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Inquiry Reviewing a Range of Taxation Issues within Australia

Submission by the Australian Treasury

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Since 1996 the Government has taken decisive steps to improve the administration of tax laws, both directly by the Tax Office and in other ways. This includes reviewing systemic tax administration issues, having regard to the overall policy framework, the perceptions of taxpayers and practitioners, and efficient and effective administration. Some key measures are outlined in this submission. Given the recent nature of many of these reforms, it may be some time before their impact will be fully evident.

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INTRODUCTION

Treasury welcomes the opportunity to assist with the inquiry.

We note that Part A of the terms of reference (Attachment A) relates to Tax Office administration of tax laws. Our submission will outline key policy measures that have been implemented or are under development to improve the framework within which the Tax Office must operate.

Part B of the terms of reference relates to the fringe benefits tax (FBT) regime and in particular its interaction with the family tax benefit (FTB) programme. Our submission will outline the purpose of FBT and also explain the important role that reporting of fringe benefits plays in enhancing the overall fairness of the taxation and welfare systems.

PART A: ADMINISTRATION OF THE TAX LAWS

Since 1996 the Government has taken decisive steps to improve the administration of tax laws, both directly by the Tax Office and in other ways. This includes reviewing systemic tax administration issues, having regard to the overall policy framework, the perceptions of taxpayers and practitioners, and efficient and effective administration. Some key measures are outlined below. Given the recent nature of many of these reforms, it may be some time before their impact will be fully evident.

ANTS measures

In 1998, the Government announced its strategy to make complying with tax obligations simpler and fairer through:

- changing the system of business registration to make it possible for businesses to deal with the whole of government at one place and with one business identifier;
- simplifying and standardising business payment and reporting systems; and
- improving the design of tax laws.[1]

While the Australian Business Number (ABN) has been adopted by all Commonwealth regulatory bodies, more can be done to increase adoption by State, Territory and local government bodies. Key improvements to business payment and reporting systems and the continuing Commonwealth work on improving the design of tax laws are dealt with below.

Tax law design

Following the bedding down of changes brought about by *A New Tax System (ANTS)*, in 2002 the Government relocated the responsibility for design of tax laws to Treasury, with the intention that this would reinforce a whole-of-government perspective for tax law design. This principle is relevant not just for future tax initiatives, but also — through systematic review — for the existing stock of tax legislation and practice. Prior to the transfer of responsibilities, there had been concern

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1. See Chapter 4, Commonwealth of Australia 1998, *Tax Reform, not a new tax a new tax system*, August 1998, Commonwealth of Australia, Canberra.

expressed that the Tax Office as regulator might not be well placed — or the appropriate agency — to apply a balanced, whole-of-government approach to tax law design.

On many occasions, tax law design needs to craft a balance between the expression of pure policy intent, reasonable compliance costs for taxpayers and practitioners, and the needs of practical administration. Effective consultation processes and modern law design processes facilitate this.

Consultation

Effective consultation helps to avoid unintended outcomes that can impose unnecessary compliance and administrative costs and frustrate the policy intent. Also, by informing the design process about business practices and Tax Office processes, consultation plays an important role in choosing the most efficient means for implementing a tax measure, minimising the extent to which competing objectives need to be traded off. Building on the valuable consultation processes established in the 1999 Ralph Review of Business Taxation, the Government has committed to a strongly consultative approach to tax law design. The Board of Taxation (see below) has an important role in developing, implementing and overseeing this strategy.

Consultation cannot be mandated for every change to the tax system, particularly in cases where there is commercial or market sensitivity, or revenue risk due to tax avoidance. Also, the flexibility government requires in managing the timing of policy change will at times determine the extent and form of consultation that can be undertaken. However, development of tax measures now works from an in-principle position of:

- consulting on all substantive tax legislation initiatives, except in circumstances as outlined above;
- 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 the 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 programme of tax legislation; and
- providing better feedback to external participants in consultation processes.

Principle-based drafting

The consultation process is complemented by legislation that avoids unnecessary complexity— reducing the likelihood of unintended outcomes. Minimising complexity will also help to avoid unnecessary compliance and administrative costs when legislation is implemented.

Treasury has been developing a principle-based approach to drafting new measures since late 2002. The philosophy and advantages of this approach were explained in detail in Treasury's Economic Roundup publication, a copy of which is at Attachment B. In essence, the approach aims to write tax law in a series of principled statements about what the law is intended to do, rather than prescribe in detail the mechanisms to get it there. As argued in the article, the resulting law can be

more certain, less complex and more flexible than under a ‘black-letter’ approach. The principle-based approach imposes a discipline on the development of policy that should result in less complex policy choices.

The approach is ideally suited to new policy proposals or replacement/modernisation of existing regimes. Although detailed or specific rules will continue to be used, for some time, especially with maintenance of older regimes, the principle-based approach will be the style of preference in future.

Board of Taxation

In 2000, the Government established the Board of Taxation, a non-statutory advisory body charged with contributing a business and broader community perspective to improving the design of taxation laws and their operation. In addition to undertaking its own consultations, a key task for the Board is monitoring the process of community consultation on tax matters by other agencies (such as the Treasury and the Tax Office). The Board comprises ten members, of whom seven (including the Chairman) have been appointed from the non-government sector. The three government *ex-officio* members are the Secretary to the Treasury, the Commissioner of Taxation, and the First Parliamentary Counsel. The presence of these officials ensures a valuable channel for feedback to the agencies with a critical role in tax design and implementation.

The Board provides advice to the Treasurer on:

- the quality and effectiveness of tax legislation and the processes for its development, including the processes of community consultation and other aspects of tax design;
- improvements to the general integrity and functioning of the taxation system;
- research and other studies commissioned by the Board on topics approved or referred by the Treasurer; and
- other taxation matters referred to the Board by the Treasurer.

In 2002 the Board of Taxation provided a report to the Treasurer on community consultation.[2] The Government decided (see Attachment C) to largely adopt the Board’s recommendations dealing with consultation, and is currently pursuing a policy of widespread consultation on tax measures (see above).

The Government’s response also emphasised the importance of periodically reviewing the consultation process itself and the legislation that results from it, to ensure that the expectations of government and external participants are being appropriately managed.

Inspector-General of Taxation

In 2003 the Government established the Office of the Inspector-General of Taxation (IGT) to review systems established by the Tax Office to administer the tax laws (and other systems established by tax laws to the extent that they deal with administrative matters)[3] and to report to

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2. Board of Taxation, *Government Consultation with the Community on the Development of Taxation Legislation*, March 2002, <http://www.taxboard.gov.au/content/downloads/consulrep.pdf>.

3. Administrative matters includes, for example, the process for assessing, collecting, paying or recovering amounts under a tax law, or the enforcement of a tax law. However, it does not include rules imposing or creating an obligation

Treasury Ministers with recommendations for improving tax administration for the benefit of all taxpayers. Issues concerning the systematic administration of tax may be raised with the IGT by individuals or groups of taxpayers, professional associations and businesses. Such concerns will be considered by the IGT in setting a work programme and determining the terms of reference of a review. The IGT has no role in reviewing the affairs of individual taxpayers, or in policy or legislation.[4]

RoSA

In late 2003, the Government commissioned Treasury to conduct a review of aspects of the income tax self assessment system. The review, which reported in August 2004 (see *Report on Aspects of Income Tax Self Assessment* (RoSA Report) at Attachment D[5]), focussed on whether the income tax laws achieved a fair balance between protecting the rights of individual taxpayers and protecting the revenue for the benefit of the Australian community. Treasury was tasked with examining a range of issues, including the statutory timeframes for amending assessments, the duration of the audit process, the reliance that taxpayers should be able to place on Tax Office advice and aspects of the general interest charge. In December 2004 the Government announced that it would adopt all of the Report's recommendations, most of which, at the time of writing, have been implemented.

The first tranche of RoSA legislation, comprising the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 1) 2005* and *Shortfall Interest Charge (Imposition) Act 2005*, received Royal Assent on 29 June 2005. Those Acts reduced the consequences of errors in assessment for taxpayers who act in good faith, by providing for a lower rate of interest for the period before they are notified of their error, and by making refinements to the penalty regime.

The second tranche of RoSA legislation, comprising the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005*, received Royal Assent on 19 December 2005. This Act increased taxpayer certainty by improving the timeliness and reliability of Tax Office advice and by reducing the time in which the majority of taxpayers' assessments can be altered by the Tax Office.

As a result of the changes to the rulings regime, taxpayers have access to improved arrangements for finding out the Commissioner's view about how the taxation laws apply, so that the risks of uncertainty when they are self-assessing are reduced. A new framework for public and private rulings allows Taxation Office advice to be more timely, accessible and binding in a wider range of cases. The reforms comprehensively redrafted the rulings provisions, including:

- expanding the category of matters that a ruling may deal with to cover administration, procedure, collection and ultimate conclusions of fact;
- giving taxpayers protection from penalty and interest charges where they follow Tax Office general administrative practice;
- providing an avenue for review where an application for a private ruling has not been determined within 60 days; and

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to pay an amount under a tax law, or rules dealing with the quantification of such an amount (s.7 *Inspector-General of Taxation Act 2003*).

4. Taxpayers can raise issues about their own tax affairs with the Commonwealth Ombudsman.

5. The RoSA Report can be found at <http://selfassessment.treasury.gov.au>.

- clarifying the rules where rulings are inconsistent.

The time during which taxpayers experience uncertainty about whether they have correctly self-assessed their income tax liability will more accurately reflect their risk profile and the revenue consequence of an error in their assessment. This reduces the period during which the Tax Office can amend an assessment for about eight million individuals and over 745,000 very small businesses, with effect from the 2004-05 income year's assessments. The reforms:

- reduce the amendment period for the majority of taxpayers to 2 years (the act retains the 4-year amendment period for some classes of taxpayers with more complex affairs);
- impose a limited amendment period of 2 or 4 years (depending on the circumstances of the taxpayer) for taxpayers with nil and loss assessments, in place of the previous unlimited amendment periods; and
- reduce the amendment period for tax avoidance arrangements from 6 to 4 years.

The RoSA report also made seventeen recommendations for administrative improvements, which the Commissioner of Taxation has advised he would implement as soon as practicable. The Tax Office advises that work on nine of the recommendations has now been completed and work on the others is generally progressing well (see Attachment E).]

Commencing from 2004-05, the Government provided funding for a series of further Treasury reviews on issues arising from the Report. Over 2006-07 Treasury is:

- reviewing the remaining provisions that expose taxpayers to open ended review periods in particular or special cases, in order to identify any that should have a finite period during which a taxpayer's self assessment may be adjusted by the Tax Office;
- examining the discretions given to the Commissioner to determine an aspect of taxpayer liability, in order to develop replacement tests that a taxpayer can apply at the time of lodgement;
- reviewing the various types of taxpayer elections in the law, to establish standard, low cost guidelines for framing elections;
- considering the possible application of the RoSA recommendations (which related only to income tax) to all federally-administered taxes; and
- exploring the possibility of reducing the volume of law (or related rules) that needs to be accessed by individuals and small businesses with very simple affairs.

These reviews are all currently under way, and are expected to yield further enhancements to the tax administration framework. Treasury has devoted the majority of a specific division — the Tax System Review Division — to this type of work and its activities are supplemented by other areas of Treasury where appropriate.

Beyond these RoSA measures, Treasury is pursuing a number of other reforms to improve the working of the Tax system, as part of an ongoing programme of review of existing regulation, to identify cost reductions, savings, opportunities for simplification and other improvements for end users or intermediaries such as tax agents. Projects at various stages of development currently include:

- a promoter penalties regime, recently passed by Parliament, designed to deter the promotion of tax avoidance and evasion schemes. The Tax Law Amendment Bill (2006 Measures No. 1) Bill 2006[6] Schedule 3 includes a number of real time measures to deter the promotion of schemes and thereby lower the risks for investors, such as allowing the Commissioner of Taxation to seek injunctive relief to stop the promotion of a tax exploitation scheme and to enter into voluntary undertakings with promoters. The package was developed after extensive public consultation;

- repeal of inoperative tax law provisions. Following a report by the Board of Taxation, in November 2005[7] the Government[8] foreshadowed the repeal of tax provisions that are inoperative, either because they have no effect after a date in the past, or because they relate only to transactions that are completed or for which the tax implications are completed. On 4 April 2006, the Government released draft legislation proposing to repeal more than 4,100 pages from Australia's tax legislation, which would include reducing the income tax law by almost one-third;[9]

- a review of anti-avoidance legislation with a view to identifying redundant provisions. The Government's response to the Review of Business Taxation (the Ralph Review) announced specific measures to improve the operation of the general anti-avoidance rule.[10] In addition to reviewing the general anti-avoidance rule, Treasury will examine whether any specific anti-avoidance provisions in the income tax law (in particular, those enacted prior to 1981) might now be rendered redundant by Part IVA or in other ways;

- a new legislative regime providing national oversight of tax agents (in place of the current, State-based, tax agents boards). This will include protection from penalties for taxpayers who have exercised reasonable care by using a tax agent in specified circumstances.

Specific issues raised by the terms of reference

Our comments on terms of reference relevant to Treasury's functions are set out below.

The impact of the interaction between self-assessment and legislation and rulings

Australia's system of self assessment for income tax relies heavily on the principle of voluntary compliance and on taxpayers (or their advisers) having a good understanding of the tax law in order to meet their obligations.

Over the last 25 years, there has been a significant increase in the complexity of business and personal affairs, and tax laws have had to become longer and of broader scope. To some degree,

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6. The Bill is currently awaiting Royal Assent.

7. Board of Taxation, *Identification and possible repeal of the inoperative provisions of the 1936 and 1997 Income Tax Assessment Acts*, October 2005, <http://www.taxboard.gov.au/content/inoperative_provisions/index.asp>.

8. Costello P (Treasurer) 2005, *Income Tax Act Reduced by Around 30 Per Cent,* Parliament House, Canberra, 25 November 2005.

9. Costello P (Treasurer) 2006, *Bill to Cut Tax Legislation by More Than 4,100 Pages,* Parliament House, Canberra, 4 April 2006.

10. Costello P (Treasurer) 1999, *The New Business Tax System: Stage 2 Response*, Attachment D: Anti-Avoidance Provisions, Parliament House, Canberra, 11 November 1999.

complexity is an unavoidable part of the trading-off of competing objectives that is part of tax law design — 'simple' law might yield unacceptable equity outcomes or significantly distort economic activity. That said, as outlined above, the Government has been taking steps to simplify and improve tax laws.

As few taxpayers use the tax law itself as a primary source of information, Tax Office advice (and advice from tax agents) plays a crucial role in bridging the gap, by providing summarised, understandable advice that taxpayers can rely on.

The Tax Office provides taxpayers and practitioners with a range of advice on applying taxation law, through formal rulings and other products. Rulings, which state the Commissioner of Taxation's view on how the tax law applies, were introduced in a legally binding way in 1992, to provide taxpayers (and their advisers) with greater certainty. There are three main types of tax ruling: public rulings, private rulings, and oral rulings.

Public rulings provide written guidance to taxpayers generally, or a class of taxpayers, and may be relied upon by anyone to whom they apply. They state the Tax Office's view on how the tax law applies to a type or class of arrangements. They are provided at the discretion of the Tax Office and are prepared in conjunction with panels containing representatives from the accounting and legal professions.

Private rulings provide written advice to a particular taxpayer on how the Tax Office considers the law applies to a specified arrangement for particular income years.

Oral rulings provide binding advice on a limited range of income tax matters to a specific taxpayer with simple tax affairs.

In 2005, the Tax Office issued 432 public rulings, including 147 class rulings; 138 product rulings; and 147 rulings and determinations dealing with a range of income tax, international, GST and product grant and benefit issues. In addition, 136 draft rulings and determinations were issued.

As Tax Office rulings are merely a statement of how the Commissioner intends to apply or interpret parts of the tax law, taxpayers are not obliged to follow them. However, if they do follow them, that statement is binding by law on the Tax Office. A taxpayer covered by a formal ruling is therefore protected from amendment of their assessment, even if the Tax Office subsequently changes its interpretation of the law. Rulings do not bind taxpayers, so if the law is more favourable than the ruling then the law applies.

As detailed above, the rulings system was examined as part of the RoSA Review. The RoSA Report recommended, and the Government agreed to, a number of refinements to the current public rulings system to reduce uncertainty for taxpayers and to move the balance of fairness in taxpayers' favour. Legislation has now been passed to implement these changes (see p.4 above). At the same time, the opportunity was taken to comprehensively rewrite the law for rulings in order to make the regime clearer for taxpayers.

The new rulings regime provides additional certainty to taxpayers, as the scope of matters on which rulings may be given has been expanded significantly. Even valuation questions (which are often the source of much after-the-fact dispute) may now be the subject of private rulings. In addition, the Commissioner is now able to access information from a wider range of sources to assist in making a relevant and timely ruling. The Commissioner must ask for further information from the taxpayer if the ruling cannot be made without it and may take into account additional information supplied by the applicant after the application was made. The Commissioner may rely on

information from other sources, or make assumptions about a future event or other matter, provided the applicant is informed and given a reasonable opportunity to respond.

We understand that some members may be under the impression that taxpayers need to apply for a private ruling (rather than relying on a public ruling) in order to protect themselves against a possible change in the public ruling. This is no longer the case. Where the Tax Office issues inconsistent public and private rulings on a subject, or withdraws one ruling and replaces it with another, the new law sets out a 'taxpayer-friendly' set of rules to resolve questions of applicability:

- If a public ruling is withdrawn, it continues to apply to arrangements that had begun to be carried out before the withdrawal.
- If the Tax Office issues a private ruling which is inconsistent with an earlier public ruling, then the taxpayer can rely on either ruling.
- If a taxpayer has a private ruling and the Tax Office subsequently issues an inconsistent public ruling then:
    - — if, when the public ruling is issued, the period to which the rulings relate has not begun (and the arrangement to which the rulings relate has not begun to be carried out), then the public ruling overrules the private ruling
    - — otherwise the taxpayer can rely on either ruling.

Rulings are not legislative instruments, and so are not debated or considered by Parliament, although public rulings are tabled in Parliament as a matter of custom and courtesy.[11] As a result, rulings do not have the force of law, but the law allows taxpayers to rely on them. If the Parliament does not think a ruling or series of rulings reflects the way the law should be interpreted, the Parliament can amend the law to re-state its meaning and make its intention clear.

Beyond the improvements to the rulings regime, some argue that there remains potential for a more effective role to be given to the Commissioner's general administration powers, in order to reduce compliance costs for taxpayers. Media coverage in early 2006 reported the new Commissioner as saying that the Tax Office should adopt a more flexible approach to administering the taxation laws to reduce red tape. Treasury is considering what government can do to facilitate this approach, and how it might be given effect.[12]

The level and application of penalties

Penalties exist as incentives for taxpayers to comply with their various tax obligations. The penalty regime within 'tax law' comprises a range of sanctions, from administrative penalties for non compliance through to offences that are of a criminal nature and punishable under the provisions of the *Criminal Code* and the *Crimes Act 1914*.

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11. Since 1 July 1995, all public rulings have been tabled in each House of the Parliament within five sitting days of the notification in the *Gazette* of the making of those rulings.

12. In the United Kingdom and in New Zealand, the Revenue Offices relax the strict interpretation of a tax law for the purposes of making administration of the law easier or to provide taxpayers with relief from hardship.

Administrative penalties

Since 2000, a uniform administrative penalty regime has applied to taxation laws administered by the Commissioner of Taxation. Broadly, the regime provides for the imposition of penalties for making false statements, failing to lodge essential documents on time, participating in tax avoidance schemes, or failing to meet various other tax obligations. The Commissioner is required to provide written notice of a penalty and, since the RoSA changes, written reasons why the taxpayer is liable to pay the penalty. The Commissioner has the discretion to remit an administrative penalty in whole or in part.

For tax shortfalls (ie, the understatement of liabilities or overstatement of entitlements), the application of a base penalty amount depends on the level of culpability of the taxpayer — essentially whether the taxpayer's error was careless, reckless or intentional. This base penalty amount, expressed as a percentage, can be varied up or down according to whether the taxpayer has hindered the Tax Office in investigating the shortfall, has previously had a shortfall amount with a similar cause, or has made a voluntary disclosure of the shortfall.

A taxpayer cannot be penalised for a shortfall caused by relying on Tax Office advice given to the taxpayer or their agent, Tax Office publications, or the Tax Office's general administrative practice.

Recent amendments to the penalty provisions were made to give effect to related RoSA recommendations. These amendments:

- abolished the penalty for a tax shortfall resulting from a failure to follow a private ruling;
- required the Commissioner to provide a written explanation of why an entity is liable to a penalty and why the penalty has not been remitted in full; and
- clarified the definition of when a statement by an entity about its income tax liability is 'reasonably arguable' (and therefore not subject to the penalty for a tax shortfall resulting from taking a position about a large item that is not reasonably arguable).

Promoter/civil penalties

The Tax Law Amendment Bill (2006 Measures No. 1) Bill 2006[13] introduces a new civil penalty regime into the *Taxation Administration Act 1953*. The new regime will apply to promoters of tax avoidance and tax evasion schemes and to entities that promote a scheme on the basis of having a Product Ruling from the Commissioner of Taxation, but that fail to implement the scheme in accordance with that ruling. The maximum penalty is $550,000 for an individual (or five times that amount for a company), with an alternative maximum penalty of twice the consideration received from the scheme. This new civil penalty regime seeks to deter the promotion of tax avoidance and tax evasion schemes more effectively than has been possible in the past using criminal sanctions. The maximum penalty has been set to eliminate the financial gains accruing from promoting ineffective tax schemes to taxpayers — taxpayers are already liable for substantial penalties and interest for participation in such schemes.

Tax offences

Various taxation offences are created in the tax laws, broadly relating to false or incorrect record keeping, furnishing false or misleading information to the Tax Office, obstructing Tax officers,

13. The Bill is currently awaiting Royal Assent.

unauthorised access to tax records, and offences involving tax file numbers. These offences can attract substantial fines and, in some cases, a term of imprisonment. The penalties are higher for second or subsequent offences. Where an offence is committed by a company, the maximum penalty is five times the maximum fine that could be imposed on a natural person.

Other criminal offences

In addition to specific taxation offences, prosecution for a number of general offences may be instituted under various provisions of the *Criminal Code* or the *Crimes Act 1914*. Some of the main offences subject to criminal prosecution involve tax fraud and aiding or abetting the commission of a taxation offence.

The application and rate of the general interest charge and shortfall interest charge

The general interest charge (the GIC) has general application to overdue tax debts. It was introduced in 1999 to replace a complex array of penalties and interest charges applying to late payments and tax shortfalls. The GIC applies either to a specific tax debt or to an overall 'running balance' of tax debts. It compounds daily from when tax was due until all tax and accrued GIC have been paid. The GIC is tax deductible.

The GIC is set at a high rate (compared with indicator rates for commercial borrowing) in order to encourage prompt payment of tax liabilities and discourage the ongoing use of tax debts as a source of business or private finance. Over the last year and a half, GIC rates have been of the order of 12.5% per annum. For the June 2006 quarter, the rate is 12.61%.

Originally, the GIC rate was set by adding an eight percentage point uplift to the Treasury Note Yield base rate. The uplift factor has no inherent meaning — it merely reflects the gap between the policy target interest rate and the base rate. In particular, the uplift factor should not be construed as being or intended to be a culpability penalty. Using a base rate that was already recognised in tax law in conjunction with the complementary uplift factor simply avoided the difficulties of directly defining the target market rate.

The structure of the GIC was amended in 2001, as Treasury Notes were no longer issued on a regular basis. The bank bill rate series published by the Reserve Bank was found to be a suitable proxy, and adopted as the new base rate. At the same time, the uplift factor was reduced by one percentage point, as the Government considered that an interest rate that was seven percentage points higher than the (new) base rate was 'sufficient to support the policy objective that taxpayers should pay their tax liabilities on time'.[14]

The RoSA Review noted that, by design, for many taxpayers the GIC rate will be higher than readily available commercial alternatives. In consideration of this point, the Review pointed out that, apart from one particular case, taxpayers should be able to manage or avoid this premium by arranging to use their alternative lower cost finance. The Review also observed that the willingness of many taxpayers to incur GIC, rather than borrow commercially to clear tax debts, indicates that the GIC rate is not excessive in many instances — and (contrary to the policy intent) may even constitute a 'soft', application-free source of finance.

The particular case where the ROSA Review recommended that a lower interest charge apply is that of a shortfall in an income tax assessment for the period prior to a taxpayer being notified of the

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14. Taxation Laws Amendment Act (No.3) 2001, Supplementary Explanatory Memorandum, paragraph 4.6.

shortfall. In this case, the taxpayer would not generally have been in a position to respond to the 'incentive to pay' premium that is built into the GIC. The Government accepted and gave effect to this recommendation by legislating to create a new shortfall interest charge (the SIC) to apply an interest rate four percentage points less than the GIC to amendments to income tax assessments relating to the 2004-05 and subsequent income years.

Like the GIC, the SIC applies a daily compound interest rate, but the three (rather than seven) percentage point uplift factor over the base rate produces a SIC rate that, when allowance is made for compounding, reflects benchmark business borrowing rates. Thus the SIC 'neutralises' the 'loan benefits' that taxpayers could otherwise receive from the temporary use of the shortfall amount.

The SIC, with its lower rate, only applies to the 'shortfall period' between the due date of the assessment that was understated and the date at which the taxpayer was notified of the shortfall. Any amounts of shortfall or SIC that are not then paid will, after a 21 day payment period, commence to attract GIC in the normal manner. This approach is consistent with the general goals described above.

Treasury is currently reviewing the appropriateness of extending the RoSA recommendations on income tax self assessment to other federally-administered taxes. This will entail considering the applicability to those other taxes of the rationale underpinning the SIC.

The statutory GIC and SIC rates discussed above can be remitted (reduced) by the Commissioner where the circumstances make it appropriate.

The new SIC can be remitted in part or in full where the Commissioner considers it fair and reasonable to do so, having regard to two principles:

- Remission should not occur just because the SIC charge exceeds the benefit the taxpayer received from the temporary use of the shortfall amount (including where the taxpayer's normal borrowing rate is lower than the SIC rate). Attempting to fine tune the application of the SIC in this way would be administratively unworkable and would raise serious transparency issues.

- Remission should occur where the circumstances justify the Commonwealth bearing part of the cost of delayed receipt of taxes — such as where there was delay, contributory cause or fault on the part of the Tax Office or others.

The GIC has a much broader scope than the SIC, and the legislated remission criteria do not specifically address shortfall cases[15] — although they do allow for remission in 'special circumstances' and where 'otherwise appropriate'. The Tax Office is currently reviewing how it interprets the GIC remission provisions in the light of the RoSA reforms, including the appropriate remission policy for 'shortfall GIC' on future amendments relating to the 2003-04 and earlier income years. Parliament decided against applying the SIC retrospectively — which would have raised its own equity problems given that shortfall GIC had already been imposed on hundreds of thousands of amendments to assessments from those earlier years. However, the scope for and appropriateness of remission of shortfall GIC in these transitional cases was left open for further Tax Office consideration.

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15. The GIC remission provisions focus primarily on circumstances that prevent a taxpayer from paying a known tax debt.

The operation and administration of the Pay As You Go system

A key feature of *ANTS* was the introduction of the pay as you go (PAYG) system — a single comprehensive payment and reporting system for withholding amounts and for tax on business and investment income — to replace the numerous systems and arrangements that existed previously. The PAYG system comprises two elements:

- the withholding system, under which entities making payments to others (such as to employees) withhold amounts from those payments and forward them to the Tax Office; and
- the instalments system, under which taxpayers earning business and investment income pay instalments of their own ultimate tax during the year.

The PAYG system ensures that most taxpayers pay income tax (and related liabilities, such as Higher Education Contribution Scheme debts) 'as they go' during the income year. Although the amounts are paid before an annual assessment is made, they are paid after the related income has been derived. The PAYG system provides a more even stream of revenue to the Government to fund services throughout the year, as well as smoothing business cash flow. It also avoids taxpayers accruing large tax liabilities on assessment which they may have difficulty paying as a lump sum.

The PAYG system also reformed reporting obligations, reducing the number of times businesses have to report to the Tax Office and replacing a range of separate payment and reporting systems that existed under the previous regime.

PAYG withholding

The PAYG withholding system replaced the following collection systems from 1 July 2000:

- pay as you earn (PAYE);
- prescribed payments system (PPS);
- reportable payments system (RPS);
- withholding where no tax file number (TFN) is quoted on investments;
- withholding from natural resource payments to non-residents;
- withholding from certain withdrawals from Australian Film Industry Trust Fund Accounts;
- withholding from repaid Farm Management Deposits;
- the collection of withholding tax which applies to dividends, interest and royalties paid to non-residents; and
- the collection of mining withholding tax which relates to payments for mining on Aboriginal land.

These former collection systems duplicated obligations or were inefficient and outdated in their own right. In particular, the former PAYE system relied on outmoded ideas to define obligations and had not kept pace with labour market trends.[16] Instead, the PAYG withholding system

16. Commonwealth of Australia, 1998, *Tax Reform, not a new tax a new tax system*, August 1998, page 132.

specifies the types of payments from which amounts are required to be withheld. It also caters more effectively for new work practices through the introduction of new rules to cover payments under labour hire arrangements (which can be extended to new work arrangements as they emerge) and payments under voluntary withholding agreements.

Because there are generally many payees for each payer in cases covered by PAYG, withholding is a much more efficient, lower cost method for collecting the tax than, say, requiring each recipient to pay their own tax instalments directly to the Commissioner.

The PAYG withholding system also serves an important integrity role, by minimising the proportion of a taxpayer's liability that is only collectable after assessment. This is reinforced by 'No ABN withholding' — an integrity measure requiring entities to withhold from payments to entities where an ABN is not quoted. This complements the introduction of the ABN as a single business identifier by ensuring that, if entities do not reliably identify themselves, amounts will be withheld at the top marginal rate. This produces an incentive for legitimate businesses to register for an ABN. The system also addresses the types of transactions previously covered by the former PPS and RPS systems. Other measures facilitate the collection of Australian income tax from certain payments to foreign residents.

The PAYG withholding system reduced complexity by introducing standardised rules for reporting and remitting amounts withheld, crediting withheld amounts against a taxpayer's liabilities, refunding amounts withheld in error and providing annual payment summaries to payees. The former withholding systems had a range of separate machinery rules.

The frequency with which withholding entities are required to remit amounts to the Commissioner depends primarily on the amounts they withheld during the previous financial year. Small withholders remit on a quarterly basis and medium withholders on a monthly basis. These reporting dates are generally aligned with other reporting obligations under the New Tax System, such as for goods and services tax (GST). Large withholders report and pay around a week after the payment from which the amount was withheld.

Taxpayers who feel that the withholding system would otherwise collect too much tax (compared with their ultimate tax liability for the year) can apply to the Commissioner for a variation to the amount to be withheld to take into account their individual circumstances. This allows a taxpayer to, for example, anticipate the effect that a large deductible expenditure will have on their year's assessment. The Commissioner may also provide class variations to take account of the particular circumstances of a class of taxpayer.

PAYG instalments

As foreshadowed in *ANTS*, the PAYG instalments system replaced the provisional tax and company instalments systems from 1 July 2000. The provisional tax system generally required taxpayers to pay quarterly provisional tax instalments calculated on the basis of their prior year income tax uplifted by the percentage increase in gross domestic product (GDP). Certain taxpayers with smaller liabilities paid provisional tax as a single lump sum several months before the end of the financial year. Under the company instalments system, companies paid instalments of income tax on the basis of the level or likely level of their tax liability, with most of the tax being payable after the end of the year. These systems were replaced primarily because they provided little flexibility for payments to reflect the trading conditions or income flows of businesses.[17] The company

17. Commonwealth of Australia, 1998, *Tax Reform, not a new tax a new tax system*, August 1998, page 131.

instalments system also created an inequity, as small companies paid tax much later than other entities and individuals.

The PAYG instalments system requires taxpayers with business and investment income to pay income tax instalments quarterly, in arrears, toward the expected income tax liability on that income. The Commissioner gives the taxpayer an instalment rate based on the tax paid in the previous year (new businesses do not pay PAYG instalments in their first year of operation). The Commissioner has used a discretion to exempt taxpayers with small liabilities from PAYG instalments, instead paying the tax on assessment after lodging their income tax return.

For all but larger entities, there are two methods of calculating a taxpayer's PAYG instalment amount for a quarter, emphasising either accuracy or simplicity.

The more accurate method is generally to multiply an instalment rate by the actual business and investment income for the quarter. The resulting instalment amount will go up and down in line with fluctuations in the actual business and investment income earned in a quarter. Large entities are generally required to use this method.

The simpler method, generally used by small entities and individuals, is to pay an instalment amount calculated by the Tax Office based on their income tax in the previous year adjusted for the increase in the GDP. By obviating the need to work out the instalment income for each quarter, the GDP-adjustment method reduces compliance costs. Taxpayers wanting their instalments more closely aligned to their ultimate tax liability may use the more accurate 'instalment rate by actual income' method described above.

Taxpayers may also vary their instalment rate or instalment amount to reflect their particular circumstances. However, the GIC is payable where a downwards variation results in the amount paid being less that 85 per cent of a benchmark amount (determined by a statutory formula).

Certain taxpayers with small liabilities may choose to pay an annual instalment, after the end of the income year (in October). This is later than under the former provisional tax system, where annual payments were due during the income year (in April or May).

Running balance account

The Government introduced the running balance account system, also known as the integrated account, in 1999 in response to recommendations by the Auditor General[18] and the Small Business Deregulation Task Force[19]. The running balance account enables the Commissioner to amalgamate all tax debts for a particular taxpayer, so that the taxpayer's net tax position can be determined by reference to a single account.

Previously, the Tax Office had maintained a variety of separate accounts and information systems to record and manage liabilities. This created difficulties for both the Tax Office and taxpayers in determining a taxpayer's overall net tax position, which required taking account of all tax liabilities (including penalties and interest), payments and credits across several accounts at a given time.

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18. Report No. 13 in 1996-97, in particular recommendations 6 and 8.

19. Commonwealth of Australia 1996, *Time for Business: Report of the small business deregulation task force*, Commonwealth of Australia 1996 — the Bell Report.

The Commissioner may allocate payments in a number of specified ways, not necessarily against the particular tax liability indicated by the taxpayer. However, regardless of how a payment is applied, the taxpayer's overall tax debt will be reduced, with a commensurate affect on the total GIC that is incurred on the taxpayer's outstanding tax debts.

Payment of interest to taxpayers

The tax system requires the Commissioner to pay interest to taxpayers for certain early payments and overpayments of tax.

Early payment interest is payable where, following an income tax assessment, an amount of income tax is paid more than 14 days before the due date. Interest is not payable on amounts paid under the PAYG system or where an actual payment has not been made (such as where a credit is applied).

Overpayment interest is payable where:

- a taxpayer's assessment is amended to reduce the amount of tax payable (and the tax previously assessed has been paid);
- the Commissioner pays or credits a refund amount 30 days or more after the day on which the taxpayer lodged the relevant return (following an ordinary income tax assessment); and
- a refund of a running balance account is not made within 14 days from the lodgement of a correct BAS.

Interest is paid at the 'base rate',[20] which, over the last year and a half, has been in the order of 5.5% per annum. For the June 2006 quarter the rate is 5.61%. Although the base rate reflects the 'time value of money' to government, it can be substantially greater than what many taxpayers would receive on comparable 'deposits' with a financial institution. A taxpayer does not receive interest simply because they have a positive balance with the Tax Office, any more than a taxpayer with a debit assessment must pay interest before the due date.

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20. The base interest rate is the monthly average yield of 90-day Bank Accepted Bills published by the Reserve Bank of Australia for the middle month of the preceding quarter.

PART B FRINGE BENEFITS TAX AND FAMILY TAX BENEFITS

The application of the fringe benefit tax regime, including any 'double taxation' consequences arising from the intersection of fringe benefits tax and family tax benefits

Fringe Benefits Tax (FBT) was introduced in 1986 and plays an important role in maintaining the fairness and integrity of Australia's taxation system. It places employees who receive fringe benefits on a more even footing with employees whose remuneration consists entirely of salary or wages. The introduction of FBT was designed to remove a serious gap in the income tax law and ensure that all forms of remuneration paid to employees bear a fair measure of tax. The FBT system also facilitates including the value of fringe benefits in an employee's effective total income for means testing benefits such as family tax benefit, ensuring that families are treated equally.

FBT applies to virtually all employers, including government and is designed to be as inclusive as possible in the coverage of benefits received by employees in respect of their employment. This means that benefits provided by employers to employees in respect of employment are taxed, whether received in cash or otherwise.[21] The FBT rate is aligned with the top marginal personal tax rate plus Medicare levy, currently 48.5 per cent.

By design, FBT is levied upon the employer, rather than the employee. This reduces the risk of non-compliance and reduces the overall costs of administering the tax. The all-inclusive nature of FBT ensures that the integrity of the tax is protected and that the law is primarily focused on calculating the value of fringe benefits and exemptions from FBT.

Benefits that are subject to FBT are not included in the employee's assessable income. Consequently there is no 'double taxation' of the benefits in the hands of both the employee and the employer.

Grossing-up of fringe benefits

The FBT 'grossing up' rules introduced on 1 April 1994 align the taxation consequences of providing salary and wages income with that of providing fringe benefits to employees.[22] Under the grossing-up rules, FBT is imposed on the amount that the employer would have needed to pay as cash to deliver the same effective after-tax remuneration as the fringe benefit. In this way, grossing-up enhances equity between taxpayers by ensuring that fringe benefits effectively bear the same tax as the benefits from goods and services purchased from after tax wage or salary income. FBT is applied to the grossed-up value, just as income tax is applied to gross wages or salary. Taxable employers are then allowed a tax deduction for the value of the benefit plus the FBT payable.

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21. FBT does not apply to benefits associated with certain contributions to superannuation funds or employee share acquisition schemes, as other taxation provisions apply to those types of benefits. The FBT regime also contains a number of specific exemptions and concessions for particular types of benefits such as work related items and remote area fringe benefits. It also provides for concessional treatment for benefits that particular employers provide to their employees. These employers include public benevolent institutions, public and not-for-profit hospitals, rebatable employers and religious institutions.

22. Following the introduction of GST, since 1 July 2000 there are now two grossing-up rates depending on whether or not the benefit is a GST creditable benefit (ie, whether the employer is entitled to recoup some or all of the GST input tax credits).

Example of grossing-up:

An employee is provided with a benefit worth $51.50 that is wholly GST free.

The grossed up value is $100 [Value of benefit x Gross-up rate = $51.50 x 1.9417 = $100]

The employer pays $48.50 FBT [Tax rate x Grossed-up value = 0.485 x $100 = $48.50]

The effect of the grossing-up rules is to achieve the same outcome as if the employee had received $100 in assessable income, paid 48.5% tax on the income and bought the benefit for $51.50 out of the after tax income.

Reporting of fringe benefits

Employers are required to include on the payment summaries of their employees the grossed-up amount of reportable fringe benefits exceeding $1,000. This measure was announced on 13 August 1998 in *ANTS*,[23] and has applied since 1 April 1999. *ANTS* identified the rapidly expanding practice of salary sacrificing as a major problem, because it would allow certain employees — by converting some salary to non-salary fringe benefits — to reduce their taxable income to access certain government benefits and avoid government surcharges (such as the Medicare levy surcharge).

Requiring the reporting of fringe benefits enhances the overall fairness of the taxation and welfare systems, by enabling the value of fringe benefits to be considered in income tests used to determine entitlements to certain income tested government benefits and liability to taxes, surcharges and income tested obligations.

This minimises the scope for employees with access to salary packaging arrangements to avoid obligations and obtain government benefits to which they would not otherwise be entitled on the basis of their total level of remuneration. Consequently, the measures improve the equity of the taxation and social security systems.

The reportable amount is not included in the employee’s assessable income and the employee does not pay income tax on that amount. Consequently, the reporting of fringe benefits does not result in ‘double taxation’.

The reportable amount is included in income tests related to:

- Medicare levy surcharge;
- deductions for personal superannuation contributions;
- Government Super Co-contribution; and
- the tax offset for eligible spouse superannuation contributions.

The reportable fringe benefits amount is also taken into account in determining child support obligations and calculating Higher Education Contribution Scheme (HECS) and Higher Education Loan Programme (HELP) repayments.

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23. See Chapter 1, Commonwealth of Australia 1998, *Tax Reform, not a new tax a new tax system,* August 1998, Commonwealth of Australia, Canberra.

Example of reportable fringe benefits amount on payment summary:

An employee has a HELP debt and a taxable income of $36,000 in 2005-06, with a total reportable fringe benefits amount of $4,000.

The HELP repayment is calculated by multiplying the relevant HELP repayment rate of 4 per cent by the sum of the employee's taxable income and reportable fringe benefit amount.

The employee would therefore have to repay an amount of $1,600 (ie, 4% x $40,000).

The reportable fringe benefits amount is also taken into account in the *A New Tax System (Family Assistance) Act 1999 and Social Security Act 1991* income tests for the entitlement to Family Tax Benefit, Child Care Benefit and parental income test for the Youth Allowance. These income tests include the non grossed-up value of the fringe benefits, which is calculated by multiplying the reportable fringe benefits total by 0.515 (1-FBT rate). This non 'grossed up' amount represents the cash or purchasing power value of the employee's fringe benefits.

Some benefits are excluded from the fringe benefits reporting requirement. Benefits which are exempt from FBT are excluded from the fringe benefits reporting requirement. In addition, certain other benefits are excluded such as defined meal entertainment and car parking fringe benefits. The compliance costs that would be associated with reporting these excluded benefits on individuals' payment summaries outweigh the equity considerations in reporting these fringe benefits.

TERMS OF REFERENCE

The Joint Committee of Public Accounts and Audit resolves to inquire into and report on the following:

PART A

The administration by the Australian Taxation Office (ATO) of the *Income Tax Assessment Act 1936* and *1997* (including the amendments contained in the *Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005)* with particular reference to compliance and the rulings regime, including the following:

- the impact of the interaction between self-assessment and complex legislation and rulings;
- the application of common standards of practice by the ATO across Australia;
- the level and application of penalties, and the application and rate of the General Interest Charge and Shortfall Interest Charge; and
- the operation and administration of the Pay As You Go (PAYG) system.

PART B

The Committee shall examine the application of the fringe benefit tax regime, including any "double taxation" consequences arising from the intersection of fringe benefits tax and family tax benefits.

The coherent principles approach to tax law design

Greg Pinder[24]

The Government is developing a new principles-based approach to the design of tax law, known as the *coherent principles approach*.

The approach is being phased in gradually, for amendments of existing provisions in the law that do not require extensive rewriting and for some new stand-alone measures.

This article explains how the coherent principles approach translates intended tax policy outcomes into principled rules in the tax law, and argues that the resulting law can be more certain, less complex and more flexible than the current black-letter tax law approach.

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24. The author is from Tax Design Division, the Australian Government Treasury. This article has benefited from comments and suggestions provided by many people but, in particular, by Brenda Berkeley, Chris Leggett, Paul McCullough and Tom Reid. The views in this article are those of the author and not necessarily those of the Australian Government Treasury.

Introduction

Australia's tax laws are complex.[25] There are many good reasons why that is the case. In particular, tax laws deal with a complex commercial world and play many roles apart from raising revenue to pay for Government services: they are also used to advance other socially desirable goals such as providing financial benefits to particular sectors of society (for example, families with children and the aged) and incentives to engage in particular economic activities (for example, research and development).

However, another factor contributing to the current complexity of our tax laws has been the manner in which they have been developed and written.

Addressing this issue in its plan for a new tax system in 1998, the Government made a commitment to bring the tax laws together in a code that would use general principles in preference to long and detailed provisions.[26]

In pursuing that commitment, Treasury, together with the Office of Parliamentary Counsel (OPC) and the Australian Taxation Office (ATO), is developing a new approach to designing and drafting Australian tax laws that is called the *coherent principles approach*.

As foreshadowed in the Review of Aspects of Income Tax Self Assessment,[27] the coherent principles approach is being used to draft as many new tax measures as possible. The coherent principles approach will not, however, be suited to all new measures. It may not, for example, be appropriate for those measures that simply amend existing black-letter structures in the law, especially if using it would require extensive rewriting of the existing law.

The coherent principles approach has been used on three new measures to date: to allow consolidated groups to be headed by corporate unit trusts and public trading trusts (see Subdivision 713-C of the *Income Tax Assessment Act 1997*); to divide the income tax position of life insurance companies into one position for their superannuation business and one for their other business (see Subdivision 320-D of that Act); and to allow employees with shares under an employee share scheme to continue to defer being taxed on the discount they got when the shares were issued, when their employer is taken over or restructures (see Subdivision DA of Division 13A of Part III of the *Income Tax Assessment Act 1936*).

This article outlines the coherent principles approach, using the employee share scheme amendments to illustrate elements of the approach. It ends with an assessment of the benefits of the approach over black-letter drafting styles.

The coherent principles approach

Principles-based approaches to drafting Australia's laws, including our tax laws, are not new. Even where laws are drafted using a black-letter drafting style, drafters, and those instructing the drafters, refer to the principles underlying those laws in deciding what the legislation needs to do.

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25. For example, in *Hepples v Commissioner of Taxation* (1992) 173 CLR 492, Deane J said '[S]uccessive administrations have allowed the Act to become a legislative jungle in which even the non-specialist lawyer and accountant are likely to lose their way in the search to identify the provisions relevant to a particular case….' , p. 511.

26. *Tax reform: not a new tax, a new tax system*, Commonwealth of Australia; 1998; p. 149.

27. See pages 88 to 89 of the *Review of Aspects of Income Tax Self Assessment Discussion Paper* released in March 2004 and pages 65 to 67 of the *Report on Aspects of Income Tax Self Assessment* released in December 2004.

But the tax laws have tended not to articulate those principles, instead emphasising the technical model that is developed to implement them. The technical model is the set of conceptual building blocks and rules that creates rights and imposes obligations. It is a necessary part of a law but need not exist independently of the principles it serves. A source of the complexity of our existing tax laws comes from making the technical model an end in itself. This over-reliance on the technical model characterises the black-letter approach that has been commonly used to draft tax laws for several decades.

The aim of the coherent principles approach, on the other hand, is to emphasise the principles (and, in particular, to specify them in the law) and to place less reliance on the technical model.

What is a coherent principle?

A principle is a statement about an intended outcome in a general field. Some commentators have focused on the degree of specificity as the quality that separates a principle from the rules that usually make up black-letter law.[28] But a principle is not just a less specific rule; it is a statement about the *essence* of all outcomes intended within its general field. When a principle works, it does so because the essence it captures appeals to readers at other than an abstract intellectual level; it *means* something to readers because it relates to their understanding of the real world.

The coherent principles approach aims to produce law expressed in such principles. A *principle* in this context:

- is an operative legislative rule;
- specifies the outcome, rather than the mechanism that achieves it; and
- expresses the outcome at the highest possible level rather than itemising a list of outcomes for every conceivable case.

The principles can only work together properly (ie can only be *coherent*) when they correctly identify the field in which they are intended to operate, and capture the essence of the intended outcomes in that field in a way that:

- helps the reader make sense and order out of the law; and
- is intuitive or obvious to someone who understands the law's context.

It also helps if the principles are drafted in a plain, non-technical style, avoiding the use of expressions that can only be understood by referring to definitions or other lower level rules.

Turning to the employee share scheme amendments, an example of a coherent principle can be found in subsection 139DQ(1) of the *Income Tax Assessment Act 1936*. It appears in Division 13A of Part III of that Act, which allows employees to defer tax on any discount they get when their employer issues shares to them under an employee share scheme. The deferral lasts for up to 10 years but is cut short if the employee (among other things) disposes of the shares or ceases employment with the company. Before the change in policy reflected in section 139DQ, the deferral was cut short by some company restructures. For example, if the employing company was taken over, and employees swapped their shares in it for shares in another company, they would have disposed of their original shares and so ended the deferral of tax on their discount. This outcome discouraged long-term participation in employee share schemes.

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28. For example, Joseph Raz said 'Rules prescribe relatively specific acts; principles prescribe highly unspecific actions.' in *Legal Principles and the Limits of Law* (1972) 81 Yale LJ 823 p. 838.

To resolve the issue, subsection 139DQ(1) says:

139DQ The effect of 100% takeovers and restructures on employee share schemes

Treating acquisitions as continuations of existing shares etc.

(1) To the extent that:

(a) a taxpayer acquires:

(i) shares in a company (the ***new company***) that can reasonably be regarded as matching shares in another company (the ***old company***) that the taxpayer had acquired under an employee share scheme; or

(ii) rights in a company (the ***new company***) that can reasonably be regarded as matching rights in another company (the ***old company***) that the taxpayer had acquired under an employee share scheme; and

(b) the acquisition occurs in connection with a 100% takeover, or a restructure, of the old company; and

(c) as a result of the takeover or restructure, the taxpayer ceased to hold the shares or rights in the old company;

then, if the conditions in section 139DR are met, the matching shares or rights are treated, for the purposes of this Division, as if they were a continuation of the shares or rights in the old company.

Note: In determining to what extent something can reasonably be regarded as matching shares or rights in the old company, one of the factors to consider is the respective market values of that thing and of those shares or rights.

This subsection treats the replacement shares the employees get as a continuation of their original shares. This means that the actual disposal of the original shares is ignored, so the deferral will continue.

To achieve the same result, a black-letter alternative to subsection 139DQ(1) would have needed rules to:

- itemise which replacement shares and rights were not to trigger a taxing point;
- turn off each of the possible triggers for a taxing point;
- set the time the replacement shares or rights were taken to have been acquired; and
- set the purchase price for the replacement shares or rights.

Most black-letter approaches would have also duplicated these rules for the takeover and demerger cases.

Subsection 139DQ(1) is a principle because it tells you what the intended outcome is — that the original shares should continue despite the takeover — rather than detailing a mechanism to do that or specifying the outcome for each of a long list of takeover situations.

It works because it captures the essence of the intended outcome in a way that intuitively makes sense of the law (by treating the replacement shares as continuations of the original shares).

The principle is also the operative legislative rule. While principles do presently appear in the tax laws, most of them are not operative. Those that appear, for example in guide material in Acts that use the Tax Law Improvement Project[29] drafting style, are not usually operative and so cannot be relied upon to achieve an outcome directly.

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29. The Tax Law Improvement Project was established in 1994 to rewrite the *Income Tax Assessment Act 1936*. Its main product was the *Income Tax Assessment Act 1997*, which employs a number of new drafting features. Several other Acts (for example, the *A New Tax System (Goods and Services Tax) Act 1999*) now use the same style.

The design process under this approach

The coherent principles approach is not simply a drafting style. It is a design approach for developing tax legislation.

This diagram shows the hierarchy of steps in that design approach:

<table>
<tr><td>Policy outcome</td><td rowspan="2">Policy</td></tr>
<tr><td>Policy means</td></tr>
<tr><td>Legislative purpose</td><td rowspan="3">Law</td></tr>
<tr><td>Coherent principle/s</td></tr>
<tr><td>Lower level detail (unfolding)</td></tr>
<tr><td>Interpretation/systems</td><td>Admin</td></tr>
</table>

Policy outcome

The first step in the hierarchy is to articulate the intended policy outcome. This will be a principled statement, at an economic, political or social level, of the outcome the Government intends.

The intended policy outcome of the employee share scheme provisions in Division 13A of Part III of the *Income Tax Assessment Act 1936* is to encourage employee share ownership in order to allow both employees and employers to benefit through aligning their interests and their goals. Employees can benefit directly when their business does well, and employers benefit through a more committed and motivated workforce. The intended policy outcome of the recently enacted amendments (see subsection 139DQ(1) set out above), is to ensure that the Division achieves its intended policy outcome even after a corporate restructure.

Policy means

The next step in the hierarchy is to determine what means to use to achieve the policy outcome (or, in other words, *how* to give effect to the policy outcome). In tax laws, this will usually be a tax vehicle (for example, creating an income tax offset or a deduction, imposing an excise on new goods, or enacting a whole new tax) but is sometimes a non-tax vehicle, such as an appropriation.

The means chosen for the amendments to the employee share scheme provisions was to stop a taxing point being triggered when shares were disposed of as a temporary incident of a corporate restructure, by ignoring the disposal.

Legislative purpose (objects clause)

The next step is the first of the legislative steps in the hierarchy. It is to identify the intended legislative purpose, which will usually be expressed in the objects clause in the law. Not every legislative measure will have an objects clause, but new measures, and any significant new module added to an existing measure, will usually contain one.

The objects clause explains how the legislation will implement the desired policy outcome, using the chosen policy means. While the policy outcome and policy means are usually framed in economic, social or political terms, the objects clause needs to reflect legal principles and the legal framework underlying the tax laws. At its most effective, an objects clause will explain both the broader purpose or policy intent behind the measure (the *why*) and the way the provisions achieve that broader purpose (the *how*).

Coherent principle(s)

The next step is to develop the coherent principles that will be the operative rules for implementing the legislative purpose in the law. Treasury develops these principles by examining the possible situations in which the intended policy outcome is expected to apply and the results that are intended in those cases. Patterns that emerge from that examination are refined into a proposition about what the general result should be across the range of likely situations, what the general characteristics of those situations are, and how that result and those characteristics can be expressed as principles. That proposition, and the principles it advances, are tested and refined by applying them to a range of different scenarios. Following this initial testing, the proposition is developed as a series of instructions to the OPC to prepare legislation.

At various stages of its development, the proposition and resulting principles will be further refined by consultations with the ATO, the tax profession and other interested parties.

The principles will be structured to flow logically in the order in which they interact. For small measures, there might be only one principle. For other measures, there will be a hierarchy of principles, and at times a collection of principles with no discernable hierarchy, that work together to achieve the legislative purpose.

When principles are grafted onto an area of the law that is expressed in black-letter terms, the 'meshing' of the new drafting approach and the existing law will be critical. In some such cases, practicalities may dictate that amending the existing framework in a black-letter style would be more appropriate than adding the amendments in a principled form. But, if the amendments are added as principles, particular attention has to be paid to providing a bridge between the principled rules of the new measure and the black-letter rules of the existing law with which it interacts.

For the employee share scheme amendments, the main principles are in Subdivision DA of Division 13A of Part III of the *Income Tax Assessment Act 1936*, and in subsection 139DQ(1) in particular (see above). Division 13A is otherwise written in a black-letter form.

The new Subdivision, written using the coherent principles approach, has been inserted into the middle of Division 13A, thus demonstrating that principled law can be used to amend existing black-letter provisions. The bridge between the new principles and the existing black-letter law that makes that possible in this case is that the principles directly affect an element of the existing black-letter structure: the trigger events that bring the tax deferral to an end.

An alternative, in some cases, will be to rewrite an existing area of black-letter law in a principled form incorporating the amendments. However, rewriting an area would only be appropriate when a thorough examination suggested that it was the most effective approach. For instance, if wholesale amendments were proposed to an area, it may be more practical to rewrite it in a principled form.

Carve-outs and add-ons

Sometimes the principle that seems the most natural or intuitive will encompass more situations than the policy outcome is intended to cover. That can be addressed by amending the principle to bring its scope within the intended bounds. But, often a better approach will be to retain the broader principle and identify carve-outs from its operation.

The reason for preferring the alternative approach is that the broader principle expresses the intended idea in a way that will make more sense to readers than modifying the principle. This happens when a modified principle would compromise the reader's intuitive grasp of what the law is doing and so actually reduce reader comprehension.

At other times the natural or intuitive principle will not cover a situation the amendments are intended to cover. The preferred course will usually be to identify the add-on to, or extension of, the principle, rather than to change the principle itself. The reasons are the same as those, outlined above, for using a carve-out.

An instance of an add-on can be found in subsection 139CA(4) of the *Income Tax Assessment Act 1936*, added as part of the employee share scheme amendments. Paragraph 139CA(2)(b) says that the deferral of tax on the discount an employee received on a share issued under an employee share scheme comes to an end when any restriction on disposing of the share stops applying. This can be a problem in a takeover case because a takeover offer usually does not offer employees replacement shares that maintain existing restrictions on disposal if the offer to other shareholders is replacement shares without restrictions. So, even if the continuation principle applied, tax on the deferral could be triggered because restrictions on disposal of the original shares would not apply to the replacement shares. To address that issue, subsection 139CA(4) says:

> (4) Paragraph (2)(b) does not apply in relation to a share that, because of section 139DQ, is treated, for the purposes of this Division, as if it were a continuation of a share acquired under an employee share scheme.

That subsection removes the taxing point that would otherwise arise when employee shares with restrictions on disposal are replaced with shares without restrictions during a takeover or other corporate restructure. It is not a modification of the 'continuation' principle, but an add-on to the law. Had the principle instead been modified, its intuitiveness might have been compromised and its effectiveness more limited.

Lower level detail ('unfolding')

A well-written principle will describe the intended outcome clearly enough to produce workable results. However, there can still be cases where it is useful to explain the principle's application to particular situations or where there may be a sufficient doubt or ambiguity about its meaning or scope to warrant clarification. The process of explanation and clarification is called 'unfolding' the principle.

To identify appropriate cases for unfolding, the principles are tested against known situations to ensure that the intended outcome is clear in those cases. Where it is not, unfolding will be necessary.

Unfolding may occur in the primary law itself by including a note, an example or further provisions in the Act. Sometimes unfolding will be done in subordinate legislation (such as regulations). More commonly, unfolding will occur in the explanatory memorandum that accompanies a Bill into Parliament.

An example of unfolding in the law can be seen in the note at the end of subsection 139DQ(1), quoted above. It does not change the law; it merely makes it clear that equivalence of the market values of the original and replacement shares was one of the factors the Parliament intended would be taken into account in deciding whether the replacement shares 'match' the original shares.

As a general rule, too much reliance on unfolding in the primary law or in subordinate legislation, particularly in obvious situations, could diminish the benefits of using the coherent principles approach: it could add to the length and complexity of the law, and could even cast doubt on the intended interpretation of the principles it is explaining.

Administration — Interpretation/systems

After law that uses the coherent principles approach is enacted, experience may suggest that further guidance is necessary in specific situations. In such cases, as now, the Commissioner of Taxation will publish rulings and other interpretive material to explain how the law applies to those situations. That process is also part of unfolding the principles.

But it does not mean the ATO is inventing the law. In those cases, the Commissioner is explaining how he thinks the principles apply, not creating the principles themselves. The principles are enacted by Parliament and, like any legislation, impose limits on what interpretations can be drawn from them. In the final analysis, the judiciary will adjudicate on whether the Commissioner's interpretations are correct, in the same way as it already rules on the correctness of his interpretations of black-letter legislation.

Key issues

Coherent principles and certainty

One of the concerns about using a principle-based legislative approach is whether it will produce law that is less certain than black-letter law is thought to be.

However, black-letter law is itself far from certain. Language is inherently ambiguous and the more complex the ideas it expresses, the greater the chance an ambiguity will arise. The problem is exacerbated with law as lengthy as the income tax law, because its sheer length makes it difficult to know what things it covers, and how it covers them.

Even recognising these inherent problems, most people's natural assumption is that, if the law deals specifically with every issue, it must be more certain than a law that covers the issues in a principle-based way.

However, our tax law does not, and probably cannot, deal specifically with every issue. Even if it could, it would have to be so long that it would take an unacceptable amount of time to reach a definitive answer to all but the simplest questions.

Since our tax laws do not deal specifically with every issue, the actual question becomes 'how can there be certainty about cases that the law does not deal with expressly?'

In those cases, a black-letter approach is actually highly uncertain because there is no way to know how, in principle, to derive an answer. The black-letter approach typically has to address such uncertainty by requiring the law to be amended to cover each new case as it emerges.

An illustration of that process was the growth in the number of capital allowance regimes in the income tax law since 1936. Under the income tax law, capital expenses are not normally deductible against income, so a special rule is needed when such deductions are to be allowed. An initial regime in the *Income Tax Assessment Act 1936* allowing deductions for 'plant' depreciation was augmented over the next 60 years by similar regimes for depreciating buildings, for writing off investments in research and development, for writing down film copyrights, for depreciating telephone connections to rural land, for depreciating land care improvements, and so on for over 30 separate regimes.[30] This amendment process, which is usually necessary for black-letter law, may deal with the problem for that instance but does not do so for any future instances, so their treatment remains uncertain.

The approach of principle-based law is very different. It aims to deal with issues at a general, or thematic, level and only descends to detail when there is something specific about a particular case that requires separate attention. There is less room to argue that each new situation can only be dealt with properly by a

30. The number of capital allowance regimes was greatly reduced with the enactment of the *New Business Tax System (Capital Allowances) Act 2001*, which replaced most of the separate capital allowances with a generic treatment (see Division 40 of the *Income Tax Assessment Act 1997*).

new specific rule because the principle is intended to deal with *all* relevant situations. Even as new situations emerge, a properly constructed principle provides a framework for working out how to deal with them.

In the capital allowance cases, such a principle might have asked whether a non-private expense produced benefits beyond the year in which it was incurred and, if so, apportioned a deduction for it between the years in which it produced those benefits.[31] In that case there would be no need for a new regime each time another situation emerged.

Coherent principles and stability

If tax law does not cover everything it needs to cover, covers something in an inappropriate or ambiguous way, or has been interpreted in an unintended way, it usually needs to be amended.

The continuing need for amendment ties up the resources of the Parliament, which must consider and vote on any proposed law; of the ATO, which must administer it; of tax practitioners, who must keep abreast of the changes; and of taxpayers, who must adjust their affairs accordingly.

Principle-based provisions, on the other hand, will describe what the law does rather than how it does it. That can give the ATO the flexibility to design administrative systems that minimise the compliance burdens on taxpayers and tax practitioners.

It can also leave the law flexible enough to apply to newly emerging arrangements, commercial and otherwise, that the legislature could not have specifically contemplated when it enacted the law, but are nevertheless within the scope of its policy.

Currently, newly emerging arrangements can create problems with the administration, interpretation or scope of the law, that have to be fixed legislatively because the law does not cover them at all or covers them in an unexpected way. Legislative amendments can take a long time. In the interim, the problem continues. Using principles to design and draft tax law can provide the flexibility for practitioners and the ATO to improve administration of the law, and to clarify its interpretation, without that delay. In particular, practitioners and taxpayers can interpret and apply the principles to their own situations without having to wait for either a legislative amendment or an ATO ruling to appear.

Draft law that makes it easier to understand the key concepts may also provide a better basis for consultation. Law prepared using the coherent principles approach could make it easier to understand how proposed amendments fit with existing law. This could reduce the preparation time practitioners need to make useful contributions during consultation, and so increase both the number of practitioners able to contribute in a consultation process, and the effectiveness of their contributions. That, in turn, may lead to better law.

If law is conceptually clearer, is interpreted more frequently in accordance with Parliament's intention, adapts to changes in the commercial environment and undergoes more effective consultation, there will be less need to amend it to preserve its original intention or keep it up-to-date. Law that changes less often is more stable law, and that is of considerable advantage to taxpayers and practitioners.

How does the coherent principles approach help with complexity?

The primary goal of the current black-letter approach to tax law is to realise an effective technical model, so that the law works. The effective communication of that technical model to readers, while important, has

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31. I am indebted to Professor Rick Krever for this suggestion.

been a secondary consideration. But, even if communication had been the primary focus, complexity would still have been a problem because it is an inherent result of trying to write a rule for each situation.

The coherent principles approach, in contrast, may provide at least a partial solution to the issue of complexity. It aims to explain the law's intended outcomes, not to detail the law's application in a variety of different situations. Although that does not reduce the number of issues the law has to cover, it does synthesise into a few principles what in a black-letter version could be several ideas and many rules. This can greatly reduce the number of ideas in the law and the interactions between those ideas.

Perhaps more significantly, presenting the ideas as principles can help readers to organise their thinking about what the law is doing. Having fewer ideas makes a better structure possible, especially if those ideas map onto the reader's existing understanding of the world.

Those two things — fewer ideas to wrestle with and a more naturally grasped organisation of the ideas that are used — can mean that for most readers, law designed and written under the coherent principles approach may be both less complex and more comprehensible than black-letter law.

Over time, black-letter law could be expected to require more amendments than would a version using principles. This is mainly because black-letter law aims to cover each relevant situation specifically and new situations do emerge from time to time. Those extra amendments in the black-letter version mean that it will usually come to have more ideas and a less well-organised structure than its coherent principles equivalent. Therefore, over time, readers will always find a black-letter version more complex to deal with.

It is true that some details traditionally provided in the primary law may migrate to subordinate law (for example, regulations) or to explanatory material (for example, the explanatory memorandum or ATO rulings). But that qualification should not lead to the conclusion that law using the coherent principles approach will be just as detailed and as complex as black-letter law, only with the detail transposed to different places. Moving details into other material is a possibility to be aware of and guard against, not a likelihood.

Explanatory memoranda and rulings already contain a lot of detail and should not grow simply because the primary law is no longer as detailed. In any case, an advantage of moving the details on a particular topic to secondary materials such as an ATO ruling is that they only need to be read in cases where that topic was in issue. If the detail is in the law, you have to read all of it to be sure you have read everything relevant to your current case.

Ultimately, however, the aim of the coherent principles approach is to avoid the need for detail in the first place, not to move it somewhere else. Achieving that outcome may involve a change in culture on the part of both the ATO and practitioners. If the ATO were to be deluged by demands for rulings on obvious applications of clear principles, the potential benefits of the approach would be unlikely to be realised.

The coherent principles approach and the judiciary

The judiciary's approach to interpretation of principle-based law will, of course, be important to its success.

The inherent ambiguity of language can make interpretation of law difficult whatever style of drafting is chosen. But this problem can be worse with black-letter law, where the absence of a stated principle makes it harder to discern the purpose of the law and so increases the chance that the interpretive task becomes an abstract exercise rather than a real attempt to understand Parliament's intention. This is exacerbated if black-letter law is silent about a situation, such as a commercial development not contemplated when the law was drafted. In those cases, the courts can be left with no means of knowing what Parliament wanted to happen.

The judiciary has, on occasion, expressed a desire for the law to contain statements of its underlying purpose so that the courts can more frequently interpret it in accordance with Parliament's intention. For instance, in November 1996, the then President of the New Zealand Court of Appeal, Sir Ivor Richardson, said:[32]

> Now the standard judicial approach to the interpretation of all legislation is to consider its purpose, its scheme and its language. The judges have to gain an overall understanding of the legislation they are interpreting. If the legislation is just a morass of detail, the judges will try to work out the scheme and interpret for themselves and they will try to take a big picture approach. So clear statements of policy intention and of underlying principles and criteria in settling the rules for determining tax liability will assist the courts and all uses (sic) of legislation.

The coherent principles approach may make it possible to deliver on that sort of judicial preference.

Next steps

Using coherent principles in tax laws is being phased in gradually. The effectiveness of the approach can only really be tested and judged on actual legislative measures. If the benefits of the approach are to be fully realised, the results of those measures have to be properly evaluated and the lessons from them identified and applied to further measures.

Measures that are already in the pipeline should not be delayed unnecessarily by imposing a principle-based approach on them, particularly where those measures simply amend existing black-letter structures in the law. Attempting to redraft entire structures on a principled basis would add unacceptable delays to achieving existing legislative commitments.

The measures being chosen to test the new approach should be those where it offers the greatest benefits. These are typically measures that are self-contained rather than those that modify existing black-letter law,[33] and those that can be developed on a principled basis from their earliest stages.

Each measure that uses the approach is evaluated by Government and, of course, by the wider tax profession. Consultation on the measures that have used the approach, even though its use has been limited so far, has been most encouraging.[34]

Conclusion

The coherent principles approach is not a panacea for all the ills, real or imagined, of Australia's tax laws. But it does hold promise as *one* means for addressing concerns about the sustainability of our tax laws.

In particular, principle-based law can be conceptually clearer. It avoids the necessity for the details so prevalent in black-letter law, by synthesising them into principles that produce the outcomes Parliament

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32. The conference proceedings of the tax drafting conference; hosted by the Inland Revenue Department of New Zealand; Auckland; 27-29 November 1996; pp. 29-30.

33. That said, it can still be used in some of those cases. The employee share scheme amendments are an instance of such a case.

34. As noted at the beginning of this article, the coherent principles approach has been used to allow consolidated groups to be headed by corporate unit trusts and public trading trusts; to divide the income tax position of life insurance companies into one position for their superannuation business and one for their other business; and to allow employees with shares under an employee share scheme to continue to defer being taxed on the discount they got when the shares were issued, when their employer is taken over or restructures.

intends. Principles also tend to fit together into better structures. Clear, operative statements of Parliament's intention and better, more intuitive structures should usually combine to produce law that is less complex than black-letter law.

The approach also offers the advantages of flexibility and robustness. Law that uses the approach is likely to adapt better to an evolving world without the need for constant amendments to keep it up to date or to ensure that it applies to every intended situation. If it needs fewer amendments, it will tend to be stable.

Finally, the approach can highlight complexities in implementing policy choices, which can otherwise be hidden in a legislative design that focuses on a technical model. With the additional complexity from particular options for implementing a policy being more obvious, this can better inform policy developers about how their decisions affect equity, efficiency and simplicity and could, itself, lead to less complex policy implementation options. That can only be positive for the wellbeing of Australians.

NO.022

REFORMS TO COMMUNITY CONSULTATION PROCESSES AND AGENCY ACCOUNTABILITIES IN TAX DESIGN

I am today announcing changes designed to enhance consultation on tax issues, and a change in the accountability for tax legislation design.

In making these changes the Government has taken into account recommendations of its advisory Board of Taxation. As a result of these changes, responsibility for the development of tax legislation and regulations will be transferred from the Australian Taxation Office (ATO) to the Department of the Treasury.

Community Consultation

Consistent with its Charter to advise me on processes for community consultation in the development of tax laws, the Board of Taxation last year commenced an evaluation of how community consultation could be made more effective. After extensive consideration, the Board provided a report to the Government on 13 March 2002.

The Government has decided to largely adopt the Board's recommendations dealing with consultation. The Board itself recognised that processes of community consultation cannot be mandated for each and every change to the tax system, particularly in cases where there is commercial or market sensitivity, or revenue or tax avoidance sensitivity. Also the flexibility government requires in managing the timing of policy change will at times determine the extent and form of consultation that can be undertaken.

However, the Government has pursued a policy of widespread consultation on Business Tax Reform. Including in areas such as debt/equity distinctions, thin capitalisation, capital allowances and consolidation where it found it particularly useful.

In continuing this process, during the development of future tax measures the Government will be working from an in-principle position of:

- consulting on all substantive tax legislation initiatives, except in circumstances as outlined above;
- 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 programme of tax legislation; and
- providing better feedback to external participants in consultation processes.

The Government also recognises that the consultation process, and the legislation that results from it, should be reviewed periodically to ensure that the expectations of government and external participants are being appropriately managed. I have asked the Board of Taxation to undertake an ongoing role in monitoring the processes of consultation, and have agreed to the Board conducting post-implementation reviews of major pieces of tax legislation to ensure that government policy intent has been effectively translated consequent upon consultations undertaken. Such reviews could be in addition to, or complement, reviews undertaken within the Treasury and ATO.

Legislation Design Role

From 1 July 2002, responsibility for the design of tax laws and regulations will be relocated from the ATO to the Department of the Treasury. Treasury currently has responsibility for providing tax policy advice. The transfer will bring the accountability for tax policy and legislative design more directly under Ministerial control. The change in responsibility will also reinforce the need for whole-of-Government perspectives to be taken into account in tax law design processes.

The new arrangements will see policy and legislative development brought together within the Department of the Treasury, providing maximum opportunity for legislation to be developed in a manner consistent with the policy intent set by Government. Working arrangements between the ATO and the Treasury will ensure that the administrative, compliance and interpretive experience of the ATO fully contributes to policy and legislation processes.

I note the ATO's considerable contribution to delivering the Government's tax reform agenda and the new arrangements will provide the ATO with the opportunity to focus even more on its core business of tax administration.

I have asked the Secretary to the Treasury and the Commissioner of Taxation, in consultation with the Office of Parliamentary Counsel as appropriate, to develop arrangements that will give effect to these decisions. As the Board's report emphasises as one of its underlying recommendations, any new working arrangements between the agencies in developing future tax measures should seek to build on progress to date in ensuring a high level of integration across the policy, legislative and administrative aspects of change.

The transfer of the legislation function to the Treasury will take effect from 1 July 2002. Details to give effect to the decisions on community consultation will be implemented over the course of this year in the context of the new structural arrangements.

I take this opportunity to thank the Board of Taxation for its considerable work in preparing what is a very valuable report on community consultation processes. The report will be available on the Board's website at http:/www.taxboard.gov.au.

CANBERRA, 2 May 2002

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ATTACHMENT D

Australian Government

The Treasury

Report on Aspects of Income Tax Self Assessment

August 2004

Progress with RoSA administrative recommendations

Completed measures

2.4	All aspects of a public ruling that are capable of binding the Tax Office (including for example, worked examples) should be collected together and clearly labelled as binding. In public rulings, alternative views need not be addressed if these are likely to confuse the reader. Where competing views are raised in consultation and not addressed in the ruling, the Tax Office should provide feedback directly to people contributing those views.
2.5	The Tax Office should take all steps necessary to ensure that an appropriate instruction or product replaces any public ruling as soon as practicable after it is withdrawn.
2.10	The Tax Office should update and consolidate its guidance on the way it interprets and administers Part IVA of the Income Tax Assessment Act 1936 into a single comprehensive Ruling or Practice Statement.
2.12	In PBRs where Part IVA could apply having regard to the facts provided in the PBR application, the Tax Office should indicate whether Part IVA has been considered. This indication may be by way of substantive comment on Part IVA's application, or by disclaimer. Where Part IVA has been substantively addressed and there has been a full and true disclosure of all material facts, the Tax Office should be prevented from reopening an assessment. Taxpayers can advise in their PBR application that Part IVA need not be considered
2.16	The Tax Office should refrain from ruling on issues not directly raised in PBR applications without the taxpayer's agreement. In cases where other aspects of the tax law could impact on the accuracy of the Tax Office's response, the response should contain appropriate caveats or statements that the advice is issued subject to certain assumptions or limitations.
2.24	The Tax Office should explore ways to record oral advice as suggested by the Ombudsman.
4.1	The Tax Office should revise its rulings on reasonable care and reasonably arguable position, with a view to providing clearer guidance and further examples as to what conduct will, or will not, attract a penalty.
4.6	The Tax Office should further explain in a Ruling or Practice Statement what understatements of liability it regards as immaterial for tax shortfall purposes.
5.5	When notifying taxpayers of a shortfall interest liability, the Tax Office should advise taxpayers on how to seek remission.

Measures in progress

2.8	Wherever possible, Tax Office general written advice, including public rulings, should be written in plain language, with a minimum of qualifying statements so that it is accessible to the general public.
2.9	The Tax Office should continue to replace large 'mail-outs' to tax agents with more targeted electronic contacts, and a 'whole-of-agency' view should be applied to volumes of information distributed.
2.14	The Tax Office should enhance its published performance reporting on PBRs to distinguish response times to individuals and very small business from those for larger businesses, and separately report agent and non-agent case statistics.
2.18	The Tax Office should continue to modify its PBR application forms and processes to reduce the need for taxpayers to conform to complex procedures, or for the Tax Office to seek additional information from taxpayers.
2.20	PBRs should contain an answer written in plain language, with a minimum of qualifying statements. In addition to the plain explanation, the Tax Office may provide a more detailed or technical statement of its position, where it is necessary to do so.
2.25	The Tax Office should work with tax agents to identify improved ways or new systems to assist tax agents with responsive and timely advice on low risk enquiries.
3.10	The Tax Office should extend its practice of entering into pre-assessment agreements to a wider range of transactions or circumstances, wherever it is cost effective to do so.
4.4	The Tax Office should explain more fully, for example in a Ruling or Practice Statement, how it exercises the discretion to remit tax shortfall penalties, including in Part IVA cases.