
Tax Policy Formulation in Australia

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KEYWORDS: TAX POLICY ■ POLICY MAKING ■ TAX LEGISLATION ■ PROCESS ■ AUSTRALIA

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INTRODUCTION

Just as Australia’s political system is a unique mix of elements, some drawn from other countries and others developed domestically, its tax system also has a unique character. Australia’s representative democratic system¹ is key to that character and informs the development and assessment of tax reform ideas.

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1 Australia is a federation, with three levels of government: the federal Australian government (or the commonwealth government), the governments of the six states and two territories, and

In this regard, tax policy making is different from monetary policy making in Australia. There is no tax entity independent of government that plays a role similar to that played by the Reserve Bank of Australia in setting monetary policy. In contemporary Australia, tax policy is an increasingly contested policy debate. Tax debates often concern tradeoffs between different values and priorities, and so tax policy making appropriately sits with elected officials. Successive governments have introduced a range of innovative institutions and practices aimed at improving the quality of tax policy making in Australia, including greater involvement of the private sector, extensive consultations, and accountability mechanisms.

This paper focuses solely on tax policy making by the Australian government. This is not to suggest that an examination of tax policy formulation by the Australian states and territories would be unwarranted. The Australian states, territories, and local governments levy a range of taxes in their own right (accounting for around 20 percent of total tax revenue) and have undertaken important reviews and reforms in recent years. In the interests of brevity, however, the ensuing discussion will focus on the federal (or commonwealth) level.

STAGES IN TAX POLICY FORMULATION

Development Stage

Under Australia's parliamentary system, the government is formed by the party with control of the House of Representatives (the lower house or "the house of government"). Ministers are appointed from both the House of Representatives and the Senate (the upper house or "the house of review") to form the executive government, with policy decisions being made by Cabinet. (The Senate's role as a house of review is discussed in a separate section below.) Ministerial responsibility for tax policy lies with the treasurer, who also has ministerial responsibility for economic, fiscal, and monetary policy (among other matters). The treasurer is supported by the other Treasury portfolio ministers. Ultimately, the power to make tax laws rests with the Parliament. It is rare in Australia for the government to have a majority in the Senate, and so legislation often needs the support of senators from the Opposition or minor parties to become law. Under Australia's system of government, the Cabinet (which is made up of senior ministers) is the key decision-making body of government. While the Cabinet's makeup and internal processes are subject to the prime minister's prerogative, and the shape and arrangements have changed over time, a core feature is that all major policy proposals are considered by Cabinet.

Tax policy development is a highly contested space. Reform, research, and policy options are generated by a multitude of sources, including electoral parties, Senate inquiries, academics, think tanks, lobby groups, tax representatives, and the media.

around 700 local government authorities. One of two major political groups usually forms the government, federally and in the states—the Australian Labor Party (the centre-left party) and the Coalition, which is a formal grouping of the Liberal Party and its minor partner, the National Party (the centre-right parties).

Governments have recognized this increasingly contested policy environment by ensuring that the Treasury undertakes greater policy consultation, including early “non-transactional” engagement, in order to be in a position to provide more comprehensive advice.² In recent years, the then Rudd government also commissioned a comprehensive tax review (the Henry review),³ and has established an independent tax studies institute at the Australian National University to improve the quality of public debate on tax reform. Governments have also made recent improvements in tax policy consultation processes (discussed later in this paper). As the department that serves the treasurer, the Treasury is the most influential public-sector advising body on tax, though its influence varies, of course, according to the precise nature of each issue.

Other processes for generating ideas, gathering information, and identifying solutions within government are discussed below, in the section describing the respective roles of the Treasury and the Australian Taxation Office (ATO) in formulating tax policy. That discussion highlights recent efforts to improve communication between the two agencies and outlines Australia’s history of tax reviews. The Australian government requires that a regulation impact analysis be undertaken by responsible departments to inform all decisions, including tax policy changes, that are likely to have a non-trivial regulatory impact on business or not-for-profit organizations. This analysis involves consideration of impacts, costs, and benefits of proposed regulatory options and is provided to the relevant decision maker (for example, Cabinet) along with the policy proposal, unless an exemption is granted by the prime minister for exceptional circumstances.

Tax proposals typically attract additional requirements, including the requirement that they be proposed by the treasurer. In practice, the great bulk of tax policy is developed and evaluated during the annual budget process, although significant policy measures are increasingly being introduced through the mid-year budget update process.

As outlined above, while the exact arrangements differ from government to government, it is fair to describe the budget process as an iterative one. Budget bids are first submitted to senior ministers (typically the prime minister, the treasurer, and the minister for finance and administration) in October, and costed proposals are considered by senior ministers between February and April through the Expenditure Review Committee, a formal subcommittee of Cabinet with delegated authority to make decisions. By tradition, the budget for the next financial year is delivered by the treasurer to Parliament on the second Tuesday of May.

It is worth noting here that while budget decisions are classified until budget night, targeted and confidential consultations with stakeholders are undertaken on

2 See Australian Treasury, *Strategic Review of the Treasury* (Canberra: Australian Treasury, December 2011).

3 Australia, Tax Review Panel, *Australia’s Future Tax System: Report to the Treasurer* (Canberra: Australian Treasury, December 2009).

more complex proposals prior to a final decision, to ensure that the proposed policy meets its objectives. These consultation processes remain confidential following the budget process.

Once a decision requiring legislative change is made, the Treasury is responsible for instructing legislative drafters in the Office of Parliamentary Counsel on tax matters, producing explanatory materials and regulation impact statements for tabling, conducting community consultation on tax policy, managing the legislation program, and assisting the government in securing the passage of bills through Parliament. In short, the Treasury has a central role in ensuring that legislative products match their policy intent.

Legislative Stage

For a tax bill to become an Act, it must be passed in the same form by the House of Representatives and the Senate and then assented to by the governor general. Section 53 of the Australian constitution⁴ prevents bills that authorize the spending of money (appropriation bills) and bills imposing taxation from originating in the Senate, so all tax bills must originate in the House of Representatives.

Despite this constitutional restriction, the Senate's role in tax policy remains important. This is because the Senate performs a well-developed house of review function through its committees, with tax policy considered by the Senate Standing Committee on Economics. Notwithstanding some fluctuations, the number of bills referred to Senate committees has trended upward in recent decades.

Post-Implementation Review Stage

As part of the regulation impact analysis described above, departments are required to provide information on how the preferred regulatory option will be implemented, monitored, and reviewed. More formal post-implementation reviews, initiated within one to two years of implementation, are required for all regulations that initially proceeded without a compliant regulation impact statement.

In addition, specific post-implementation reviews on tax policy are conducted by the Board of Taxation. The Board of Taxation, which was established following the 1999 Review of Business Taxation (the Ralph review),⁵ is a non-statutory advisory board charged with providing advice to government, from a business and broader community perspective, on improving the design and operation of taxation laws. As part of its functions, the board also conducts post-implementation reviews of legislation to assess their quality and effectiveness. Since its establishment in 2000, the Board of Taxation has conducted 29 reviews and consultations, with 6 of those reviews covering the post-implementation phase.

4 Commonwealth of Australia Constitution Act.

5 Australia, Review of Business Taxation, *A Tax System Redesigned—More Certain, Equitable and Durable* (Canberra: Review of Business Taxation, July 1999).

GOVERNMENT DEPARTMENTS WITH A ROLE IN TAX POLICY FORMULATION

The Treasury's role in developing tax legislation has been outlined above. The Treasury also has primary responsibility for advising on tax policy; more specifically, the Treasury formulates and provides advice to government on policy options, produces regulation impact statements, and prepares official costings, which together with the overall revenue forecasts underpin the government's budgets. All of these activities are undertaken in close conjunction with the ATO, the statutory authority responsible for the administration of Australia's taxation and superannuation laws and the government's principal revenue collection agency.

In recognition of the importance of the relationship between the ATO and the Treasury, in September 2012 the secretary to the treasury and the former commissioner of taxation substantially redrafted the "Treasury and the Australian Taxation Office—Tax and Superannuation Protocol."⁶ The protocol aims to improve the working arrangements between the Treasury and the ATO. It is applied in the design of new policies and laws that form part of these systems, and in the administration of the law once enacted.

Tax Policy Reviews

Australia has a rich history of tax policy reviews. The report of the Taxation Review Committee (the Asprey review) released in 1975⁷ was seminal and marked a watershed moment in the realm of tax policy reviews. Justice Ken Asprey's review shifted the emphasis away from tax policy motivated solely by the adequacy of revenue to fund growing public provision, to a greater focus on improving the equity, efficiency, and simplicity of the tax system.

A key theme of the Asprey review was the need to broaden the tax base. Key reforms recommended by the Asprey review were implemented over the next two decades, including capital gains tax and fringe benefits tax (in the late 1980s) and the goods and services tax (in 2000). Other reviews, including the 1999 Ralph review and the Board of Taxation's review of international taxation arrangements in 2002-3⁸ had more immediate policy impacts, with reform packages announced alongside the review's public release or shortly thereafter.

More recently, a comprehensive review of the tax and transfer system, the Henry review,⁹ was conducted over 18 months in 2008 and 2009. The Henry review added

6 Australian Taxation Office, "Treasury and the Australian Taxation Office—Tax and Superannuation Protocol" (www.ato.gov.au/General/New-legislation/In-detail/ATO---Treasury-protocols/ATO---Treasury-protocol).

7 Australia, Taxation Review Committee, *Full Report* (Canberra: Australian Government Publishing Service, 1975).

8 Australia, Board of Taxation, *Review of International Taxation Arrangements* (Canberra: Board of Taxation, February 2003).

9 *Supra* note 3.

the design principles of policy consistency and sustainability to the principles identified by the Asprey review. Essentially, the requirement for consistency ensures that tax and transfer policy are internally consistent, while the requirement for sustainability ensures that the tax system has the capacity to meet the changing revenue needs of government on a continuing basis without recourse to inefficient taxes.

Consistent with Australia's system of responsible government, tax reviews are provided to the relevant minister. The government decides how the review will be released and what policy changes (if any) it wishes to make in response to the recommendations. While review panels do not make policy decisions, they do facilitate such decisions by identifying areas of concern in the tax system and promoting public discussion about tax reform.

RESOURCE ALLOCATION IN THE TREASURY

Within the Treasury, Revenue Group formulates advice to the government on taxation policy. The work of the group includes

- analysis and the provision of advice to the relevant minister on tax and superannuation policy options and their economic and social impacts;
- the provision of revenue forecasts and costings of taxation policies;
- extensive policy-based and non-transactional consultations; and
- legislative support, including providing instruction to parliamentary counsel on the design of taxation laws and support for the passage of tax legislation through Parliament.

Revenue Group accounts for over 20 percent of Treasury staff members, and nearly a sixth of the group's staff are engaged in preparing tax legislation. The group is headed by an executive director and structured into seven divisions, with almost half of the staff employed at the junior (Australian public service, or APS) level (see table 1).

Following a review in 2012 of Revenue Group's capabilities, the Law Design Practice was established to better identify legislative priorities and provide greater quality assurance of legislative products, as well as provide a clearer career pathway for specialist law design officers. Officers engaged in the Law Design Practice have legal qualifications and/or extensive experience in law design. In a similar vein, the overwhelming majority of officers engaged in the Tax Analysis Division have specialist skills and are trained in economics and/or quantitative studies (mathematics, statistics, or actuarial studies). Officers in the remaining divisions possess tertiary qualifications in law, economics, finance, and/or statistics. Thus, Revenue Group employs both specialists and generalists, reflecting a need to strike a balance between both sets of skills. A few officers also have private sector experience.

The Treasury has an active two-way secondment program with the ATO. This provides an opportunity for Treasury officers to gain direct experience of the administration of Australia's tax system and the implementation of tax policies, with the aim of enhancing an officer's overall skills in policy and legislative development.

TABLE 1 Staffing Resources in Revenue Group, Australian Treasury^a

	Total division staff	SES	EL	APS
Tax System Division	19.87	2.00	5.27	12.60
Corporate and International Tax Division	30.40	5.00	11.00	14.40
Small Business Tax Division	17.88	0.80	6.80	10.28
Indirect, Philanthropy and Resource Tax Division	25.35	2.00	12.35	11.00
Personal and Retirement Income Division	31.55	3.00	14.64	13.91
Tax Analysis Division	45.47	3.60	19.87	22.00
Law Design Practice	30.25	1.73	12.52	16.00
Executive team	4.80	1.00	1.00	2.80
Total, Revenue Group	<u>205.57</u>	<u>19.13</u>	<u>83.45</u>	<u>102.99</u>

^a Full-time equivalent staff as at May 2013.

SES = senior executive service.

EL = executive level.

APS = Australian public service.

Source: Australian Treasury internal data.

By the same token, ATO officers are routinely seconded to the Treasury to gain experience in tax policy development.

Revenue Group employs private-sector consultants from time to time, most often to review existing processes or to provide technical assistance. The Treasury has a program of temporary secondments from the private sector and also encourages such secondments in tax policy, particularly in the secretariat that the Treasury provides to the Board of Taxation. More generally, Revenue Group taps into the expertise of private-sector tax specialists for specific projects on a paid consultancy basis.

Of course, it is not just government agencies that are devoting resources to the formulation of tax policy in Australia and, more broadly, throughout the world. The Big Four accounting firms derive between 20 and 30 percent of their global revenues from the provision of taxation services, and around 20 percent of their workforce is employed in taxation—proportions that have remained generally stable over the past few years. Information on the websites of these firms suggests that similar allocations apply to their Australian operations.

It is at least arguable that this extensive devotion of resources by the private sector results in more tax system complexity. While there is general confidence in the Australian tax system, a recent survey by Per Capita that explored the public's attitude toward taxation and government expenditure revealed that Australians find the tax system "burdensome."¹⁰ This finding seems consistent with the fact that over

10 See David Hetherington, *Per Capita Tax Survey 2012: Public Attitudes Towards Taxation and Government Expenditure* (Sydney: Per Capita Australia, March 2013).

70 percent of Australian tax lodgers rely on tax agents to complete their personal tax returns—a proportion that has remained broadly unchanged over recent years. According to data published by the Organisation for Economic Co-operation and Development (OECD), Australia has the third-highest rate among 16 OECD member countries for personal tax returns filed by tax agents (see figure 1).

CONSULTATION

Until the early 2000s, tax policy consultations in Australia were infrequent and largely confined to administrative matters. Today, consultation forms an integral part of the tax design process, with a large number of measures being subject to consultation in both the policy design and draft legislation phases.

Tax consultations serve a number of purposes and are subject to diverse influences. The major aims of consultation are

- to act as a discovery process that will provide valuable input on the most effective way to implement government policy, and to assist in minimizing compliance and administration costs, as well as to avoid (to the extent possible) unintended consequences;
- to elucidate on the policy intent of proposed changes;
- to serve as a vehicle to formulate current and future tax policy; and
- to improve situational and strategic awareness to better inform Treasury thinking.

Both the Treasury and the ATO have an active consultation program that focuses on the particular areas of responsibility of each agency. The ATO is a full participant in consultation arrangements undertaken by the Treasury.

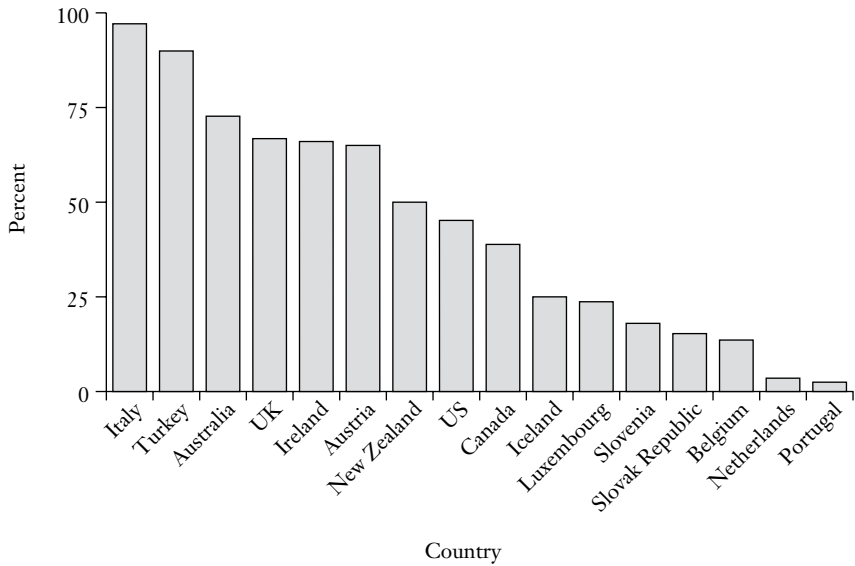
In the normal course of events, consultation involves the public release of an initial discussion paper, followed by an exposure draft of legislation or regulation. From time to time, however, consultation is more targeted, either to a public audience or to a more confidential group. Consultation on some measures may include more than one approach.

In the case of confidential consultations, participants are required to sign an undertaking not to divulge details of the consultation. However, if participants wish to discuss a confidential consultation with someone who is not a party to the consultation, they can request that this party also be given the opportunity to sign an undertaking and participate.

Participants in targeted consultations are generally chosen because they have expertise in the area or because they belong to a group that may be specifically affected by the legislation. Responses can be in the form of discussions at meetings or written submissions.

Public consultations are open to the general public, including individuals. Such consultations may be advertised in newspapers and posted on the Treasury website. For open public consultations, discussion (or policy) papers and/or exposure drafts

FIGURE 1 Percentage of Personal Tax Returns Filed by Tax Agents in 16 OECD Countries, 2009



Source: Organisation for Economic Co-operation and Development, Forum on Tax Administration, *Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series (2010)* (Paris: OECD, March 2011).

of legislation are generally prepared and made available. Submissions are sought in response to these papers, and these are also frequently made public on the website.

The nature of tax consultations can be characterized by the state of knowledge of a particular matter by the Treasury and the ATO on the one hand, and by stakeholders on the other. The 3×3 matrix (table 2) depicts this graphically. The rows indicate the state of information that the Treasury and the ATO have about industry conditions, and the columns indicate stakeholders' understanding of policy.

Cell A represents fairly routine, basic "care and maintenance" law changes. These may arise from Treasury/ATO law fix registers or from stakeholder consultations. Cell A could also represent situations of policy deadlock; progress is possible only by compromise and not necessarily through further consultation.

Cell B reflects complex "care and maintenance" law changes that may well reflect more fundamental problems in tax law. Tax-avoidance issues could be present.

Cells C and D represent complex situations where the Treasury and the ATO do not have a full or sufficient appreciation of industry conditions. This will tend to occur at turning points in the economic cycle, during periods of structural change (as is the case at the time of writing), and when policy change spans overlapping regulatory domains.

TABLE 2 Tax Consultation Characterization Matrix

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

Cell C represents situations where stakeholders are better informed about certain tax practices, including those that seek to undermine the policy intent of a measure. In such situations, the Treasury should draw on contracted private-sector expertise. The Treasury should also undertake multilayered consultations that cover a range of interests affected by the policy measure, in order to manage the risk that certain vocal and possibly influential voices might otherwise unduly distort the stakeholder experience.

Cell D represents mutual lack of information. This situation could arise with respect to new taxes, or when a judicial decision throws open an established way of thinking about a tax issue. In both situations, the Treasury and the ATO should be learning together with stakeholders and should seek to be informed through multilayered consultations and international experience, as appropriate.

In practice, tax consultations often entail multiple stages and approaches. For example, consultations on the minerals resource rent tax legislation in 2011 were conducted in two stages: first, the detailed policy design, led jointly by a government minister and a senior industry representative; and second, more detailed legislative implementation, led by the Treasury and involving a broader industry and practitioner group. This approach, in part, follows from the Treasury's role in such consultations.

While the Treasury may often lead consultations, its role is to listen to participants, advise the government on the views of stakeholders, and provide policy advice. The Treasury does not take policy decisions—that is ultimately the role of Parliament.

In addition to the well-developed program of consultations on announced measures, Revenue Group has in recent years conducted a program of semi-annual non-transactional consultations and has increased early-stage pre-policy consultations with stakeholders. The Revenue Group stakeholder consultation program aims to supplement Treasury consultations on specific tax measures and to engage the taxpayer community in a wider conversation about strategic tax policy issues.

Similarly, the early-stage consultations facilitate broader conversations about tax policy tradeoffs. In the past two years, pre-policy consultations have been undertaken on the business tax system, base erosion and profit shifting, and not-for-profit sector tax concessions. Each of these groups has been composed of a range of business, union, and community representatives. While this diversity might make it more difficult for groups to reach consensus on tax policy recommendations, it does expose sectoral interest arguments to appropriate scrutiny.

THE ROLE OF TAX GOVERNANCE BODIES

The tax system in Australia operates with a number of tax governance bodies (listed in table 3), each serving a perceived need. The ATO plays a central governance role as the government's principal revenue collection agency and administrator of tax and superannuation laws.

The Parliamentary Budget Office is the latest independent governance body to become operational and will give Parliament the ability to better evaluate tax policy measures. The Parliamentary Budget Office is intended to inform Parliament by providing independent and non-partisan analysis of the budget cycle, fiscal policy, and the financial implications of proposals. It is relatively well resourced (with around 25 staff employed currently and the intention of employing between 30 and 35 permanent staff), has experienced policy officers among its ranks, and has access to Treasury data and models.

The Tax and Transfer Policy Institute at the Australian National University was recently established to serve as a centre for excellence, collaborating with academics and institutions across Australia and overseas. The institute is expected to raise the quality of national debate on tax reform and the awareness of tax policy issues.

CONCLUSION

The tax system is a fundamental part of Australia's social and economic infrastructure. This paper has outlined the role of key agencies, such as the Treasury and the ATO, as well as some of the more significant developments in governance and consultation arrangements in Australian tax policy formulation over the past decade. Underlying that discussion, Australia's system of responsible government remains central: All tax policy decisions are made by the democratically elected government of the day, and not by bureaucratic, academic, or other elites.

TABLE 3 Tax Governance Bodies in Australia

Organization	Type	Purpose
Australian Taxation Office	Independent statutory agency	The government's principal revenue collection agency, and part of the treasurer's portfolio. Administers the tax and superannuation laws.
Board of Taxation	Non-statutory advisory body	Advises the treasurer on improving the general integrity and function of the taxation system. Provides business and broader community perspectives. Established in 2000.
Inspector General of Taxation	Independent statutory agency	Identifies systemic issues in tax administration and reports to the government with recommendations for improving tax administration. Does not review tax policy. Established in 2003.
Taxation Ombudsman	Independent statutory agency	Investigates complaints from taxpayers and tax professionals about the administrative actions of the ATO. Also uses information from complaints to identify potential systemic problems in tax administration. Established in 1995.
Australian National Audit Office	Independent statutory agency	Undertakes financial statement audits and performance audits examining the economy, efficiency, and administrative effectiveness of the ATO's administration of the tax system.
Tax Practitioners Board	Independent statutory board	Responsible for the registration and regulation of tax practitioners and for ensuring compliance with the Tax Agent Services Act 2009. Replaces six state-based tax agents' boards.
Tax and Transfer Policy Institute	Independent research centre	Established in 2013 as an independent centre for excellence at the Australian National University.
Parliamentary		
Parliamentary Budget Office	Parliamentary department	Informs Parliament by providing independent and non-partisan analysis of the budget cycle, fiscal policy, and the financial implications of proposals. Established in 2011.
Joint Committee of Public Accounts and Audit	Statutory committee in Parliament	Since 2007, has conducted public hearings with the ATO commissioner with respect to the administration of the tax system.
Senate Economics Committee	Statutory committee in Parliament	Investigates specific matters of policy, government administration, or performance.

Some Additional Comments on Australia's Tax Policy Process

Graeme Cooper*

INTRODUCTION

These comments refer only to income tax matters (though I have no reason to believe that consultation on other federal taxes works in a significantly different manner), and they should be read subject to the general caveat that they are based only on what is publicly visible.

GENERAL DESCRIPTION OF THE PROCESS

It is a striking feature of the Australian tax world that, dating from about 10 years ago, consultation on every major tax announcement is expected and will occur. Just what accounts for this situation is not obvious, but it seems that our politicians have listened to years of complaints from business and tax professionals about the lack of consultation, and so there is an expectation that major policy announcements will be released for public comment prior to formal enactment. This will often take the form of a discussion paper and perhaps one or more drafts of indicative legislation.

However, while there is a lot of consultation, it almost always occurs *ex post*: day-to-day tax policy proposals almost always emerge from government as a *fait accompli* without the benefit of any transparent, prior, and external involvement. Instead of being involved in policy development, the participation of actors external to government is typically limited to policy refinement and issues of implementation. The one exception is policy announcements that have been prompted by lobbying, but that too is not conducted in public.

The usual situation is that the government will announce some measure, and then invoke a consultative process to refine and implement that measure. A typical example is the recent proposal to amend the tax secrecy rules to permit disclosure by the ATO of the tax position of corporations with taxable income over AU\$100 million. The measure was announced by the treasurer on February 4, 2013, along with the proposal to examine “advice from Treasury and views of the community . . . with a view to introducing any necessary legislative changes this year.”¹¹ In April, the Treasury released a brief paper, allowing three weeks for comment.¹²

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11 Australian Treasury, Assistant Treasurer, “Greater Transparency of Tax Paid by Large and Multinational Businesses,” *Media Release* no. 5, February 4, 2013.

12 Australian Treasury, *Improving the Transparency of Australia's Business Tax System: Discussion Paper* (Canberra: Australian Treasury, April 2013).

There is nothing new in the observation that external public consultation is rarely conducted *ex ante*; it is a constant complaint. The 1999 Review of Business Taxation was keen to see what it described as a “participative” approach to the formulation of tax policy.¹³ Recommendation 1.8 of its report proposed that tax policy be formulated in conjunction with the business community, and advocated “a more open and integrated approach to the initiation of policy proposals relating to business taxation.”¹⁴ In a similar vein, the 2008 Tax Design Review Panel recommended 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.¹⁵

This *fait accompli* method of operating has drawbacks that occasionally become obvious. Proposals can be based on mistakes: the erroneous claims upon which the recent amendments to Australia’s general anti-avoidance rule (GAAR) were based were never tested. Changes can be ineffectual: the recent repeal and re-enactment of Australia’s domestic transfer-pricing rules probably does nothing to change Australian law, although it was promoted as a change. Or the change is simply unworkable: one of my favourite examples is the Treasury’s proposals in the early 1990s to allow the pooling of depreciable assets rather than asset-by-asset depreciation; it was not possible for taxpayers to pool assets because the capital gains tax rules insisted upon tracking costs asset by asset.

Australia’s more ambitious tax policy projects, which seem to occur every decade, tend to be more road-tested before implementation, and the lesson of grand projects is that many do not survive serious external scrutiny. Key elements of the Asprey review,¹⁶ such as the introduction of a value-added tax, were not pursued. Many of the reforms suggested by the 1999 Review of Business Taxation were never adopted, especially key proposals such as replacing the fringe benefits tax with tax imposed directly on the employee, the proposal to tax trusts as companies, the proposed tax value method, and the proposed regime for taxing “leases and rights.” A similar story can be told about the Henry review:¹⁷ almost all of its recommendations were ignored at the time the report was released; a handful have been enacted since. In some cases, the failure of a proposal has undoubtedly been due to politics and factors other than the merits of the proposal—but in many cases, a proposal was abandoned simply because it was shown to be misconceived once it was publicly scrutinized.

13 *Supra* note 5.

14 *Ibid.*, at recommendation 1.8.

15 Australia, Tax Design Review Panel, *Better Tax Design and Implementation: A Report to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs* (Canberra: Australian Treasury, April 2008), at paragraph 3.4.

16 *Supra* note 7.

17 *Supra* note 3.

GOVERNMENT DEPARTMENTS WITH A ROLE IN TAX POLICY FORMULATION

While the Treasury has formal responsibility for formulating income tax policy, it is inevitable that administrative agencies will make policy, and the ATO is definitely a key player in deciding the shape of Australia's tax settings.

There have been many examples over the years of occasions when the ATO, by administrative edict, has unilaterally added refinements, imposed restrictions, or simply rejected policy settings. These are just a few such cases:

- Non-portfolio dividends from foreign subsidiaries would be tax-exempt only if received directly by the parent company, and not if the dividend flowed to the company via a wholly owned trust.
- Interest incurred to earn foreign (exempt) dividends would be deductible only for dividends earned in the same tax year.
- Company tax treatment would be denied to a trust in the face of legislation that treated the trust as a company “for all the purposes of the Act.”¹⁸
- An instrument could not be classified as debt despite an economic compulsion to repay (contradicting the explanatory memorandum, which referred to this very example three times).¹⁹
- GAAR could be used to deny tax credits to holders of instruments classified as equity under Australia's debt-to-equity tests.
- Loans by in-house finance companies would be treated as akin to equity investments.
- The key building blocks of tax law relating to trusts are viewed as being unresolved, despite 70 years of jurisprudence.

While it may not be obvious to outside observers, these are not simply instances of an administrator taking a position because of a lack of clarity, or acting to remedy a perceived weakness in the drafting, or trying to give effect to what the ATO presumes would be the policy. To my mind, they contradict policy settings. As one judge recently put it,

the real problem for the Commissioner [of Taxation] in the present case is that he seeks to cancel, in reliance on the [GAAR], tax consequences intended by Parliament to be conferred on a company . . . joining a consolidated group.²⁰

These ATO policy decisions are not subject to any external and formal review process; it is not possible to say whether they are subject to any formal internal ATO review. The lore in the profession is that they are unilateral decisions taken individually by powerful, apparently unchecked, senior ATO officials.

18 Income Tax Assessment Act 1997, section 713-135.

19 The ATO eventually abandoned its resistance in Taxation Ruling TR 2008/3.

20 *Macquarie Bank Limited v. Commissioner of Taxation*, [2011] FCA 1076, at paragraph 43.

On the other hand, the ATO has put in place an extensive set of committees that consult with the tax profession. (I have heard that there are more than 100 such committees.) Indeed, the ATO conducts far more consultations each year than the Treasury does on tax matters. The discussions of these bodies are not limited to matters of administration and technical detail. Whether and how the deliberations of these ATO-sponsored committees are fed into the Treasury's formal processes is not obvious, but—at least sometimes—they definitely are. For example, the many revisions of Australia's taxation of financial arrangements regime appear to have been driven largely by the issues raised by the non-governmental members of the Finance and Investment Subcommittee operated by the ATO.

The newly appointed commissioner of taxation is understood to be keen to reduce the current level of consultation, which he views as excessive and inefficient.

CONSULTATION

Formal Processes for Consultation with External Actors

Consultation on implementing policy is conducted in an ad hoc manner despite the existence of formal institutions for this process. Different models can be seen in practice:

- Sometimes policy proposals will be referred to the Board of Taxation, a standing committee (drawn from the tax profession, the private sector, and administrative agencies) charged with contributing “a business and broader community perspective to improving the design of taxation laws and their operation.”²¹ Several recent reform projects (consolidation, collective investment vehicles, private company dividends, controlled foreign corporation rules, charities, share redemptions, etc.) were referred to the board.
- Sometimes a special ad hoc committee will be struck to assist with the refinement and implementation of policy. Special committees were struck, for example, for the minerals resource rent tax, reductions to the corporate tax rate, the project on reducing delays and improving tax law, the GAAR review, and the base erosion project.
- There are instances of selective secret consultations, where the Treasury will conduct informal discussions with a handful of experts of its own choosing, or with organizations representing particular industries, prior to releasing its legislation. This is understood to have occurred for some of the recent projects affecting the funds management industry.
- Sometimes a proposal is simply revealed to the general tax community, and interested observers are invited to comment. This has occurred, for example, with respect to the trust-law reform project, the minimum income tax regime,

21 The board's charter is available at www.taxboard.gov.au.

the limited recourse debt rewrite, the special regime for losses suffered on infrastructure projects, the corporate loss carryback regime, and so on. This consultation usually occurs around a draft bill and before a formal bill is introduced in Parliament.

- There are still instances where there is no precommencement consultation. A measure is announced and a bill enacted without external review.

These models are not necessarily discrete (for example, in the review of Australia's GAAR, there was both a publicly announced ad hoc panel and secret consultations), but in many instances they are (sometimes the Board of Taxation will be approached; sometimes it will be ignored in favour of an ad hoc committee). There is no apparent logic that drives this decision.

The only consistent pattern is that public post-implementation reviews—and there have only ever been a handful of these—appear to be solely allocated to the Board of Taxation.

Those Consulted

Another significant dimension of this part of the topic is, who is consulted and why. The Treasury and the ATO rely to varying degrees on experts they have selected, individuals invited from a leading private-sector player, individuals nominated by the industry bodies, and individuals nominated by professional organizations, all volunteers. There is clearly a temptation (and it is probably also the practice) for private-sector actors to inveigle their way onto panels in order to advocate for their firms, their industry, or clients.

The resulting tension is inevitable: the very people who will best foresee the problems are the people with the greatest potential conflicts of interest. The Treasury is trying to manage this tension by introducing its proposed “Charter for Consultations on Tax Policy and Law” (in addition to the oath of secrecy, enforceable by criminal sanctions, which is routinely sought from experts). The same charter will apparently apply both to partisan players (the Treasury's own experts, and people who represent an affected industry or group) and to those who might be disinterested—professionals with technical expertise in tax.

The problem is difficult. The role expected of those being consulted is rarely made clear to them. In the case of industry experts, for example, have they been invited to represent and advocate for the industry, or have they been invited to explain the industry's position so that its concerns can be understood? The Treasury appears to have a notion of “key stakeholders” who must be involved in consultations. If people are selected because they are “stakeholders,” they are not being selected for their disinterested expertise. Tax professionals might be expected to be disinterested, though many will be invited precisely because of their client base.

The Treasury's draft charter attempts to deal with the problem by requiring that conflicts of interest be made transparent and by asking participants to advance the national interest. It is not clear what is meant to happen when everyone declares a conflict. It seems to me inevitable that anyone in the room who is an expert will

have some conflicting interest, and few delegates, even those acting from the best of motives, are likely to see as a “national interest” a position that is inconsistent with their own/their clients’ pecuniary interests.

Moreover, this approach mismatches roles and responsibilities. Everyone expects the ultimate decision maker (the minister or board member) to be impartial and disinterested, while everyone expects a lobbyist to be entirely partial. Those being consulted on tax matters are not decision makers, so it is implausible to insist that they accept strictures appropriate for those with real authority.

Perhaps what this really shows is that the Treasury lacks the skills and judgment to be able to differentiate the partisan from the disinterested, and it is trying a work-around to change the dynamic of the consultation process. From my observation, the Treasury and the ATO are not good at distinguishing the zealot from the sage or the expert from the charlatan (though admittedly sometimes these people are foisted upon them).

Effectiveness of Consultation

The professional bodies and some of the individuals who participate in consultation routinely ponder whether consultation exercises are worthwhile. The professional accounting and tax bodies have staff devoted more or less full-time to attending consultation meetings or answering requests for submissions on the latest legislation or topic. Much of this effort is devoted to negotiating with the ATO, which has by far the largest number of consultation events.

The consensus seems to be that consultation is not worthwhile—announced policies rarely change unless there is a single, coordinated, “over-my-dead-body” response. There have been a few notable instances where the professional bodies have combined to defeat major reforms. Examples are the proposal to tax trusts as companies, the tax value method, the leases and rights project, the first iteration of the tax-preferred leasing rules, the ATO’s paper on section 974-80, and the ATO’s position against streaming income classes via trusts. A common feature of these examples is that the proposals did not emerge from the government as announced policy and so could be disowned by the government without political damage.

But even consultation just on refinement and implementation seems often to be ineffective in modifying errors or removing the impractical elements of proposals. The professional bodies have decided to pool resources and offer joint comments to the ATO, prepared on a rotating basis; evidently they have come to the conclusion there is little to be gained from investing separate time and effort.

To be fair to the government agencies, it is not common to receive consistent responses from external consultants. Except in cases where there is only one industry representative, they are unlikely to be presented with a single set of clear recommendations.

Regardless of its effectiveness in improving legislative outcomes, consultation will probably continue in much the same vein as currently. No single professional body will abandon the field to its rivals, and individual practitioners like it to be known that they are heavily involved in matters of great moment, even if they “can’t

really talk about it”; the major firms clearly see a benefit in demonstrating their connection with government.

It is significant that, as part of the negotiation surrounding the Treasury’s Charter for Consultations on Tax Policy and Law, the quid pro quo sought by the profession was a promise by the Treasury to explain its decisions on submissions made during consultation. This may not change the profession’s perception that “we invested all this time and effort and nothing changed,” but at least the profession hopes that it will now know why.

