basis) has steadily increased over the past 6 years. We acknowledge that prospective legislation does go some way to securing taxpayer certainty as taxpayers have greater confidence that transactions undertaken in the past cannot be subject to a retrospective change in legislative policy.

However, there remains considerable uncertainty for taxpayers where there is significant delay in the release of sufficient detail (in particular, draft legislation and explanatory materials) in respect of a Government announcement, even where the measure is to apply on a prospective basis, and particularly where a start date is not known.

One recent example of this is in connection with the proposed reforms to the foreign income rules. Exposure Draft legislation¹ was released on 17 February 2011, without any explanatory materials and without a proposed start date. While it is acknowledged that further work is to be done on such complex reforms to be sure that the right policy outcome is achieved, these reforms were first announced on 12 May 2009. Coupled with the associated repeal of the foreign investment fund rules with effect from the 2010-11 income year, the absence of a statement about a proposed start date for the balance of the reforms is a cause for taxpayer uncertainty.

The Discussion Paper indicates that a very high proportion of prospective measures (93%) and a fairly high proportion of retrospective measures (77%) were introduced into Parliament within the period recommended by the Tax Design Review Panel. While this prima facie sounds positive, we note that there remain a number of announced measures (many of which are quite significant) which have not yet been introduced into Parliament and which would exceed the recommended benchmark period².

In addition, it is our perception that it is often the complex and significant announcements which have a potentially material tax effect that tend to be the measures for which there is often a considerable delay before the measure is introduced into Parliament. This often is a concern for companies where the tax effect of material transactions needs to be reflected in tax balances or otherwise disclosed in global and domestic financial reports under applicable accounting principles. For tax accounting purposes, until legislation is substantively enacted, there is no requirement for the proposed rules to be reflected in tax balances.

It should also be acknowledged that there remain a number of measures which were announced prior to the Board's review period for which legislation is outstanding³. Steps need to be taken by

¹ Tax Laws Amendment (Foreign Source Income Deferral) Bill 2011

² For example, the announcement of 12 May 2010 to improve the capital gains tax treatment of earnout arrangements with potential retrospective effect to 17 October 2007 has caused taxpayers undertaking transactions for the sale and purchase of assets uncertainty since it was first announced.

³ For example, the outstanding amendments to the foreign currency rules (Division 775 of the Income Tax Assessment Act 1997) were confirmed by the current Government on 13 May 2008 to give effect to the prior Government's announcement of 5 August 2004. Refer to the February 2011 Forward Work Program for other examples of announcements that pre-date 22 August 2008.



Government to ensure that these measures, if they are to proceed, are dealt with as soon as possible. Delays of this extent do not sit well in terms of achieving a goal of generating taxpayer certainty and confidence in the tax law design process, in spite of the progress that has been made in respect of measures announced since the recommendations of the Tax Law Design Panel were made.

It is clear that there needs to be a fine balance to ensure that there is effective, quality consultation (which can be time consuming) and having an announced change enacted in an appropriate timeframe. We submit that this could be addressed by:

- appropriate prioritisation of proposals having regard to fiscal objectives, the need for taxpayer certainty, and proposed date of effect, and
- appropriate communication with key stakeholders of the progress of law design throughout the entire process right through to enactment.

Quality and quantity of consultation

As noted earlier, it is clear that there is much greater opportunity in recent years for the taxpayer community to participate in consultation on tax law design, whether it is through targeted, confidential or public consultation on pre-announcement policy, discussion papers or draft legislation.

We have observed positive experiences and outcomes (albeit inconsistent) emerging from the consultative process, in particular, through the sharing of industry or taxpayer experiences, practical insights into the potential application of the measure, raising of additional technical issues, and highlighting other consequential legislative issues.

Accordingly, we see merits for all forms of consultation to continue to be conducted.

In our view, the main practical concerns that go to the core of the quality of the outputs of the consultation process relate to whether:

- sufficient time is given to the consultative process for any particular measure⁴
- all key stakeholders have the opportunity to participate, and if so, do they participate, and
- the form in which consultation occurs.

As to the question of appropriate time to effectively participate in a consultation, we have found this varies. In addition, there is often more than one consultation on tax law design happening at the same time which puts pressure on stakeholders who have multiple interests⁵.

We acknowledge that there are legislative priorities and timeframes which must be met to ensure that legislation can be introduced in the appropriate Parliamentary sittings. However, it is often unclear whether in all instances, the period of time that is given for comments to be made on a Discussion

⁴ For instance, a period of only 14 days was given for public submissions to be made on the Discussion Paper for Improving the Taxation of Trust Income, released on 4 March 2011 - a matter that is quite complex and significant.

⁵ For example, submissions on the Discussion Paper for Improving the Taxation of Trust Income and the Exposure Draft law on the foreign source income reforms were both due on 18 March 2011.



Paper and/or draft legislation is driven by the Parliamentary timetable and/or some other factor such as availability of Treasury/drafting resources (which is often our perception).

Although having standard benchmarks is a useful guide in setting a consultative period, ultimately the appropriate length of time should also be assessed having regard to the complexity and significance of the particular measure.

Again, this raises the need for appropriate prioritisation (and communication with key stakeholders) of the development of legislation for specific announcements.

There may have been instances where due to “consultation overload” or tight timeframes some key stakeholders have not fully participated in a public consultation.

In the case of targeted consultation, it would be useful to understand the criteria for which targeted (as opposed to public consultation) is selected as the most appropriate form of consultation and to understand the selection process as to who is approached to participate in the targeted consultation. This may be critical in understanding whether all relevant stakeholder interests are considered and can be appropriately balanced when developing the policy and law.

It has been our experience that the most effective consultation has occurred where we have had the opportunity to have direct dialogue with the relevant Treasury officials, either in person or by phone, to raise questions, explain issues and discuss points of contention. This is often accompanied by a formal submission either prior to or after the relevant discussion.

There is also merit in having the Australian Taxation Office (ATO) participate in any dialogue, particularly for complex matters, as this no doubt can assist in all parties understanding implementation issues.

A further criteria that may be useful for the Board in addressing the quality of consultation or design of law in the absence of consultation, is the extent to which subsequent amendments are made to the relevant legislation either during its passage through Parliament or in subsequent amending Bills in order to correct unintended consequences or technical defects.

In relation to the involvement of private sector experts in tax policy design and involvement in a tripartite design team in the tax design process, there are a number of areas that can be substantially improved. We have separately provided our views on our experiences as a private sector participant on this aspect to members of the Board’s Working Group.

At the outset, we are supportive of tripartite law design involving the private sector, Treasury and ATO where the process is fully understood by all parties, the process is effectively managed and inclusive of all relevant parties from inception through to enactment, and with a post-enactment consideration of its implementation.