

27 May 2019

The Hon Michael Sukkar
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Dear Minister

Improvements to Consultation on Tax Policy and Administration of the Tax System

National Tax Liaison Group

The National Tax Liaison Group (**NTLG**) is the Australian Taxation Office's (**ATO**) longest standing consultative forum, focusing on strategic taxation matters of national interest. The primary objective of the NTLG is to provide a wide range of stakeholders with the opportunity to discuss the strategic direction of the tax system and to deliver opportunities for improvements to the administration of the tax system. The NTLG's membership is comprised of senior ATO and Treasury officers and representatives of the major tax, law, and accounting professional associations. Details of the activities of the NTLG, including its membership, can be found [here](#).

At the most recent meeting of the NTLG, a paper titled '*Consultation on Tax Policy and the Administration of the Tax System*' (**the paper**) was tabled. This paper was prepared by external members of the NTLG for the purpose of initiating a discussion on the current framework supporting consultation on tax policy and administration of the tax system.

Whilst the paper acknowledges the improvements that have been made to the level and quality of consultation on both tax policy and administrative matters, it explores six further ideas which the external NTLG members believe, if adopted, would significantly improve consultation on tax policy and administrative matters. These further improvements are as follows:

- the adoption of a consultation framework;
- the conduct of consultation at the pre-policy announcement stage on technical/routine matters;
- the clarification of the policy objective of tax legislation at the start of the tax law design process;
- adopting an explicit commitment that legislative products and ATO guidance match their stated policy intent;
- the broadening of the scope of the Commissioner's statutory remedial power; and
- an annual review, prioritization and publication of the backlog of announced but unenacted measures.

A copy of the paper is attached for your reference.

The complexity of the tax system, as well as the ever-changing environment in which it operates, requires strong collaboration between the government and non-government sectors to produce

tax legislation that is consistent with policy intent. Such an outcome is only possible when that collaboration is underpinned by a strong, well understood consultation framework.

The external NTLG members understand and value the key role consultation plays in improving the quality of tax legislation and the operation of the tax system more generally. Having a shared understanding of the policy underpinning tax laws leads to a shared commitment to the development of clear, concise legislation and administrative products that align with that intent. The importance of consultation in this context means we must strive for continuous improvements in the arrangements that underpin it.

Whilst the ATO and Treasury have acknowledged and been willing to engage on some aspects of the paper, it has become apparent that some of the proposed improvements are matters for Government rather than for Treasury and/or the ATO. Given this, we are seeking an opportunity to discuss the attached paper with your office at your convenience.

Please feel free to contact Michelle de Niese on (03) 9600 4411 if you have any questions regarding any aspect of the paper.

The external NTLG members look forward to the opportunity to working with your office towards improving the consultation arrangements underpinning tax policy and administration in Australia.

Yours faithfully



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Discussion Paper

Consultation on Tax Policy and the Administration of the Tax System

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Background

The purpose of this draft discussion paper is to initiate engagement with the Australian Taxation Office (**ATO**) and other stakeholders on the current framework supporting consultation on tax policy and the administration of the tax system.

This paper has been prepared by representatives of the following professional bodies, in their capacity as members of the National Tax Liaison Group (**NTLG**):

- Corporate Tax Association;
- Chartered Accountants Australia and New Zealand;
- Institute of Public Accountants;
- Law Council of Australia (Business Law Section); and
- The Tax Institute.

Consultation on tax policy and the administration of tax laws has been the subject of numerous reviews over the past few decades.¹ Many of the recommendations made in these reviews have been implemented, resulting in significant improvements to both the level and quality of consultation on both tax policy and the administration of the tax system.² There are however a number of important recommendations and themes canvassed in each of the reviews that have not been adopted or implemented. There are also a number of recommendations that have been implemented but are not working as well or effectively as envisaged.³

The current landscape

The last four years have seen a marked increase in the number of significant changes and amendments to tax laws, many of which charter new and complex territory. The most obvious examples of such law changes relate to the BEPS OECD Actions and the proposed and announced law changes stemming from the recommendations of the Black Economy Taskforce.

There have also been a number of noteworthy changes to the operations of both the Treasury and the ATO, including:

- A recalibration and subsequent review of the ATO's consultation framework;
- An expansion of Treasury, both in terms of location and secondees, beyond Canberra to other major cities;
- Changes in the ATO's approach to public advice and guidance (notably the development of Practical Compliance Guidelines); and
- Responses from both the ATO and Treasury to the rise of tax as a key feature in the broader public debate about 'fairness' and 'social responsibility'.

The complexity of the tax system has also continued to grow unabated. This is due to a number of factors⁴, including:

- The demand to cater to an increasingly wider range of stakeholders;
- A need to satisfy requests for certainty via tax laws;
- An increasing tendency to respond to specific integrity concerns with broad-spectrum anti-avoidance rules;
- 'Scope creep' in tax law design projects; and
- The increasing globalisation of the business environment.

The role of the NTLG in consultation

The NTLG is the ATO's longest standing consultative forum.

The primary objective of the NTLG is to provide an opportunity to discuss the strategic direction of the tax system and to deliver opportunities for improvements to the administration of the tax system.⁵ This includes ongoing consultation and collaboration with the ATO and Treasury on enacted law.⁶

External NTLG members see the primary objective of consultation as improving the quality of tax legislation and the operation of the tax system more generally. The complexity of the tax system as well as the ever changing environment in which it operates requires collaboration between the government and non-government sectors to achieve tax legislation that is consistent with policy intent and that serves the national interest. This is only possible when that collaboration is underpinned by a strong, well understood consultation framework.

Although external NTLG members acknowledge the significant improvements that have been made to consultative processes over the past decade or so, the key role of consultation in improving the quality of tax legislation and the operation of the tax system more generally means it is important to strive for continuous improvement in the arrangements that underpin it.

It is within these parameters, and in the context of previous reviews and recommendations around consultation on tax policy and the administration of the tax system, that external NTLG members make the following observations around potential improvements to existing consultation arrangements.

Potential improvements to existing consultation arrangements

1 Adopting a consultation framework

Given the complexity of the tax system and ever evolving tax policy landscape, the nature of consultation between the government and non-government sectors should be determined in a systemic way.⁷ A guiding framework built on consensus views, which articulates roles, responsibilities and expectations of all parties would improve consultation on tax policy and related administrative matters by:

- encouraging consistency in process (and explanations for variances); and
- improving accountability both in terms of roles, responsibilities and outcomes (including related legislative and administrative guidance).

Such an initiative was recommended by the Board of Taxation (the Board) in its 2016 paper titled 'Recommendations to Improve Tax Policy Development in Australia' (2016 paper), in its 2011 post-implementation review of the tax design review panel recommendations (2011 paper) and more broadly in the Board's 2007 paper titled 'Improving Australia's Tax Consultation System' (2007 paper).

In the 2011 paper, the Board also refers to and recommends the application of the Treasury Tax Consultation Characterisation matrix⁸ to assist in characterising the nature of tax consultations that would fit with the state of knowledge of a particular matter by Treasury and the ATO on one hand, and by stakeholders on the other. In relation to the latter, the application of the matrix would also assist in developing a shared understanding, from the outset, of the state of information Treasury and

the ATO have about industry conditions and stakeholder's understanding of policy. Such an assessment should provide preliminary indicators of the breadth, depth and nature of engagement or consultation that would be desirable in relation to a measure.

The ATO's commitment to open, transparent engagement in tax law design as outlined in PS LA 2013/4⁹ is also worth considering in the context of developing a consultation framework.

2 Conducting consultation at the pre-policy announcement stage on technical/routine matters

This recommendation is one which appeared in the Tax Design Review Panel's 2008 report, the 2011 paper and the 2016 paper. Despite this apparent consensus on the need for a stronger framework around pre-announcement consultation, it still occurs in an ad-hoc manner and public awareness of pre-announcement consultations is often limited by confidentiality, which contributes to the perception that little or no pre-announcement consultation was undertaken.

Formalising the requirement to consult at the pre-policy stage on all routine/technical tax law changes should deliver real benefits to consultation on tax policy via:

- better information being factored into the decision-making process; and
- improving the quality and clarity of tax policy changes and their implementation increase genuine engagement from the business and community sectors by allowing stakeholders to participate more fully in the decision-making process.

External NTLG members also note that this initiative would allow all stakeholders in the tax system the opportunity to contribute to the development and understanding of tax policy. This should reduce the likelihood of perceptions that Treasury and ATO views on the intent of the law are 'entrenched'.

3 Clarifying the objective of tax legislation at the start of the tax law design process

Recommendations around the Government ensuring policy intent is clearly described in initial consultation documents can be found in the 2007 paper, the 2011 paper and the 2016 paper, although the 2016 paper describes this commitment as clarifying the objective of tax legislation at the start of the tax law design process. Such a statement would not only clarify the Government's intentions and objectives but would also:

- discourage stakeholders from seeking to re-define policy issues throughout the consultation process;
- serve as a point of reference for all related legislative products and administrative guidance;
- minimise the potential for 'scope creep' following the introduction of the legislation; and
- ensure legislation and any related guidance is appropriately targeted to meet its stated objective.

External NTLG members believe that having all stakeholders engage in a consultation process built around a clear statement of objective would also engender further trust in the system and mitigate against disputes arising at a later stage over what the Government at the time intended when introducing the relevant tax law or amendment.

4 Ensuring legislative products and ATO guidance match their policy intent

The Treasury and ATO Tax and Superannuation Protocol¹⁰ provides a framework for the working arrangements between Treasury and the ATO 'to enable the best possible functioning of the tax and superannuation systems that Treasury and the ATO share stewardship of'.

The protocol makes the following statement regarding quality assurance:

Ensuring that legislation accurately reflects the government's policy intent is a critical element of the Treasury's policy advising and legislation implementation role. In developing new legislation, it is imperative that agreement is reached with the [ATO] that the legislation will achieve the Government's policy intent and a commitment that it can and will be administered in that way.

The joint quality assurance program as established in the Protocol is overseen by the Tax Policy Coordination Committee, whose oversight role includes:

- communicating the purpose and deliverables of quality assurance to all relevant staff;
- resolving differences of view that might impede the process; and
- discussing critical tax and superannuation policy and legislation issues as necessary.

Although it could be argued that Treasury and the ATO's commitment to the Protocol's quality assurance process implicitly includes a commitment to ensuring that legislative products (Treasury) and administrative guidance (ATO) match their policy intent, such a commitment should be explicitly stated. Concerns raised at the NTLG around insufficient detail in explanatory memoranda and excessive reliance on ATO guidance material (which is not able to be considered by the Courts) highlights the need for a clear commitment from both agencies for legislative products and administrative guidance to be clearly within the parameters of the policy intent. Recommendations 1 and 3 above are relevant to the implementation of this recommendation.

5 Broaden the scope of the Commissioner's statutory remedial power

The recommendation to consider whether the Commissioner of Taxation should be given further power to modify the tax law to give relief to taxpayers was first flagged in the Tax Design Review Panel's 2008 report. In its response to that recommendation, the 2011 report noted that as the matter of an extra-statutory concession power was before the government, it did not need to comment on it. The 2016 report however was able to reflect on the impending Statutory Remedial Power (SRP), and made the following recommendation:

As noted in the Board's comments on the draft legislation and explanatory materials for the proposed SRP (dated 26 October 2015), the Board is of the view that the Power should be expanded beyond what is currently envisaged, so that it is applicable in a wider range of circumstances and is subject to fewer restrictions - when applied to resolve technical corrections and where the application of the SRP favours taxpayers. Such an expansion would make the SRP more effective in achieving its goal of reducing red tape and the need for minor legislative changes.

The limited use of the SRP since its introduction in 2016 suggests the Board's concern about its limited parameters were well founded. As such, NTLG members support the Board's recommendation to expand the existing power beyond its parameters or at the very least review the current processes supporting the use of the SRP to ensure the power is being used in all appropriate circumstances.

6 Reviewing and making public the stock of unlegislated announcements annually

Recommendations on the need for increased transparency around announced but unenacted measures appeared in the Tax Design Review Panel's 2008 report and the 2011 report. Although Treasury did produce a Forward Work Program following the 2008 Review Panel recommendations, this program is no longer shared publicly. Although NTLG members acknowledge the significant

reduction in the number of announced but unenacted measures, the sheer volume of tax changes flowing through the system at any given point makes it extremely difficult to keep track of the status of impending law changes. A lack of visibility over Treasury's forward work program or the number of announced but unenacted changes also appears to decrease stakeholders' appetite for applying resources to the simplification or care and maintenance of the tax system.

A review and making public of the stock of unlegislated announcements on an annual basis is a suggestion made in the 2011 paper and is one the external NTLG members endorse. A reintroduction of the publication of Treasury's Forward Work Program would also be welcomed.

¹ Board of Taxation: *Improving Australia's Tax Consultation System* Report, February 2007
Better Tax Design and Implementation: *A Report to The Assistant Treasurer and Minister for Competition Policy and Consumer Affairs*, 30 April 2008
Board of Taxation: *Post-Implementation Review of the Tax Design Review Panel Recommendations* December 2011
Board of Taxation: *Recommendations to improve tax policy development in Australia* February 2016

² See for example *Treasury and the ATO Tax and Superannuation Protocol* September 2012 and PS LA 2013/4 *The ATO's role in tax law design and expressing ATO views as part of the law design process*

³ See for example recommendation 24 of the Tax Design Review Panel's report *Better Tax Design and Implementation* (Commissioner's power to grant extra-statutory concessions)

⁴ See page 6 of Board of Taxation: *Recommendations to improve tax policy development in Australia*, February 2016

⁵ [https://www.ato.gov.au/General/Consultation/Consultation-groups/Stewardship-groups/national-tax-liaison-group-\(ntl原因\)/](https://www.ato.gov.au/General/Consultation/Consultation-groups/Stewardship-groups/national-tax-liaison-group-(ntl原因)/)

⁶ See paragraph 5 of PS LA 2013/4: *The ATO's role in tax law design and expressing ATO views as part of the law design process*

⁷ See recommendation 6 at page 86 of Board of Taxation: *Post-Implementation Review of the Tax Design Review Panel Recommendations* December 2011

⁸ IBID Chart 3 paragraph 4.21 and recommendation 7

⁹ <https://www.ato.gov.au/law/view/document?DocID=PSR/PS20134/NAT/ATO/00001>

¹⁰ <https://www.ato.gov.au/General/New-legislation/In-detail/ATO---Treasury-protocols/ATO---Treasury-protocol/?anchor=P58-8617>