

Chapter 3

A taxing time: the development of the Resources Super Profits Tax, the Mineral Resources Rent Tax and expanded Petroleum Resources Rent Tax

Introduction

3.1 This Chapter provides an assessment of how the deeply flawed policy development processes for the government's RSPT and its successors, the proposed MRRT and expanded PPRT, contributed to the development of a bad tax.

3.2 The policy development process for the MRRT and expanded PPRT was characterised by exclusive and secretive negotiations by the government with a small, select group of large multi-national, multi-commodity and multi-project mining companies. All the competitors of the big three miners were excluded from the process. The government also excluded the states and territories from the 'mining tax design process' despite the serious encroachment into the own-source revenue sphere of state and territory governments. The exclusion of state and territory governments was in direct breach of the explicit recommendations made by the Henry Tax Review, which had advised the government to negotiate the implications of a resources rent tax with state and territory governments.¹

3.3 Not only was the mining industry (with the exception of the big three), excluded from the mining tax negotiations, they were also refused access by the Gillard Government to key information about the workings and implications of the proposed MRRT and expanded PPRT. To this day the government has refused to make public the mining tax revenue assumptions it has used. Given both the Western Australia and Queensland government publish that same information in their budget papers, that ongoing lack of transparency appears unacceptable. Particularly in the context of a requirement imposed by the government that any changes which may flow from subsequent processes either through the Policy Transition Group or in the context of the current 'draft exposure draft legislation' have to be revenue neutral.

3.4 Repeated calls by mining industry peak bodies like the Association of Mining and Exploration Companies and business groups for a more inclusive consultative process were ignored:

Industry is extremely disappointed that the first opportunity it will have to formally comment on the MRRT is over a period of just one month. The

1 Recommendation 48 of the Henry Tax Review explicitly stated: 'The Australian and State governments should negotiate an appropriate allocation of the revenues and risks from the resource rent tax'. Source: *Australia's Future Tax System – Report to the Treasurer*, December 2009, Part One, Recommendation 48, p. 89.

Government has also ignored industry concerns by directing the PTG to consult solely on MRRT design and implementation rather than on the merits of the tax itself. There has been little debate on the merits of rent taxes and their suitability to mining.²

...the PTG's consultation timetable and the reporting timeframe back to government will provide to be quite challenging and therefore will present some risks to the thoroughness of the policy development process... the [Institute of Chartered Accountants in Australia] urges the PTG to consider carefully whether an extended reporting timeframe back to government is necessary in light of the circumstances, and if so, to alert the government and external stakeholders to this as soon as possible. Clearly, it is in the national interest to ensure we all get this new regime right, first time around.³

3.5 To this day state and territory governments continue to be ignored by the Gillard Government when requesting information about the interaction between the proposed MRRT, State and Territory royalties and GST sharing arrangements. Repeated correspondence from the Western Australian Government for example over a period of a whole year remained unanswered:

Senator CORMANN: ...in the statement that Mr Ray has just made, you listed a series of pieces of correspondence from the state governments to the Commonwealth, but you haven't listed any responses from the Commonwealth to the state governments in response to those letters.

Mr Ray: There are none on our files. I say that carefully because one of the pieces of correspondence that is on our files is a letter to the Prime Minister. We do not know whether the Prime Minister replied to that letter.

Senator CORMANN: Sure, but successive correspondence from the state government at a Treasury level—that is, from WA Treasurer Buswell on 18 March [2010], from the Under Treasurer on 11 May [2010], from the Under Treasurer again on 16 November [2010]. Treasury or the federal government has not responded to one of those letters—

Mr Ray: Correct.

Senator CORMANN: which raise serious concerns about the impact of the mining tax on royalty arrangements and the interaction with GST sharing arrangements. You said 'correct' before.

Mr Ray: It is correct that there is no reply to those pieces of correspondence. That is correct.⁴

2 Chamber of Commerce and Industry Western Australia, *Submission to the Policy Transition Group*, October 2010, p. 5.

3 Institute of Chartered Accountants in Australia, *Submission to the Policy Transition Group*, 28 October 2010, p. 4.

4 Senator Mathias Cormann and Mr Nigel Ray, Executive Director, Department of the Treasury, *Estimates transcript of evidence*, 1 June 2011, p. 9.

3.6 The discussion continued:

Senator CORMANN:... .There are five letters from the state government in Western Australia—18 March, 11 May, 16 November, the letter from the Treasurer on 18 May 2011 and there was a submission to the PTG. Not one of them has been responded to by the Commonwealth government. Yet the Queensland Treasurer wrote a letter on 9 February, which was received on the 11th, and within less than a week he gets a response from the Commonwealth. Why, with respect to the letters that were addressed to Treasury by the Under Treasurer from WA, did Treasury not once respond to any of those letters where the state government of Western Australia raised serious concerns about the implications of the mining tax for royalty arrangements and the introduction of GST sharing arrangements? Why is there not one single response to one of those letters?

Mr Ray: Because, Senator, we did not think we were in a position to reply.

Senator CORMANN: Because you did not think you were in a position to reply? Why is that?

Mr Ray: Because those letters were seeking assurances that we could not give.

Senator CORMANN: It was actually not seeking assurances; it was seeking confirmation of assurances that, according to the state government, had been given before.⁵

3.7 The committee is disappointed that in pressing ahead first with the RSPT and then the MRRT and expanded PRRT the Rudd/Gillard Governments both missed the opportunity to pursue genuine tax reform through an open, transparent and inclusive process.

3.8 Both the consultation processes around the RSPT (where it was non-existent), as well as for the MRRT and expanded PRRT were deeply flawed. This inevitably led to a deeply flawed mining tax design. Where the government had promised a simpler, fairer tax system as a result of the Henry Tax Review the new proposed mining tax arrangements would be more complex and less fair. The tax designed by the government with the big three miners is not competitively neutral and does not adequately take the implications for State and Territory governments own-source revenue into account.

3.9 The final MRRT/expanded PRRT design is far removed from the original policy intentions promoted by the Henry Tax Review when recommending its resource rent tax proposal. The key objective promoted by the Henry Tax Review was to remove the supposed distortions from royalties on production for investment and production decisions. Under the Gillard Government's version of the resources rent tax all iron ore and coal projects would continue to pay royalties. Only those projects

5 Senator Mathias Cormann and Mr Nigel Ray, Executive Director, Department of the Treasury, *Estimates Transcript of Evidence*, 1 June 2011, p. 40.

that are liable to pay more MRRT than royalties paid would ultimately get a full refund. Those projects not subject to the MRRT/expanded PRRT (which presumably are those exposed to 'distortions in investment and production decisions' talked about by the Henry Tax Review) will not have those royalties refunded. Those projects in the so-called 'decline phase' will never get a royalty refund. Yet all those projects would now have to go through the additional compliance and administrative burdens of having to prove that they remain outside the scope of the MRRT/expanded PRRT.

3.10 The government's failed taxation reform efforts resulted directly from the government's flawed response to the Henry tax review. In effect, failure was "baked in the cake". The government failed to consult appropriately with a wide range of stakeholders (including state and territory governments), the government underestimated the complexities of running a resource rent tax and royalty system in parallel, the government sidelined Treasury officials during the negotiations with BHP Billiton, Rio Tinto and Xstrata, the government refused to release key assumptions, the government demonstrated a lack of good faith by presenting much of the details of the tax as a "fait accompli" and the government's modifications to create the MRRT and expanded PRRT was "policy by deal" rather than policy developed through extensive consultation and detailed consideration. In doing so, the government completely defied its own best practice regulation guidelines with predictable results.

3.11 This chapter charts the flawed taxation development process before chapters 4 and 5 consider the impact of these poorly designed taxes on investment and jobs in the mining industry and on states like Western Australia, Queensland and New South Wales where most of the MRRT/expanded PRRT revenue will come from.

The government's initial consultation process and response for the RSPT

3.12 The Henry Tax Review was to investigate options to reduce complexity and compliance costs and deliver recommendations to improve the tax system. In relation to resource taxation (recommendations 45 to 50) the Henry Tax Review panel recommended that the current resource charging arrangements be 'replaced' by a uniform resource rent tax imposed and administered by the Australian Government⁶ and that the Commonwealth negotiate with the state and territory governments an appropriate allocation of the revenues and risks from the resource rent tax.⁷

3.13 The Henry Tax Review concluded that:

Australia has too many taxes and too many complicated ways of delivering multiple policy objectives through the tax system. The capacity of the legislative and operating platforms of these systems, and their human users, to deal with the resulting complexity has been overreached. To a large

6 *Australia's Future Tax System – Report to the Treasurer*, December 2009, Part One, Recommendation 45, p. 89.

7 *Australia's Future Tax System – Report to the Treasurer*, December 2009, Part One, Recommendation 48, p. 89.

extent this is a reflection of a compartmentalised and incremental approach to tax policy that has been weighted toward achieving finely calibrated equity and efficiency outcomes at the expense of simplicity. Around 90 per cent of Australian tax revenue is raised through only 10 out of some 125 different taxes that are currently levied on businesses and individuals.⁸

3.14 The government's response to the Henry Tax Review released on 2 May 2010 ignored that finding. It proposed another new tax (number 126) – the RSPT⁹ – without replacing any of the other 125 taxes (or royalties). The government's proposed MRRT and expanded PRRT proposes two new taxes (126 and 127) without replacing any other tax (or royalty).¹⁰ The 'compartmentalised and incremental approach to tax policy' criticised by the Henry Tax Review is clearly continuing.

3.15 Instead of releasing the Henry Tax Review Report and its recommendations for public consideration and debate, the government announced its response, including the proposal for a new national tax on mining at the same time as making the report publicly available for the first time.

3.16 The RSPT was designed by the government in secret and announced without any prior proper consultation either with business stakeholders or with state and territory governments. Although the RSPT was based on the model recommended in the Henry Tax Review it is substantially different in important parts. After having promoted the merits of the RSPT aggressively the government abandoned it less than two months after having first proposed it.

The states and the RSPT

3.17 The interaction between the various national mining tax proposals and state and territory royalties has previously been subject to detailed consideration, especially in the Senate Select Committee on Fuel and Energy Committee Report: *The mining tax: Still bad for the economy – still bad for jobs*. Below is a relevant extract covering the key points about the way in which the Commonwealth approached the implications of the proposed new tax for state and territory royalty arrangements.

3.18 The Senate Select Committee on Fuel and Energy inquired into the level of consultation which took place during the development of the RSPT and the MRRT and expanded MRRT. The Department of the Treasury confirmed during that inquiry that the original resource rent tax proposal by the Henry Tax Review was designed to 'replace' state royalties, which neither the RSPT nor the MRRT/expanded PRRT does:

Dr Henry...when the royalties are removed and replaced with an RSPT one would expect not a reduction in investment but actually an increase in

8 *Australia's future tax system – Report to the Treasurer*, December 2009, p11.

9 The Hon. Kevin Rudd MP, Prime Minister, the Hon. Wayne Swan MP, Treasurer, *Stronger, fairer, Simpler: A tax plan for our future*, Media Release, 2 May 2010.

10 *Mineral Resource Rent Tax Heads of Agreement*

investment and an increase in mining activity in Australia. That is why all the modelling shows that by removing royalties and introducing this profits based tax, mining investment would be expected to increase, not to fall.¹¹

3.17 While the Senate Select Committee on Fuel and Energy inquired into the matter of state and territory royalties being replaced, this committee also considered the matter:

CHAIR—Dr Henry, I had a close look through your review document again. Chapter 6, ‘Land and resource taxes’, under 6.1, ‘Charging for non-renewable resources’, talks about how current charging arrangements distort investment and production decisions, thereby lowering the community’s return from its resource—hence your recommendation. It is fair to say that your recommendation was for the national resource rent tax to replace state royalties completely. That is right, isn’t it?

Dr Henry—Yes, that is correct.

CHAIR—And under the RSPT the distorting effects of royalties were effectively removed because they were completely refunded—is that right?

Dr Henry—That is correct.

CHAIR—But under the MRRT they are not, are they?

Dr Henry—No, clearly they are not.

CHAIR—So the distorting elements of state royalties, to the extent that they exist, have not been removed, have they?

Dr Henry—To the extent that there is not a full credit provided for those royalties under the MRRT, the royalties would be impacting on investment decisions.

CHAIR—Would be impacting on investment decisions?

Dr Henry—I would expect so, yes.

CHAIR—And, potentially, production decisions too, wouldn’t they?

Dr Henry—Indeed.

CHAIR—Smaller projects that are not yet subject to the MRRT would continue to pay royalties?

Dr Henry—That is correct.¹²

3.19 The Western Australian Government, sought assurances from the federal government concerning the interaction between the proposed resource rent taxes with

11 Dr Ken Henry, Secretary, Department of the Treasury, *Committee Hansard*, 27 May 2010, p. 16.

12 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes, Dr Ken Henry, Secretary, Department of the Treasury, *Committee Hansard*, 22 November 2010, p.9

both the state and territory royalties and GST sharing arrangements. Their inquiries however, remain unanswered.

Senator CORMANN: ...Treasury tabled this morning a whole series of letters. There are five letters from the state government in Western Australia—18 March, 11 May, 16 November, the letter from the Treasurer on 18 May 2011 and there was a submission to the PTG. Not one of them has been responded to by the Commonwealth government Why, with respect to the letters that were addressed to Treasury by the Under Treasurer from WA, did Treasury not once respond to any of those letters where the state government of Western Australia raised serious concerns about the implications of the mining tax for royalty arrangements and the implications for GST sharing arrangements? Why is there not one single response to one of those letters?

Mr Ray: Because, Senator, we did not think we were in a position to reply.

Senator CORMANN: Because you did not think you were in a position to reply? Why is that?

Mr Ray: Because those letters were seeking assurances that we could not give.

Senator CORMANN: It was actually not seeking assurances; it was seeking confirmation of assurances that, according to the state government, had been given before.¹³

3.20 The Senate Select Committee on Fuel and Energy noted that the Secretary to the Treasury, Dr Henry, had made it quite clear that the RSPT was designed to replace state royalties, if not immediately, then over time. Dr Henry also conceded that under the RSPT, there could be a nil return to the community from the exploitation of these non-renewable resources if there was no 'super profit' and all state royalties were either refunded or abolished.

3.21 The Senate Select Committee on Fuel and Energy, and later inquiries through this committee as well as through Senate Estimates heard repeated concerns from the Western Australian Department of Treasury and others about the lack of consultation on the RSPT or its successor the MRRT/expanded PRRT, including in relation to the possible future abolition of state royalties:

CHAIR—Did the Australian Treasury contact you before the release of the super profits tax?

Mr Barnes—Before the original public announcement the Commonwealth Treasury did give a very general heads-up of the direction that the recommendations were heading in, but at no stage prior to public release did we actually see the recommendations, nor—by definition, given that we did not see the recommendations—were we asked to comment or provide input on the recommendations.

13 Senator Mathias Cormann and Mr Nigel Ray, Executive Director, Department of the Treasury, *Estimates transcript of evidence*, 1 June 2011, p. 40.

CHAIR—The original proposal was for the resource super profits tax to replace state royalties and that state royalties would be abolished. As far as you are aware, has anyone from the federal government at an official or government-to-government level discussed the prospect of abolishing state royalties with WA Treasury or the WA state government?

Mr Barnes—In the initial heads-up that I mentioned, that prospect was flagged as the direction that the Henry review committee was heading in.

CHAIR—What was your response to that?

Mr Barnes—We were not really given the opportunity to respond; it was more in the nature of a one-way communication that that was the direction the review was heading in.¹⁴

3.22 The recommendations of the Henry Tax Review to replace state and territory royalties with a resource rent tax and consult with the states and territories have been consistently ignored as have requests from state governments seeking assurances about how the proposed taxes will affect their own source revenue.

3.23 The Senate Select Committee on Fuel and Energy heard evidence from the Western Australian Department of Treasury and Finance that 'if there is a view that the community is not receiving a fair return' for its non-renewable resources then the department would prefer the Commonwealth and states work together to design enhancements to the royalty regimes.¹⁵

Secret and exclusive: the MRRT and expanded PRRT development process

3.24 Following considerable opposition to the RSPT, the newly appointed Prime Minister Julia Gillard announced there would be changes to the tax after the government had negotiated a deal – exclusively and in secret – with three of the mining industry's biggest players.

3.25 On 2 July 2010, the Prime Minister announced that the government would remove its proposed resource rent tax from all mineral resources other than iron ore, coal, oil and gas. The RSPT was replaced by the MRRT which would apply to profits on iron ore and coal production. The Prime Minister also announced the extension of the current PRRT to all Australian onshore and offshore oil and gas projects, including the North West Shelf gas project.

14 Senator Mathias Cormann, Chair, Senate Select Committee on Fuel and Energy, and Mr Michael Barnes, Department of Treasury and Finance, Western Australia, *Fuel and Energy Committee Hansard*, 13 July 2010, p.8

15 Senate Select Committee on Fuel and Energy, *The mining tax: Still bad for the economy – still bad for jobs*, Second interim report, July 2010, pp. 28 – 33.

3.26 The Prime Minister asserted that the agreement was 'the result of intense consultation and negotiation' and that these changes recognised the views of 'the' mining industry in relation to the treatment of new investments.¹⁶

3.27 In this phase of the process the government consulted with BHP Billiton, Rio Tinto and Xstrata. It did not include any of the other mining companies impacted by the proposed new tax, nor any industry representative bodies, or any of the states and territories in the process. Given the importance of mining-based revenue for states like Western Australia, Queensland, New South Wales and the Northern Territory in particular it seems extraordinary that the government did not at least offer the same access to contribute to the ultimate design of the tax to those states and territories as it did to the three biggest mining companies.

3.28 The completely inadequate nature of the consultation process in developing the MRRT and expanded PRRT was raised during submissions to the inquiry and at public hearings.

Nature and extent of industry consultation

3.29 Although the government has consistently contended that they did undertake consultation with 'the' mining industry, the facts are that 99 per cent of the mining industry was excluded from the process. Around 320 mining companies will be impacted by the MRRT and only three were given the opportunity to contribute to the revised design of the mining tax.

3.30 It is notable that even the three big miners themselves urged the government to consult more widely:

CHAIR—...I understand that BHP Billiton acted, as you must, in the best interests of your shareholders. But there is of course a different test for governments, which is to act in the public interest. The government sat down with essentially three taxpayers and designed a tax with broader application beyond those three taxpayers, behind closed doors, with all other stakeholders and the public at large excluded. It was not a very open and transparent process, was it?

Mr Bond—The conversations that we participated in were at the invitation of government. As taxpayers and industry participants, if invited to participate in those conversations, we naturally went. Prior to entering those discussions, during those discussions and after those discussions, we did

16 The Hon Julia Gillard MP, Prime Minister, the Hon. Wayne Swan MP, Deputy Prime Minister and Treasurer and the Hon Martin Ferguson AM MP, Minister for Resources and Energy, *Breakthrough agreement with industry on improvements to resources taxation*, Media Release, 2 July 2010, pp.1, 3.

urge the government to engage more broadly with other affected industry participants.¹⁷

3.31 Miners and stakeholders excluded by the government from the consultation process such as the Association of Mineral Exploration Companies, expressed clear frustration with the government's lack of consultation:

Going to the Henry tax review and tax reform in general, we have been very disappointed with both the outcome of that review and the government's approach to tax reform...the lack of consultation with industry has been a very serious concern for us. We think there are still some very serious flaws in the proposed MRRT.¹⁸

We are very disappointed in the lack of consultation that has occurred leading into the introduction of the MRRT in July. That probably sticks in our throat as much as anything else in the context of a lack of involvement by the government with industry and essentially doing a deal with three large multinationals at the expense of not only our membership but others as well.¹⁹

3.32 Witnesses before the committee's inquiry were generally critical of the government's approach to negotiating the proposed tax with the mining industry's three largest miners exclusively and in secret:

CHAIR—Let me ask you a more general question then. Do you think it is appropriate for a government to negotiate the design of a tax with three taxpayers with a particular perspective and exclude everybody else that has a separate interest in the same industry?

Dr Manning—No.

Mr Armstrong—No. I would concur. You need to have consultation and look at all the implications of what you are doing with all the players. I would say that is a general policy.

CHAIR—Should there have been a discussion paper and consultation giving everybody an opportunity to—

Mr Armstrong—Yes. It would be ideal, I would think, to canvass opinions.

...

17 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Mr Gerard Bond, Head of Group Human Resources, BHP Billiton, *Committee Hansard*, 8 December 2010, p. 6.

18 Mr Simon Bennison, Chief Executive Officer, Association of Mineral and Exploration Companies, *Committee Hansard*, Monday 8 November 2010, p. 2.

19 Mr Simon Bennison, Chief Executive Officer, Association of Mineral and Exploration Companies, *Committee Hansard*, Monday 8 November 2010, p. 3.

Mr Armstrong—One of the fears about the political process is that it has become too 'insider'.²⁰

3.33 There were concerns that the Heads of Agreement with the three miners chosen to participate in the government's exclusive negotiations would have detrimental effects on those excluded from that process. In terms of a specific example:

CHAIR—Obviously you are understandably aggrieved that the government negotiated in secret with some of your competitors. You have mentioned the issue of infrastructure. Can you give us the areas where the design of the new MRRT favours your competitors compared to the business structure or business model that you have in place?

...

Mr Pearce—The design of the tax is biased in favour of BHP and Rio in particular—given that they are our major competitors in the iron ore industry in a number of ways—in terms of both design and the combination of elements of the design. The main points are around the application of the mining rights value versus the principles involved in historical cost; the low value they appear to be arguing should be placed on infrastructure, where they are likening it to a railroad in central Melbourne as opposed to high-risk infrastructure linking a port to a mine; the way 'projects' looks as if it is being defined through the consultative panel; and the transferability rules. It is the combination of those particular factors that tends to favour companies with established mines and infrastructure and clusters of mines that help to de-risk that infrastructure in remote locations. The definitional aspects of 'projects' seem to be biased towards BHP and Rio. There is the issue of possible treatment of black-hole expenditure, which is particularly relevant for companies that are trying to develop but may not meet the definition of a project at this point in time... There is also the cost of compliance. The cost of compliance for this thing, per tonne, for the smaller players is going to be horrendous compared to the per-tonne cost of compliance for the larger companies.²¹

3.34 Even though they had received exclusive preferential treatment by the government, BHP Billiton and Rio Tinto remained concerned about the government's approach to industry consultation:

CHAIR—...BHP Billiton was very critical of the lack of proper process...with no consultation or testing of the design features, of the original resource super profits tax, so-called. Do you think the process

20 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Mr Graham Armstrong, Senior Associate, Dr Ian Manning, Deputy Executive Director, National Institute of Economic and Industry Research, *Committee Hansard*, 19 November 2010, pp. 23 – 24.

21 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Mr Stephen Pearce, Chief Financial Office, Fortescue Metals Group Ltd, *Committee Hansard*, 8 November 2010, p. 22.

which led to the development of the MRRT and the expanded PRRT was a good public policy development process?

Mr Bond—I think it is fair to say that the whole experience and the formulation of the tax would not go down as world’s best practice on policy development. The only comment we would make is that the MRRT that resulted from the discussions we had and the government’s thinking based on the feedback it got is a better tax than the RSPT.²²

CHAIR—...Do you think the process which led to the development of the minerals resource rent tax was a good public policy development process?

Mr O’Neill—I am happy to say that it was not ideal. We view the entire process, if you like, from the report of the Henry review in late 2009 through to the announcement of the MRRT, as being effectively part of an overall process that was entered into. It is no secret that we do not regard much of that as being an ideal public policy process.

CHAIR—What would have been an ideal public policy development process?

Mr O’Neill—I think Mr Bond from BHP in evidence just given reflected on the process that was undertaken in relation to the petroleum resource rent tax in the 80s where you had a long period of policy being flagged, a long period of public consultation. You had numerous discussion papers and, presumably, hundreds if not thousands of meetings leading to that particular reform. That is a reasonable yardstick I think of the sort of public policy process that we would have preferred had led to where we are today.²³

The Government's failure to implement best-practice regulation principles

3.35 The government's failure to consult widely with affected stakeholders was a direct breach of their own best-practice regulation guidelines. The Office of Best Practice Regulation released updated best-practice regulation guidelines in June 2010. These guidelines outline how government should develop Regulatory Impact Statements (RIS) to help them evaluate all of the potential options for tackling a particular policy issue.

3.36 Although these guidelines apply to the development of a broad range of regulations, it is clear that they are meant to apply to new taxes as well.

Do the RIS requirements apply to changes in taxation?

Yes – a RIS is required for all regulatory decisions, including changes in taxation, likely to have any impact (whether positive or negative) on

22 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Mr Gerard Bond, Head of Group Human Resources, BHP Billiton, *Committee Hansard*, 8 December 2010, p. 6.

23 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Mr Mark O’Neill, Chief Adviser Taxation, Rio Tinto, *Committee Hansard*, 8 December 2010, p. 38.

business or the not-for-profit sector unless the impact is of a minor or machinery nature or, in the case of taxation, purely revenue in nature.²⁴

3.37 The best-practice guidelines contain an appendix on best practice consultation principles. These guidelines state that:

RISs are required to demonstrate that consultation commensurate with the magnitude of the problem and the size of the potential impact of the proposal has been undertaken.²⁵

3.38 The Guidelines stress that consultation should be a continuous process which is undertaken at all stages of the policy development process:

Meaningful consultation with key stakeholders should be continuous and should start as early as possible. Consultation should continue through all stages of the regulatory cycle, including when detailed design features are being finalised. This will assist in identifying and understanding potential problems and in designing and implementing better regulation.²⁶

3.39 The Guidelines further stress the importance of consultation with other governments:

Relevant state, territory and local governments, and Australian Government agencies, should be consulted to ensure that regulatory policies across jurisdictions are consistent and complementary. In order to produce efficient regulation, it is necessary to avoid or minimise duplicating legislative requirements across agencies and government at all levels. This is particularly important where the regulatory processes arise from negotiations between different levels of government and/or involve overlapping responsibilities.²⁷

3.40 Given that the government failed to undertake any consultation before the announcement of the RSPT, it is clear that the government failed to comply with these principles. The exclusive and secretive negotiation between the government and the three largest mining companies before announcing the MRRT and expanded PRRT is also a clear breach of these guidelines, as the government failed to involve all stakeholders, including state and territory governments.

24 Australian Government, 2010, *Best Practice Regulation Handbook*, p.26, <http://www.finance.gov.au/obpr/proposal/handbook/docs/Best-Practice-Regulation-Handbook.pdf> (access on 20 June 2011)

25 Australian Government, 2010, *Best Practice Regulation Handbook*, p.51, <http://www.finance.gov.au/obpr/proposal/handbook/docs/Best-Practice-Regulation-Handbook.pdf> (access on 20 June 2011)

26 Australian Government, 2010, *Best Practice Regulation Handbook*, p.51, <http://www.finance.gov.au/obpr/proposal/handbook/docs/Best-Practice-Regulation-Handbook.pdf> (access on 20 June 2011)

27 Australian Government, 2010, *Best Practice Regulation Handbook*, p.52, <http://www.finance.gov.au/obpr/proposal/handbook/docs/Best-Practice-Regulation-Handbook.pdf> (access on 20 June 2011)

The Treasury and the development of the MRRT and expanded PRRT

3.41 The negotiations between the government, BHP Billiton, Rio Tinto and Xstrata were the mechanism by which the new MRRT and expanded PRRT were developed. As outlined above, a cross-section of industry players expressed concern about the lack of broader stakeholder involvement.

3.42 The role of the Treasury as an adviser to the government during these negotiations has also arisen during this inquiry.

CHAIR—Who was in the room during the discussions?

...

Mr Bond—During the discussions there was the Deputy Prime Minister and Treasurer, Mr Swan; the resources and energy minister, Mr Ferguson; their chiefs of staff, Mr Barrett and Ms Winters; and a senior advisor to the Prime Minister, Mr Bentley.

CHAIR—Were there any Treasury officials in the room at any stage of the process? Any public servants?

Mr Bond—Not in those particular discussions, but through the period of time we did meet with Treasury, as I articulated in the opening address.

CHAIR—Sure. But in the discussions you had with the Deputy Prime Minister and the Minister for Resources and Energy, there were no public servants present?

Mr Bond—Not in those ones, no.

CHAIR—... So it was essentially the ministers and their private staff. At the end of the process, before the announcement that you signed the deal [HoA], who was involved at that time? You signed the heads of agreement.... At the end of the process when you signed the heads of agreement, who was involved then?

Mr Bond—The secretaries were obviously involved in the signing of the document and the signatories. Is that the question you are asking?

CHAIR—Who was in the room when you signed the deal?

Mr Bond—The same people. There was no difference.

CHAIR—The Prime Minister was not in the original—

Mr Bond—The Prime Minister was not in the room, no.

CHAIR—But she was in the room to sign the heads of agreement?

Mr Bond—She signed the document, yes.

CHAIR—So was she in the room when that happened? She signed it at another location?

Mr Bond—It was in the same office. I think it was next door.

CHAIR—But she was not actually in the room with you?

Mr Bond—Correct.

CHAIR—So the three people that signed the heads of agreement for the government were the Prime Minister, the Deputy Prime Minister and the Minister for Resources and Energy?

Mr Bond—Yes.²⁸

3.43 The Department of the Treasury had no direct involvement in negotiations between government ministers and those big three mining companies. The following exchange between the chair and Dr Ken Henry, then Secretary of the Treasury, outlines the limited involvement of Treasury during the negotiations between the government, BHP Billiton, Rio Tinto and Xstrata:

CHAIR—Just going back to the level of Treasury involvement in the negotiation between the government and BHP, Rio and Xstrata, can you describe for us again in detail what level of involvement Treasury officials did have in those negotiations?

Dr Henry—I cannot add much to what I said last week, which is that we were involved very heavily in the quantification of proposals and beyond that we were involved in a quality assurance or due diligence role in providing advice to government in respect of propositions that the companies were advancing.

CHAIR—So you were not personally present for any of the sessions of the negotiations?

Dr Henry—That is certainly true.

CHAIR—Who was the most senior Treasury official directly involved in the negotiations between the government and BHP, Rio and Xstrata?

Dr Henry—As I have indicated, there was no Treasury official...directly involved in the negotiations as such. There were Treasury officials who were, during that time, having discussions with senior executives of those companies about numbers and design issues.

CHAIR—So those Treasury officials were waiting in the Treasurer's office and somebody would come in and out of the negotiations with BHP, Rio and—

Dr Henry—No. I would have to check, but I think that most—and maybe all—of those consultations occurred during that period by phone. I think the Treasury officials, on all occasions—I would need to check—would have been in the Treasury building.

CHAIR—So the way it would have worked was that the Treasurer and Minister Ferguson were having negotiations with BHP, Rio and Xstrata and then somebody would walk out, pick up the phone and talk to a Treasury official and say, 'They have just told us this. Is this right? We have just agreed to do that. What does that mean?' Is that the way it worked?

28 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Mr Gerard Bond, Head of Group Human Resources, BHP Billiton, *Committee Hansard*, 8 December 2010, pp. 8-9.

Dr Henry—That is a relatively accurate characterisation of it.²⁹

3.44 The Government's principal economic advisor, the Department of the Treasury, the Prime Minister's own Department, as well as all the states and territories and around 2500 mining companies were sidelined from the process which led to the design of the MRRT and expanded PRRT. It was a secret, non-transparent and exclusive process involving two Ministers, the Prime Minister and three companies:

Senator CORMANN: I have a series of questions of officers that provided advice to the Prime Minister on the mining tax deal that was entered into in July last year—including whether or not and when this is going to be dealt with at COAG. First up, I assume that PM&C [Department of the Prime Minister and Cabinet] did provide advice to the Prime Minister before she signed, along with the Treasurer and the Minister for Resources and Energy, the so-called MRRT heads of agreement with BHP Billiton, Rio and Xstrata?

Dr English: We provided advice to government on a range of matters around the minerals resource tax arrangements in 2010. So at various times we have, yes.

Senator CORMANN: So the answer is yes.

Dr English: I am not confirming a particular briefing at a particular time; I am just saying that we have supported, as best we can, the Prime Minister on this matter.

Senator CORMANN: ...My very specific question is for you to confirm that the Prime Minister's department provided advice to the Prime Minister in relation to the proposed mining tax deal before the Prime Minister decided to sign on the dotted line along with the Treasurer and the Minister for Resources and Energy.

Dr English: On that occasion, the advice was provided to the Prime Minister by the Treasurer.

Senator CORMANN: So the Prime Minister received advice from the Treasurer, not from her own department.

Dr English: On that occasion, yes.³⁰

3.45 Correspondence between the Office of the Treasurer and BHP Billiton provides an insight into the way in which the MRRT was settled between the government and the big three miners.

29 Senator Mathias Cormann, Chair, Senate Select Committee on Fuel and Energy, and Dr Ken Henry, Secretary, Department of the Treasury, Fuel and Energy *Committee Hansard*, 13 July 2010, pp. 52–53.

30 Senator Mathias Cormann and Mr Dominic English, First Assistant Secretary, Economic Division, Department of the Prime Minister and Cabinet, Hansard, *Estimates transcript of evidence*, 23 May 2011, p. 71.

3.46 On Wednesday, 30 June 2010, Gerard Bond of BHP Billiton sent a draft of the MRRT Heads of Agreement by email to the Treasurer's then Chief of Staff Chris Barrett along with the Minister for Resources' then Chief of Staff, Tracey Winters. The next day, on 1 July, Mr Barrett emailed David Parker who was at the time the Treasury Executive Director for the Revenue Group along with another senior Treasury officer and Ms Winters:

David,

Please see the draft heads of agreement sent yesterday by BHP. We aim to sign this 5pm today with all three companies. Can your troops read it and ensure all the elements are OK? Please get back to me with any problems asap. Tracey, you might want to check it with DRET [Department of Resources, Energy and Tourism].

I will send a separate email on the \$50 million threshold, which is new, but helpful, I think.

Regards,

Chris³¹

3.47 On 1 July 2010, Mr Barrett sent an email to Mr Gerard Bond of BHP Billiton:

Gerard,

Final, clean version for your signature. Please let me know if any issues at your end.

Regards,

Chris³²

3.48 It seems highly unusual and inappropriate that one taxpayer, BHP Billiton, was given the extraordinary opportunity to draft this mining tax peace deal after a process from which all its competitors (other than Rio Tinto and Xstrata) had been excluded by the government. To top it all off the immediate past chairman of that same taxpayer who drafted the deal was then appointed by the government as the co-chair of the new mining tax implementation committee soon re-named the 'Policy Transition Group'.

31 Email by Mr Chris Barrett, Chief of Staff, Office of the Treasurer, the Hon Wayne Swan MP. Email dated 1 July 2010 released under Freedom of Information: http://www.treasury.gov.au/documents/1936/PDF/103_email_agreement_with_BHP_design_MRRT.pdf, (accessed 20 June 2011)

32 Email by Mr Chris Barrett, Chief of Staff, Office of the Treasurer, the Hon Wayne Swan MP. Email dated 1 July 2010 released under Freedom of Information: http://www.treasury.gov.au/documents/1936/PDF/103_email_agreement_with_BHP_design_MRRT.pdf (accessed 20 June 2011)

The Implementation Committee – renamed 'Policy Transition Group'

3.49 The Heads of Agreement on the MRRT and expanded PRRT announced on 2 July 2010 provided for an Implementation Committee which was to be:

Implementation Committee

A mutually acceptable Committee comprising credible, respected industry leaders will oversee the development of more detailed technical design to ensure the agreed design principles become effective legislation. This will have the objective of ensuring the agreed principles are effected in line with their intent in a commercial, practical manner.³³

3.50 The government renamed the 'Implementation Committee' the 'Policy Transition Group' (PTG) and announced immediate past Chairman of BHP Billiton Don Argus and Resources Minister Martin Ferguson as its co-chairs.

3.51 Mr Argus had stepped down as Chairman of BHP Billiton about three months before the mining tax deal was signed. By that time he had been at the company in that role for around a decade.

3.52 The PTG was given the task to 'consult' with industry. However its task was severely constrained by both the brief it was given through the Heads of Agreement and by the government in subsequent announcements.

3.53 In its terms of reference the Policy Transition Group was directed by government to:

...advise the Australian Government in the development of the technical design of the [MRRT] and transition of existing petroleum projects to the [PRRT] regime as announced by the Government on 2 July 2010.³⁴

3.54 In providing this advice, the PTG was directed to:

...ensure the new tax arrangements are implemented as efficiently and consistent with the design principles as possible... [and] be consistent with the Government's fiscal strategy as stated in the 2010-11 Budget.³⁵

3.55 It is notable that in directing the PTG to ensure that their advice was consistent with the government's 2010-11 budget commitments, the government mandated that:

Any policy deviation from the Government's announcement of 2 July 2010 is to be fully offset within the recommendations in terms of impacts on revenue or costs.³⁶

33 *Mineral Resources Rent Tax Heads of Agreement*, p.2.

34 Policy Transition Group, *Terms of Reference*, p. 1.

35 Policy Transition Group, *Terms of Reference*, p. 1.

36 Policy Transition Group, *Terms of Reference*, pp 1-2.

3.56 Given that the terms of reference of the PTG were limited to working out the practicalities of implementing the fundamental design features of the tax rather than examining the suitability of those design features it is little wonder that stakeholders expressed frustration and concern that the PTG process was inadequate:

CHAIR—But those terms of reference for the Policy Transition Group are pretty restrictive, aren't they? There is one condition in there which says that any recommendations have to be revenue neutral... Do you think that there is enough scope for the Policy Transition Group to recommend the sorts of changes that you need?

Mr Bennison—...no, I do not think there is. And I do not think the burden or the onus should have been put on the PTG to actually come out with revenue neutrality...that is something that should be tasked to the Treasury...it seems an unrealistic expectation...³⁷

CHAIR—...Are you of the view that your concerns are able to be properly considered and taken on board by the Policy Transition Group?

Mr Bennison—We hope so. One of the concerns that has been uppermost in our mind over recent months has been the lack of transparency in this whole process... that is a serious concern to us. We can only work within the process at the moment.³⁸

3.57 Given the government has refused to release its mining tax revenue assumptions it is pretty hard to see how contributors to the PTG process could be expected to make 'revenue neutral' recommendations.

3.58 The PTG provided two reports to the government on 21 December 2010, the first making 94 recommendations regarding the technical design of the MRRT and the expanded PRRT. The second report made four recommendations on mineral and petroleum exploration.

3.59 In compiling its reports to government, the PTG considered feedback from industry and other stakeholders provided during consultations across Australia as well as through 88 written submissions.³⁹ On 24 March 2011 the government announced it had accepted all 94 recommendations of the PTG. The exposure draft of the legislation has only recently been released for public consultation.⁴⁰

37 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Mr Simon Bennison, Chief Executive Officer, Association of Mining and Exploration Companies, *Committee Hansard*, 8 November 2010, pp. 6 - 7.

38 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Mr Simon Bennison, Chief Executive Officer, Association of Mining and Exploration Companies, *Committee Hansard*, 8 November 2010, p. 6.

39 http://www.futuretax.gov.au/pages/resourcetax_PTG_consult.aspx (accessed, 20 April 2011)

40 <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2070>

3.60 Despite assurances that consultation had occurred, the majority of witnesses who gave evidence to the committee were highly critical of the PTG's approach. They maintained that the government's consultation process had been completely inadequate. The establishment of the PTG to implement a mining tax deal negotiated exclusively and in secret with the three biggest mining companies did nothing to allay their concerns.

3.61 Concerns remained about the overall policy development approach. The Chief Executive Officer, Mr Andrew said:

The consultation process which has been carried forward for the mining industry—particularly iron ore and coal, which this tax discriminates against—is no more than the sham of the original Treasury discussions. There was no change at all in terms of reference, there was no change in how much money the tax would raise and there was no change in what was allowed to be discussed.⁴¹

3.62 The committee approached the Co-Chairman of the PTG, Mr Don Argus, to participate in this Inquiry to provide his perspective and expertise. The first approach was made by email on 31 December 2010 and other further attempts followed on 2 February 2011 and 8 March 2011. On 19 May, 2011 a further invitation was extended for Mr Argus to attend and on 25 May 2011 Mr Argus again declined to appear. The committee is very disappointed that Mr Argus did not see fit to assist the committee with its inquiries. The committee had a series of questions for Mr Argus which remain unresolved. Given his important role in assisting the government with the implementation of its revised mining tax proposals and his association with one of the three companies involved in the mining tax negotiation until shortly before the mining tax deal was concluded, his evidence on these matters was – in the committee's view – in the public interest. In these circumstances the committee considers it to be very unfortunate and regrets that Mr Argus has declined these opportunities to assist the committee with its inquiries and to help it in the preparation of this report.

The Resource Tax Implementation Group

3.63 On 24 March 2011 the government announced the establishment of the Resource Tax Implementation Group (RTIG) to support the legislative design process.

3.64 The purpose of the RTIG is to enable ongoing industry engagement and respond to the PTG's recommendation that an implementation group should support the legislative design process.

3.65 The RTIG, comprising representatives of industry and the tax profession as well as government officials, is supposed to ensure close consultation with the

41 Mr Andrew Forrest, Chief Executive Officer, Fortescue Metals Group Ltd, *Committee Hansard*, 8 November 2010, p. 19.

resource sector during drafting of the legislation and as legislation is prepared for introduction into the Commonwealth Parliament.

3.66 The committee will follow the work of the RTIG with interest.

General comments on the policy development process

3.67 The chronology and outline of submissions and evidence from hearings as presented above should also be considered in the context of a participant not directly involved in the consultation process itself.

3.68 Professor Ross Garnaut, a pre-eminent economic advisor to this government, was particularly critical of the government's approach to the development of the government's mining tax proposals:

It is best I be straightforward. I would think that the best process—world's best practice, to which I refer there—would have been for the Henry review recommendations to have been made public and for there to have been a thorough public discussion with everyone with an interest—from a public interest point of view or a business or private interest point of view—putting views on that. I think we would have had a better discussion if it had been done in that way. Obviously, that was not done the first time and it was not done the second time.⁴²

3.69 Professor Garnaut suggested that the preferred approach for the development of a complicated public policy, such as a mining tax, should involve 'widespread' public discussion:

CHAIR—We are now in a position where we are trying to assess the merits or otherwise. We have got the policy transition group process going with very narrow terms of reference and prescriptions that it has to be revenue neutral and it has got to respect the main features of the tax. Do you think that the policy transition group process is adequate to ensure that there is a proper discussion of the merits of specific features of the tax, so it gives enough flexibility for the government to properly take on board the public interest as well as the various stakeholder interests?

Prof. Garnaut—My views on policy process are well enough known for it to be no surprise for me to say that I think that a complicated public policy issue like this will be handled better if there is widespread public discussion of it. But that process that is going on now involving some consultation will not be the whole of the process. The process that you are going through is part of the process. What I would hope is that through all of the various ways in which this will be discussed we can get all of the important interests, especially public interests, properly represented in the discussion. But if all there was for us was the process as described, that would not be enough...

CHAIR—So the policy transition group process on its own is not enough?

42 Professor Ross Garnaut, *Committee Hansard*, 19 November 2010, p. 27.

Prof. Garnaut—No, I think that the processes of this committee and of parliamentary discussion and the public discussion that could go on around whatever comes out of the transitional process are all important to good policymaking.⁴³

3.70 Professor Garnaut identified the importance of hearing from a broadly representative public voice in the development of the proposed tax.

CHAIR—...this time, of course, the government has negotiated the design of the tax with three individual companies who have got a particular business model—and these are the BHPs, Rios and Xstrata's—and they have excluded the FMGs and the iron ore ones and all of the other companies who in fact had a different business model. Can you see why those companies that were excluded from that tax design process feel aggrieved and why they think that BHP, Rio and Xstrata were given a competitive advantage?

Prof. Garnaut—...I think that the public interest would be well served by a wide discussion in which the interests of particular companies are legitimate, so we can hear their voices but we need a wider public voice. And there is a very big public interest in this question; it is not just that of BHP and Fortescue and the other mining companies. So I hope that we will get enough public discussion.⁴⁴

Transparency

3.71 Previously in this chapter, the focus was on the consultation process. In this part of the chapter the focus is on the lack of the transparency that restricted proper scrutiny of the RSPT, MRRT and expanded PRRT. That lack of transparency remains as an ongoing issue.

3.72 Based on the hearings and submissions, it is clear that the government's processes lacked openness and transparency. Rather than using the Henry Tax Review as a starting point to 'support an informed debate about future tax and transfer policy,'⁴⁵ debate has not and did not take place. In particular, there was no negotiation with State and Territory governments around the interaction between the proposed new national mining tax and state and territory royalty arrangements:

CHAIR—You suggested in your review that the allocation of revenue and risks from the new tax should be—and I emphasise—negotiated between the Australian and state governments. That did not happen before the announcement, did it?

43 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Professor Ross Garnaut, *Committee Hansard*, 19 November 2010, pp. 27–28.

44 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Professor Ross Garnaut, *Committee Hansard*, 19 November 2010, pp. 27–28.

45 *Australia's Future Tax System Review*, Letter to the Treasurer, December 2009, p. iii.

Dr Henry—There was no negotiation as such, no.

CHAIR—What is the status of discussions with states and territories on royalty arrangements and interaction between the MRRT and royalties now? Is there negotiation around that with state and territory governments? Have they impacted on it?

Dr Henry—I am not aware of any negotiations as such on those matters. That is not to say that there have not been discussions, but I am not aware of any.⁴⁶

3.73 The committee is of the view that no genuine reform of resource taxation and royalty arrangements can take place without active engagement and ultimately agreement with state and territory governments.

3.74 Evidence received by the committee throughout the inquiry also identified that the lack of transparency around revenue estimates and key assumptions compounded concerns that stakeholders already had with the process:

We are concerned about the lack of transparency over the revenue estimates and the key assumptions behind those estimates. We believe that the tax is centred on the revenue that would be raised rather than on a genuine commitment to tax reform, and we believe that such an approach is flawed in nature and really does represent a missed opportunity to undertake more wide-ranging and fundamental tax reform to Australia's tax system.⁴⁷

3.75 Professor Garnaut agreed that from an openness and transparency perspective, given the importance of this issue, 'we would all benefit from wide discussion of effects on the budget and the economy, and I hope we will still get some of that'.⁴⁸

3.76 The government's refusal to make available key modelling and forecasting assumptions about its taxes has also hampered the ability of industry participants (other than for the three directly involved in the negotiations) to model the effect that the proposed mining tax would have on their operations.

3.77 The Senate Fuel and Energy Committee heard evidence from Mr Simon Bennison, Chief Executive Officer (CEO), Association of Mining and Exploration Companies (AMEC) about the role of AMEC in the resource sector. AMEC is a national organisation. It represents mainly the mid-tier to junior production and exploration companies across Australia. It has about 140 members in this category. It also represents a vast number of the service industries to the resource sector, particularly companies that are involved in drilling and equipment supply. AMEC has

46 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Dr Ken Henry, Secretary, Department of the Treasury, *Committee Hansard*, 22 November 2010, p. 11.

47 Mr John Nicolaou, Chief Officer, Membership and Advocacy, Chamber of Commerce and Industry of Western Australia, *Committee Hansard*, 8 November 2010, p. 78.

48 Professor Ross Garnaut, *Committee Hansard*, 19 November 2010, pp. 28–29.

over 100 member companies that fit into this category. Effectively AMEC acts as an advocacy and policy organisation for these members.⁴⁹

3.78 Mr Mike Young, Managing Director, BC Iron Limited who appeared as part of a panel of witnesses before the Fuel and Energy committee with AMEC noted:

Mr Young—Can I add something about the heads of agreement as I went through it and as we were modelling this. We have had to do six iterations based on the various assumptions. My assumption, cynical as it may be, is that the companies who negotiated this MOU will have only done one model because they understand the underlying assumptions of all these points and we do not.

CHAIR—So they have a competitive advantage, in effect, compared to you because they would have been part of the discussions?

Mr Young—Yes, absolutely. And that is part of the consultation process that I would have expected. The first time I knew that there had been an agreement with the mining industry was over my Weet-Bix watching Sky News. When you look at how many miners there are in Australia currently mining iron ore, it is BHP, Rio, Atlas, Murchison, Mount Gibson, Cleveland- Cliffs and Grange Resources. Next year there will be BC Iron and probably Gindalbie.⁵⁰

3.79 Mr David Flanagan, Managing Director, Atlas Iron Limited, who also appeared as part of a panel of witnesses who belong to AMEC noted:

From a compliance point of view with the ASX, we are obliged to make material disclosures to the market, just to keep the market informed. There are a number of measures on what is ‘material’, and one of them is if something can impact the value of your company by more than 10 per cent. So there are some companies that have an understanding of whether this is material and some companies that do not. We feel disadvantaged by that.⁵¹

3.80 Mr Young further noted that:

By not being in the room, particularly with Rio Tinto and BHP, who have clearly shown that they do not wish to share their rail infrastructure and will fight tooth and nail to avoid it, a cynic might think that the deal they have

49 Mr Simon Bennison, Chief Executive Officer, Association of Mining and Exploration Companies, *Fuel and Energy Committee Hansard*, 13 July 2010, p. 81.

50 Senator Mathias Cormann, Chair, Senate Select Committee on Fuel and Energy, and Mr Mike Young, Managing Director, BC Iron Limited on behalf of Association of Minerals and Exploration Companies, *Fuel and Energy Committee Hansard*, 13 July 2010, p. 86.

51 Mr David Flanagan, Managing Director, Atlas Iron Limited on behalf of Association of Minerals and Exploration Companies, *Fuel and Energy Committee Hansard*, 13 July 2010, p. 90.

negotiated for themselves would be prejudicial to any of their competitors in the Pilbara.⁵²

3.81 The extent to which Treasury's assumptions were commercial-in-confidence and could not be released publicly was raised during the public hearings:

CHAIR—Okay. You mentioned that you provided the government with information. You have already said that the original information used by government was wrong.

Mr Bond—No, we said the information that we saw was vastly different to that which we had on the same item. There was a difference pertaining to critical input assumptions and we simply articulated what our view was on those same assumptions.

CHAIR—When you had those discussions about your views, did you provide the government with market sensitive, commercial-in-confidence information from BHP Billiton?

Mr Bond—One point of clarification: we provided it to the Treasury. And, yes, the information that we did provide was market-sensitive, confidential information.

CHAIR—So you did not point them to information that was publicly available in order to inform their revised assumptions?

Mr Bond—In articulating what our view was on some assumptions, we certainly directed them to public sources that would give them a basis for having the view as to the approximate reasonableness of ours. For example when it comes to prices, we were able to point them to the forward curves for commodity prices and indeed exchange rates that were closer to our assumptions than theirs were.

CHAIR—Let me make this absolutely clear: the information you provided to the Treasury and/or the government was information that was otherwise publicly available but relied upon by BHP or was it very specific, very secret, commercial-in-confidence information tightly held within the senior management levels of BHP Billiton?

Mr Bond—It was certainly more the latter. The public information goes to inform our assumptions.

CHAIR—Was information of production volumes tightly held commercial-in-confidence data or was that publicly available data?

Mr Bond—The information as it pertains to volumes was very macro level; it was not specific. It was more in the nature of year-on-year change rather than bottom-up estimates. There was a difference in that rate of change period on period.

CHAIR—Much of your operation in Australia is in the Western Australian market—and I see you nod. You would be aware that the Western

52 Mr Young, BC Iron Limited, Association of Minerals and Exploration Companies, *Fuel and Energy Committee Hansard*, 13 July 2010, p. 86.

Australian government publish their commodity price and production volume assumptions in their budget papers. Do you have a problem with that?

Mr Bond—We do not have a view on it. What the government chooses to do is their decision.⁵³

3.82 In addition to the views of BHP Billiton, the committee also heard from Rio Tinto on the matter:

CHAIR—Have you provided the government with confidential data and market-sensitive data on your commodity price assumptions moving forward?

Mr O'Neill—There would have been a number of discussions, which were obviously in-confidence discussions, where we may have provided a view on issues that we would regard as commercial-in-confidence. **We did not hand over data that would go to our own price assumptions**, but we may well have discussed issues. (emphasis added)

CHAIR—...I have difficulty in accepting that any of the companies would have provided market-sensitive information to the government. The suggestion then is that you would have provided information to the government that you did not provide to the market.

Mr O'Neill—I do not believe that we would have provided information to the government that we were required to provide to the market and haven't.

CHAIR—You say that your commodity price assumptions are market sensitive. So by giving the government access to market-sensitive information, they have information not available to others. Would you have provided the government with market-sensitive information not available to others or would you have pointed them to publicly available information?

Mr O'Neill—We may at times have done both. We would certainly have pointed them towards publicly available information. But we are talking about commodity price forecasts, volume forecasts, exchange rate forecasts several years into the future.⁵⁴

3.83 Xstrata also made a similar representation to the committee regarding the disclosure of information to the government:

CHAIR—Revenue estimates for the mining tax have bounced around quite a bit. The original RSPT was said to be \$12 billion and then there were changes in commodity prices and other assumptions to facilitate the MRRT.

53 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Mr Gerard Bond, Head of Group Human Resources, BPH Billiton, *Committee Hansard*, 8 December 2010, pp. 17 – 18.

54 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Mr Mark O'Neill, Chief Adviser - Government Relations, Rio Tinto, *Committee Hansard*, 8 December 2010, p. 46.

We were told the original tax would rise to \$24 billion. Did the government get it wrong with their original assumptions?

Mr Freyberg—I do not know what their original assumptions were. **We pointed them in the direction of public information.** (emphasis added) At the end of the day, I cannot comment on their projections. I do not have an insight to it. It is something that Treasury does.

CHAIR—So you directed them to publicly available information. You did not provide them with market sensitive commercial in confidence information?

Mr Freyberg—We pointed them to public information.⁵⁵

3.84 The companies involved in the negotiations indicate that they pointed the government to publicly available information to inform their revised commodity price and various other assumptions. Yet the government continues to refuse to release that information. It does raise the question what the government has to hide. In particular when both the Western Australia and Queensland Governments publish all that information in their budget papers as a matter of course.

3.85 The projected revenues remain highly speculative with unknown commodity price and production volume assumptions, unknown implications of State and Territory government decisions around royalties into the future and question marks over the constitutional validity of the new tax.

3.86 This lack of transparency has limited the effectiveness of the consultation processes of the Policy Transition Group. As noted above, that Group was directed to only consider changes which would be revenue neutral. It is unclear to the committee how the Group could effectively evaluate whether a change would be revenue neutral considering it did not have access to basic information about the government's assumptions in respect of commodity prices and the volume of commodity sales.

Senate Committees, the Executive and Departments

3.87 A theme running through the hearings has been the issue of a lack of transparency. This theme of a lack of transparency was also evident in the Senate Select Committee on Fuel and Energy which conducted the initial inquiry into the RSPT, MRRT and expanded PRRT.

3.88 The Senate has been engaged in the scrutiny of the RSPT, the MRRT and the expanded PRRT since the Senate Select Committee on Fuel and Energy began its inquiries into the tax on 5 July 2010. That committee's report released in July 2010, provides a detailed account of the lack of disclosure of key information to the Senate and Senate Committees by the government.

55 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Mr Peter Freyberg, Chief Executive Officer Xstrata Coal, *Committee Hansard*, 13 December 2010, p. 24.

3.89 After ignoring repeated requests by the Senate to provide relevant information about the MRRT and expanded PRRT for months, the Treasury eventually released much of the information sought following a Freedom of Information request by various media outlets.

3.85 On 5 July, a public hearing was held to seek information on the new MRRT and the expanded PRRT. It was attended by the then Secretary to the Treasurer, Dr Ken Henry and Treasury officials. The hearing sought information about the new taxes and their associated revenue projects.

3.90 During the hearing, 13 questions were taken on notice. These were focussed on the underlying commodity price and production assumptions, inquiries about where the revenue was expected to come from geographically and by sector. The Senate Fuel and Energy committee requested replies by 9 July 2010. The Senate was attempting to provide transparency to enable the states and territories as well as key stakeholders to more engage in the development of the MRRT and the expanded PRRT.

3.91 On 9 July 2010, the Treasury provided responses to the questions taken on notice, but not all questions were answered. As a result, the Senate Committee on Fuel and Energy invited the Treasury to appear at another hearing on 13 July 2010 and the Chair of the Committee, Senator Mathias Cormann, sought advice from the Clerk of the Senate regarding the committee's ability to obtain information.

3.92 Before the public hearing on 13 July 2010 the committee wrote to the Prime Minister to request that the Secretary to the Treasurer answer questions about the new resource rent tax arrangements. No reply has ever been received to this day.

3.93 At the hearing on 13 July 2010, the Senate Committee on Fuel and Energy sought responses to the Questions on Notice that were placed at the hearing on 5 July 2010. In summary, the committee was advised that the Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP, would place more information into the public domain that would go to addressing questions placed on notice at the hearing on 5 July 2010.

3.94 A further series of Questions on Notice were placed by the Senate Committee on Fuel and Energy. The committee requested replies by 16 July 2010. The second interim report of the Senate Committee on Fuel and Energy noted that:

2.38 Despite the fact that Dr Henry suggested that the Treasurer would address 'some' of the committee's questions in his *Economic Statement July 2010*, the Treasurer really only addressed one—how much tax revenue the MRRT would raise when using the same price forecasts. Moreover, Dr Henry led the committee to believe that the government's announcement would include commodity-specific information on prices and volumes and also some region-specific data. This was not the case. Given the election has now been called, the committee will not be able to pursue further

whether that has been as a result of deletions in the report imposed by the government.⁵⁶

3.95 With the calling of the 2010 Commonwealth Election, the Questions on Notice issued by the Select Senate Committee on Fuel and Energy lapsed. With the creation of the Senate Select Committee on the Scrutiny of New Taxes, the issue of the government's refusal to release data and costings underpinning the MRRT and expanded PRRT was pursued again.

3.96 The government's unwillingness to release costings and assumptions extended to requests of this committee. When this matter was initially raised with them, the Treasury were unable to provide a comprehensive reason for their failure to provide the requested information although they were able to confirm that the modelling had been completed.

CHAIR—We have had a very specific order of the Senate and we have had questions on notice. In fact, there have been two orders of the Senate. Treasury completely ignored that specific order. You made one consolidated response to all three orders and the question about you providing us with the breakdown on a commodity-by-commodity basis of the mining tax revenue estimate was completely ignored. Why is that?

Dr Henry—...I am pretty sure that that was one of those questions that we took on notice to refer to the Treasurer. I suspect strongly that it was the Treasurer's decision what material should be released to the committee rather than a decision taken by the department.

CHAIR—But if a decision is made not to release information sought by a committee, and we have sought this information on a number of occasions now, you would be well aware of the need to point to a public interest ground and parliament would—

Dr Henry—I am aware of that, but I do not agree that I need to point to such a claim.

CHAIR—You can refer it to the Treasurer.

Dr Henry—Indeed.

CHAIR—I understand that, but whoever deals with the Senate committee's request or the Senate's request—

...

CHAIR—has to point to a public interest ground and to explain the public harm.

Dr Henry—I do not think you can fairly bring this one back to us. I think it is a matter as between this committee and the Treasurer.

CHAIR—Are you aware of any reason why it would not be in the public interest to release the breakdown?

56 Senate Select Committee on Fuel and Energy, *The mining tax; Still bad for the economy – Still bad for jobs*, Second interim report, July 2010, p.11.

Dr Henry—It is a matter for the Treasurer.

CHAIR—But you can confirm that that is analysis that has been done? That is what you told us on 5 July, so it has been done. It is information that is held by Treasury; it is information that is held by the government but the Treasurer has decided not to release that information.

Mr Parker—That is right. We have the information.

CHAIR—You have the information?

Mr Parker—We have done the analysis by commodity.⁵⁷

3.97 After further questioning however, Dr Henry advised that the assumptions relied on for modelling purposes could not be released as they were commercial in-confidence.

CHAIR—You mentioned earlier—and this is the reason why the government does not want to release this information—that in part the commodity price forecasts are based on commercial-in-confidence information provided by BHP Billiton, Rio and Xstrata. You are confident that BHP Billiton, Rio and Xstrata have provided the government with internal commercial-in-confidence data about expected commodity prices?

Dr Henry—Yes, indeed.

CHAIR—They have provided the government with commercial-in-confidence data about their internal commodity price expectations?

Dr Henry—That is correct.

CHAIR—They have not just pointed you to publicly available data from market analysts?

Dr Henry—No.

CHAIR—Have BHP, Rio or Xstrata asked Treasury not to release the government's commodity price assumptions used to estimate the revenue from the RSPT or the MRRT?

Mr Parker—I can answer that. In addition to the Senate requests for information we have had a number of FOI requests. In the context of those requests we have an obligation to consult with the companies which provided the information, and they have objected to its release.

CHAIR—I have asked a very specific question. Have the companies objected to you releasing information about the government's commodity price assumptions?

Mr Parker—Yes, they have, in the context of the FOI—but not the government's commodity price assumptions. They are published—

57 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Dr Ken Henry, Secretary and David Parker, Executive Director, Department of the Treasury, *Committee Hansard*, 22 November 2010, pp. 17–18.

CHAIR—In relation to the Senate order for you to release commodity price information, the government's commodity price assumptions, have the companies asked you not to provide that information?

Mr Parker—They have asked us not to provide the information which they have provided to us.

CHAIR—But that is not the question I am asking. In relation to the commodity price assumptions, have the companies asked you not to provide the government's commodity price assumptions for iron or for coal?

Mr Parker—No, of course not.

CHAIR—Well, if they have not asked you not to provide it, why wouldn't you—why would you use those companies as an excuse not to provide that information?⁵⁸

...

CHAIR—So you are saying that the assumptions the government has used are so closely aligned with the commodity price expectations of the three companies that it would be commercially damaging to them for you to release that information?

Mr Parker—That is a judgment that has been taken, yes.⁵⁹

3.98 When this issue of the Treasury declining to disclose information on the grounds that it may be commercial in-confidence was raised with contributors to the committee, many were of the view that transparency is in fact preferable:

CHAIR—...Do you think it is legitimate for the government to keep secret the commodity price, production volume and exchange rate assumptions that they have used to estimate the revenue from the tax?

Prof. Garnaut—I think best practice is to be as transparent as possible on all of these things.⁶⁰

CHAIR—Do you think that a government that relies on revenue from the mining industry ought to be transparent about the assumptions they are using to estimate their revenue?

Dr Moran—Yes.⁶¹

58 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes, Dr Ken Henry, Secretary, Department of the Treasury, Mr David Parker, Executive Director, Department of the Treasury, *Committee Hansard*, 22 November 2010, pp. 4 - 5.

59 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes, Mr David Parker, Executive Director, Department of the Treasury, *Committee Hansard*, 22 November 2010, p.6.

60 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Professor Ross Garnaut, *Committee Hansard*, 19 November 2010, p. 29.

61 Senator Mathias Cormann, Chair, Senate Select Committee on the Scrutiny of New Taxes and Mr Alan Moran, Director, Deregulation Unit, Institute of Public Affairs, *Committee Hansard*, 19 November 2010, p. 5.

3.99 As mentioned earlier, an array of information has been released in response to a Freedom of Information request.

3.100 The contrast between the approaches of the Commonwealth Government with that of other governments could not be more stark. Both the Western Australian and the Queensland Governments publish their commodity price and production volume assumptions in their budget papers. That enables proper scrutiny of budget estimates and budget outcomes. In scrutinising the budget people can assess whether they are due to changes in any of these variables or whether they are because of decisions made by government.

Committee comment

3.101 This part of the report has explained and highlighted the flawed consultation and transparency mechanisms deployed during the development of the RSPT, as well as the MRRT and expanded PRRT.

Consultation: Committee Comment

3.102 The committee considers that the government's handling of the Henry Tax Review created an environment which made any constructive consideration of the Report's recommendations impossible. Although the report put forward a range of options for discussion, the government's decision not to release the findings for public consultation before announcing its response was justifiably criticised heavily by all relevant stakeholders.

3.103 The committee considers that the government's negotiation of the design of a revised tax on mining with the three largest miners was inappropriately exclusive and secretive. The government most definitely did not consult or negotiate with 'the' mining industry. Far from it.

3.104 In the Senate Select Committee Fuel and Energy Interim Report of July 2010, *The mining tax: Still bad for the economy, Still bad for jobs*, that committee's Recommendation 5 recommended real consultation and genuine engagement with small and mid-tier mining companies. That consultation has not occurred. The PTG was not formed with the intent of engaging on the real substance of the MRRT and expanded PRRT. In these circumstances, the committee is persisting with the recommendation made by the previous inquiry into the MRRT and expanded PRRT that genuine consultation beyond the select few must occur as a matter of urgency.

3.105 It is the committee's view that the Parliament should insist on genuine consultation taking place with all relevant stakeholders, including with the 99 per cent of the mining industry which has been excluded so far as well as with state and territory governments.

Transparency: Committee Comment

3.106 The committee takes the view that when a government seeks to introduce a new tax which is forecast to generate significant revenue and its revenue estimates are based on highly sensitive variables the government should be open and transparent about the assumptions used. All relevant forecasts and revenue assumptions should be made public to enable proper scrutiny of the implications of any such new tax on the economy, the budget, international competitiveness, jobs and investment in affected sectors of the economy.

3.107 In the Senate Select Committee Fuel and Energy Interim Report of July 2010, *The mining tax: Still bad for the economy, Still bad for jobs*, that committee's Recommendation 10 sought greater and more appropriate disclosure of Budget information and Recommendation 11 requested the disclosure of the above information. Those recommendations remain valid and current.

3.108 None of that information was provided by the government in its 2011-12 Budget for the MRRT and expanded PRRT. The Budget Strategy and Outlook (Budget Paper No.1) 2011-12 failed to provide open and transparent information. The committee will again recommend that such information be disclosed. The next Mid-year Economic and Fiscal Outlook provides an opportunity for the government to comply with that recommendation.

3.109 The committee has identified other areas of concern in relation to transparency and openness that have not been acted upon as recommended by the Senate Select Committee Fuel and Energy Interim Report of July 2010, *The mining tax: Still bad for the economy, Still bad for jobs*. Specifically, in that report Recommendation 4 sought the disclosure of the impact of new taxes on a range of variables such as employment, investment and certainty.

3.110 A Review of the 2011-12 Budget did not find such information for the MRRT and the PRRT. The Budget Strategy and Outlook (Budget Paper No.1) 2011-12 failed to provide such transparency and openness. In these circumstances, the committee has again found it necessary to recommend that such information be disclosed. The next Mid-year Economic and Fiscal Outlook would provide such an opportunity.

Other matters: Committee Comment

3.111 The committee has consistently sought input from the PTG throughout the course of its inquiry into a mining tax. The committee took the view that the PTG, established specifically by the government to consult with stakeholders and advise government on transitional issues, would provide valuable insight into development of the MRRT and the PRRT.

3.112 Invitations to appear before the committee however were declined by all members of the PTG, including the Chair Mr Don Argus. In future, it would be desirable for those entities engaged in any policy development process to use their

best endeavours to cooperate with the Senate as it inquires into matters of importance to the nation.

Recommendation 1

3.113 The committee recommends that the Parliament not support the deeply flawed and poorly designed MRRT and expanded PRRT.

3.114 Should the Parliament be inclined to consider the government's proposed mining tax contrary to this principal recommendation, the committee makes the following further recommendations:

Recommendation 2

3.115 The committee recommends that Parliament insist that government proposals to make major structural changes to Australia's tax system be based on an open, transparent and inclusive policy development process before final policy decisions are made.

3.116 The committee also recommends that the Parliament refuse to consider any changes to resource taxation which have implications for state and territory royalty arrangements until the government can demonstrate that it has actively engaged and reached agreement with state and territory governments.

Recommendation 3

3.117 The committee recommends that in line with the government's stated commitment to openness and transparency the Parliament require the public release of all mining tax related revenue assumptions, including commodity price and production volume assumptions.

3.118 To enable proper scrutiny of the government's mining tax revenue estimates, the committee recommends that the Parliament insist on release of that information before it agrees to consider any mining tax related legislation.

Recommendation 4

3.119 The committee recommends that the government should not implement any future taxation reform without first providing the Australian public with independently verified modelling demonstrating any impact of the proposed reform on:

- employment
- investment
- industry
- Australia's international competitiveness
- the Commonwealth's budget position
- State and Territory revenues
- cost of living; and
- the Australian Economy as a whole.

Recommendation 5

3.120 The committee recommends that the Parliament insist on the government restoring confidence in good regulatory processes by:

- **formally recommitting to the best-practice regulation guidelines developed by its Office of Best Practice Regulation;**
- **confirming that proposals for new taxes require the development of Regulatory Impact Statements consistent with the requirements of the best-practice regulation handbook**

3.121 The committee recommends that before considering any mining tax related legislation the Parliament insist on a report from the Office of Best Practice Regulation about the extent to which the government's policy development processes for the RSPT, MRRT and expanded PRRT were consistent with its own best-practice regulation guidelines.

3.122 The committee recommends that the Office of Best Practice Regulation be required to make recommendations to improve the government's compliance with these principles.