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(2005) Vol 11:2 *New Zealand Journal of Taxation Law and Policy* page

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At the Extremes of a "Good Tax Policy Process": A Case Study Contrasting the Role Accorded to Consultation in Tax Policy Development in Australia and New Zealand

MICHAEL DIRKIS AND BRETT BONDFIELD

Michael Dirkis is a Senior Tax Counsel at the Taxation Institute of Australia, and Brett Bondfield is a Lecturer, Discipline of Business Law, Faculty of Economics and Business, University of Sydney.¹

This article reviews and critically assesses the tax policy and implementation processes adopted in Australia with specific reference to the development of a 'new' tax legislative drafting approach: Coherent Principle Drafting, a concept that is both explained and critiqued. The Australian position is compared and contrasted with that operating in New Zealand under the Generic Tax Policy Process. From that comparison, further critical insights into the efficacy of the developing Australian tax policy processes and infrastructure, the established New Zealand Generic Tax Policy Process, and the operation of consultative tax policy development and implementation systems more generally, are drawn.²

1.0 INTRODUCTION

On Australia Day, 26 January 2005, the front page of Australia's national newspaper, *The Australian*, carried a claim that the Australian Government "has secret plans to ... dramatically simplify onerous tax laws, including stripping back the 7,000-page tax act."³ The plan is the adoption of a new approach to drafting tax legislation, known as "coherent principles drafting".

The plan was not secret. This drafting style was first formally mentioned in Appendix 3 to the *Review of Aspects of Income Tax Self Assessment* (ROSA discussion paper), released on 29 March 2004.⁴

¹ The assistance of Adrian J Sawyer at the University of Canterbury, along with an anonymous referee, is gratefully acknowledged. The views expressed in this article are those of the authors' solely, and do not necessarily reflect the views of the Taxation Institute of Australia.

² This article is a revised version of a paper entitled "Trans-Tasman insights into tax policy design: Do the tax policy design approaches adopted in Australia and New Zealand require consultation in the development of a new tax law drafting style?", presented at the 17th Annual Australasian Tax Teachers' Association Conference hosted by Victoria University of Wellington, 26-28 January 2005.

³ D Uren and S Lewis, "Clean-up for tax law 'disgrace'", *The Australian* (26 January 2005), p 1.

⁴ Treasury (Australia), *Review of Aspects of Income Tax Self Assessment*, (Canberra, 2004), Discussion Paper, p 89. This ROSA paper notes that "... [t]he principle based approach will be adopted for new tax law measures, except where it would

However, despite that mention, little has publicly been revealed in respect of the scope of the new drafting style save brief mentions in:

- The former Minister for Revenue and Assistant Treasurer's speeches;⁵
- An answer to a question raised in an Australian Taxation Office (ATO) consultative forum;⁶ and
- An article in an ATO newsletter for tax agents.⁷

Given the poor history of consultation in Australia,⁸ it is not surprising that the adoption of this version of a "principle" based drafting methodology and the design of that process were not consulted upon.⁹ This article first seeks to outline what is "coherent principles drafting", by looking at the factors that gave rise to its adoption, the claimed advantages of the drafting approach and any possible weaknesses or risks. This discussion cannot seek to fully evaluate its operation as there is a lack of information on how the process works in practice.

Second, given that there was an absence of consultation in the design of this methodology, despite the Review of Business Taxation's (RBT's) express directions on consultation, the article seeks to question whether in fact consultation was required under Australia's current consultative processes. As background, a brief description of existing consultative arrangements will be undertaken.

Thirdly, given the seemingly more consultative approach adopted in New Zealand, it is useful to contrast it with the Australian situation to see whether, hypothetically, if such a drafting change was contemplated in New Zealand, could that change be implemented outside New Zealand's Generic Tax

require extensive rewriting of existing law." A passing reference to the initial development of this new drafting process was made in early 2003 in a Treasury presentation; see P McCullough, "Corporate taxation - Where to from here?", (Presentation at the 1st National Consolidation Symposium, Leura, 3 February 2003), p 6; republished in (2003) 4 *Tax Specialist* 182, p 185).

⁵ H Coonan, "Address to open the Corporate Tax Association Conference", (Paper presented at Corporate Tax Association Conference, Sydney, 23 May 2004), available at <<http://assistant.treasurer.gov.au/atr/content/speeches/2004/004.asp>> (as at 10 January 2005); H Coonan, "Holding Our Head Up High - Achievements and Challenges for the Australian Economy", (An address to the Australian Institute of Company Directors in Perth on 12 July 2004), available at <<http://assistant.treasurer.gov.au/atr/content/speeches/2004/010.asp>> (as at 10 January 2005).

⁶ Response to Item 4 of the 17 June 2004 meeting of the Australian Taxation Office's National Tax Liaison Group (NTLG), available at <<http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/49746.htm&pc=001/005/036/001/002&mnu=6547&mfp=001&st=&cy=1>> (as at 10 January 2005).

⁷ Australian Taxation Office, *the TAXAGENT* 26 (December 2004), A Coherent Principles Approach to Tax Law Design, p 4. The Australian Treasury issued some further information in a confidential paper ("Taxation of Financial Arrangements Stages 3 and 4 - Coherent Principles: Treasury Information Paper", (2004)) and presented a draft paper ("Coherent Principles - A Better Way to Design Our Tax Laws") to a meeting between the Commissioner of Taxation and professional association CEOs on 21 February 2005. However, given the nature of these documents and their limited circulation, the information could hardly be called public.

⁸ For a history of the lack of consultation in tax policy development in Australia, see generally M Dirkis, "Observations on the Development of Australia's Income Tax Policy and Income Tax Law", (2002) Vol 56:10 *Bulletin for International Fiscal Documentation* 522. The Australian Government has reacted to these concerns by asking the Board of Taxation to undertake an ongoing role in monitoring the processes of consultation; see P Costello, "Reforms to Community Consultation Processes and Agency Accountabilities in Tax Design", *Press Release* 22 (2 May 2002).

⁹ The Minister for Revenue and Assistant Treasurer, Hon Mal Brough, disagrees that there has been no consultation; see D Uren and S Lewis, "Clean-up for tax law 'disgrace'", *The Australian* (26 January 2005), p 1. However, the consultation he refers to is consultation on specific measures drafted using this methodology, not on the methodology itself.

Policy Process (GTPP).¹⁰ This hypothetical discussion carries significant importance in the Australian context given that the Australian Government accepted on 16 December 2004¹¹ a recommendation, contained in the Treasurer's August 2004 *Report on Aspects of Income Tax Self Assessment*, that the Board of Taxation should conduct a review of international consultative processes to identify improvements for the Australian system.¹²

This hypothetical exposition first touches upon the pre GTPP position, before examining the current administrative arrangements between New Zealand's Treasury, Inland Revenue and parliamentary drafters. The role of select committees and the commitment of the New Zealand Government to consultation will be touched upon in this context before exploring whether a new drafting tax style could be implemented outside the consultation arrangements laid out under the GTPP.

This article concludes by briefly exploring the reasons underlying the differences in the approaches to tax policy development and consultation in each country and draws four key insights from this discussion.

2.0 COHERENT PRINCIPLES DRAFTING

Before defining "coherent principles drafting", it is first necessary to give some context to its development in order to understand why it has been devised and advocated by the Australian Government and Treasury.

2.1 What Led to this Change in Australia?

In 1998, the RBT noted that policy development had been ad hoc, resulting in almost 4,000 pages of legislation, and in numerous judicial and administrative decisions and rulings handed down over many years. The RBT observed in its paper *A Strong Foundation* that:¹³

"[t]he rules governing business taxation are the result of an accelerating accretion of policy changes over several decades. This process of unstructured accretion has increased the complexity of changes and limited their effectiveness. While each policy change, or program of changes, has been designed to address particular problems, those policy changes are now revealed to have been additions to a system lacking a sound foundation."

In 1999, the RBT recommended that the then current, largely sequential taxation policy and law design process be replaced with a process that is holistic and fully integrated, "... a principle-based

¹⁰ Inland Revenue, *Supplementary Briefing Papers: Volume 1 - Tax Policy*, (Wellington, November 1999), p 2, available at <<http://www.taxpolicy.ird.govt.nz/publications/files/volume1.pdf>> (as at 1 January 2005). For a comprehensive discussion and analysis of the GTPP and the context of its implementation, see AJ Sawyer, "Broadening the Scope of Consultation and Strategic Focus in Tax Policy Formulation - Some Recent Developments", (1996) Vol 2:1 *New Zealand Journal of Taxation Law and Policy* 17.

¹¹ P Costello, "Outcome of the Review of Aspects of Income Tax Self Assessment", *Press Release 106* (16 December 2004), Attachment A.

¹² Treasury (Australia), *Report on Aspects of Income Tax Self Assessment*, (Canberra, 2004), Recommendation 7.1, p 69. Prior to this, despite some initial discussion, there was no effective mention of the GTPP in the relevant areas of the Review of Business Taxation's final report; see Review of Business Taxation, *A Tax System Redesigned*, (Canberra, 1999), Section 1: Policy Formulation, pp 95-97, and Section 2: Legislation, pp 129-134.

¹³ Review of Business Taxation, *A Strong Foundation: Discussion Paper 1: Establishing Objectives, Principles and Processes*, (Canberra, 1998), Ch 2: Illustrating A Deficient Foundation, p 14.

approach to the design of business tax policy, legislation and administration."¹⁴ The Australian Government did not directly respond to this recommendation,¹⁵ however, it did endorse a process of high level principles drafting¹⁶ in the context of the recommendation for the introduction of an alternative income calculation method, initially known as "Option 2" (subsequently known as the "Tax Value Method" (TVM)).¹⁷

The RBT noted that consultation was fundamental to any adoption of principles based drafting. It noted that the:¹⁸

"... concept of integration embraces not only the design process itself but also, and at least as importantly, the way the various tax-related government agencies relate with each other and with the business sector and wider community. There must be a shared sense of ownership of the issues, clear accountabilities, open communication, a commitment to consultation ..."

However, despite identifying the problem, the process of implementing both the "A New Tax System" changes¹⁹ and the RBT recommendations resulted in an increasing number of Bills²⁰ and average length of legislation. By the end of 2004, the Income Tax Assessment Act 1936 (Cth) (ITAA 1936) and

¹⁴ Review of Business Taxation, n 12, Section 1: Policy Formulation, pp 95-97, and Section 2: Legislation, pp 129-134. In particular, see Recommendations 1.1 (in respect of co-design) and 2.1-2.3 (in respect of an integrated tax code). This picked up on earlier suggestions in the ANTS document (Treasury (Australia), *Tax Reform, Not a new tax, a new tax system*, (Canberra, 1998), Ch 4: Simplicity - Reform to tax administration, The plan, Establishing an integrated tax code, p 149) that a proposed Integrated Tax Code should "use general principles in preference to long and detailed provisions".

¹⁵ Both of the Treasurer's press releases that set out the Government's response to a Tax System Redesigned (see n 14) did not expressly adopt or engage with these recommendations; see P Costello, "The New Business Tax System", *Press Release 58* (21 September 1999); and "The New Business Tax System: Stage 2 Response", *Press Release 74* (11 November 1999).

¹⁶ P Costello, "The New Business Tax System: Stage 2 Response", *Press Release 74* (11 November 1999), Attachment N.

¹⁷ On 11 November 1999, the Australian Government gave in principle support to the TVM measures. TVM was designed to replace Australia's current traditional income tax system (ie, based upon the income/capital dichotomy) with a new income calculation method where taxable income or loss is calculated as the sum of net income (being the difference between receipts and payments (excluding private flows) plus the change in the tax value of assets over the period less the change in the tax value of liabilities), and tax law adjustments (ie, the exceptions to the rules where government policy requires a different treatment (eg, capital gains discount, gifts, R&D etc)). However, despite the Government's in principle commitment, the Treasurer announced on 28 August 2002 following the development and review of the proposed measure by the Board of Taxation "... that the Government has accepted a recommendation from the Board of Taxation not to proceed with the Tax Value Method (TVM) and the associated Section 4 'core rules'."; see P Costello, "Government decides against the Tax Value Method", *Press Release 48* (28 August 2002).

¹⁸ Review of Business Taxation, n 12, Section 1: Policy Formulation, pp 95-96.

¹⁹ See generally Treasury (Australia), *Tax Reform, Not a new tax, a new tax system*, (Canberra, 1998), which included recommendations to introduce a goods and services tax (GST) and to tax trusts as companies. For a summary of this reform process see J Harrison, "The GST Debate - A Chronology: Background Paper No 1 1997-98", (1997) (updated to 1999 by M Stretton) available at <<http://www.aph.gov.au/library/pubs/chron/1998-99/99chr01.htm>> (as at 10 January 2005).

²⁰ Between June 1999 and the dissolution of Parliament on 5 October 2001 for the Federal Election, introducing into Parliament 144 taxation, superannuation, excise and license fee Bills, with a further 44 taxation and superannuation related Bills introduced in 2002, and 20 taxation and superannuation Bills in 2003. In 2004, a further 46 tax and superannuation Bills were introduced.

the Income Tax Assessment Act 1997 (Cth) (ITAA 1997) grew to about 8,000 pages.²¹ The Chair of the Productivity Commission predicted that if this rate of growth continued unabated.²²

"... that by the end of this century the paper version of the Tax Act would amount to 830 billion pages; it would take over 3 million years of continuous reading to assimilate and weigh the equivalent of around 20 aircraft carriers!"

The Minister for Revenue in May 2004 ascribed this growth over the last 20 years to the fact that:²³

"... tax law has set out in increasing detail how the law is to apply in a variety of fact situations. This is often seen as desirable, as taxpayers naturally want a high degree of certainty as to whether and how the law will apply in their particular circumstances.

"While this approach does provide certainty where a taxpayer's particular circumstances are specifically addressed, laws designed in this way can never anticipate all the relevant circumstances of each and every taxpayer. I am being constantly approached for a carve-out or exception to prescriptive legislation that at times can work a manifest unfairness or have an unintended consequence."

Thus, it is asserted that in response to these problems set out above, "coherent principles drafting" was adopted by the Australian Government.²⁴

2.2 What is "Coherent Principles Drafting"?

The first thing to clarify is that "coherent principles drafting" is not the plain English drafting,²⁵ which was the focus of the failed Tax Law Improvement Project (TLIP).²⁶ Rather:²⁷

²¹ Treasury (Australia), "Coherent Principles – A Better Way to Design Our Tax Laws", (A draft paper presented to a meeting between the Commissioner of Taxation and professional association CEOs on 21 February 2005), 6. This calculation does not include the Bills introduced in 2005 nor the law contained in other tax Acts, including the Taxation Administration Act 1953 (Cth), International Agreements Act 1953 (Cth), and the Fringe Benefits Tax Assessment Act 1986 (Cth).

²² G Banks, "The good, the bad and the ugly: economic perspectives on regulation in Australia", (Paper presented at the Conference of Economists, Business Symposium, Canberra, 2 October 2003), p 4. Suggestions that the length of the law gives rise to complexity are subject to similar superficiality criticisms. In fact, length may increase simplicity by providing a fuller explanation. In an electronic age, length is not as problematic. The solution to length is technology, as H Stone, (in "Some Aspects of the Problem of Law Simplification", (1923) Vol 23 *Columbia Law Review* 320) noted as early as 1923. He predicted that the ever increasing length of legislation would put pressure on some new technology to facilitate the expeditious location of relevant law.

²³ H Coonan, "Address to open the Corporate Tax Association Conference", (Paper presented at Corporate Tax Association Conference, Sydney, 23 May 2004), available at <<http://assistant.treasurer.gov.au/atr/content/speeches/2004/004.asp>> (as at 10 January 2005).

²⁴ See n 23 where Senator Coonan noted that "[o]ur overarching objective in adopting a principles based approach is to ensure our regulatory framework remains robust, modern and flexible without over burdening businesses with unnecessary regulation." Australian Treasury officials note that the ROSA Discussion Paper, *Review of Aspects of Income Tax Self Assessment* (Canberra, 2004), clearly set out (at p 89) the Government's green light for the adoption of a new drafting style by stating "[w]ith the transfer of responsibility for legislation from the Tax Office to Treasury in mid 2002, the Government signaled its determination to address issues with tax legislation". This seems to conflict with statements by the then Minister Revenue who saw the ROSA discussion as merely exploring "... whether a principle-based approach to tax law design could result in a less complex, more coherent statement of the tax laws"; see n 23.

²⁵ The complexity of taxation law is sometimes measured by the readability of the legislation; see, for example, Law Reform Commission of Victoria, *Plain English and the Law*, (Melbourne, 1987), p 60; and S James and A Lewis, "Fiscal Fog", (1977) *British Tax Review* 371. "Plain English" drafting was viewed by some as a means of law simplification by improving readability.

"[t]he coherent principles approach aims to write the law in a series of operative rules - that are principled statements about what the law is intended to do - rather than details about the mechanism that gets it there."

The Treasury states that:²⁸

"[t]he approach involves identifying the intent or the general principle behind an announced Government policy and stating it clearly and concisely in the law."

Thus, these "[p]rinciples synthesise the detail that would otherwise be set out in black letter rules, to achieve the substantive effect of the measure."²⁹

The 21 February 2005 CEO's forum draft Treasury paper notes that the law is "coherent" if it:³⁰

- Helps the reader make sense of the law;
- Captures the essence of the law's intent;
- Uses language and concepts consistent with reader's understanding of what the law deals with;
- Is intuitive or obvious to someone who understands its intent and context.

The Treasury paper states that an example of "coherent principles drafting" in the current law is s 25-5(1)(a) ITAA 1997 (Cth), which allows taxpayers a deduction for expenditure for managing their tax affairs. It is principles based as "the provision captures the intended core idea" and "uses concepts in the readers' normal understanding."³¹ In such a simple example, there is a circular logic at work in that a primary and straightforward concept is (or should be) capable of simple straightforward expression in legislation. But this example does not shed light on how tax law design deals with the shaping of the concept to be legislated. Where matters are more complex and contested, settling on an unambiguous concept is a far more problematic exercise. As this article discusses in respect of consultation and the insights drawn from a comparison between the Australian and New Zealand approaches to tax law design, there is a debate as to the best processes and approaches to adopt in order to maximize the opportunity for the basic concepts (to be legislated) to be debated and refined.

²⁶ Although TLIP did give rise to the Income Tax Assessment Act 1997 (Cth), by 1998 it was overtaken by the tax reform of ANTS and the RBT. Staff were transferred to the tax reform work (Treasury (Australia), *Tax Reform, Not a new tax, a new tax system*, (Canberra, 1998), p 149) with some of the output of the project being released by the RBT as the Draft Legislation (entitled A New Tax System (Income Tax Assessment) Bill 1999). Also see M Dirkis and M Burton, "Australia: The Income Tax Simplification Experience to Date", (1996) Vol 50 *Bulletin for International Fiscal Documentation* 67; and for a trans-Tasman viewpoint on the TLIP experience, see AJ Sawyer, "Rewriting Tax Legislation: Reflections on the New Zealand Experience", (2003) Vol 57:12 *Bulletin for International Fiscal Documentation* 578, pp 583-584 and 587.

²⁷ H Coonan, "Holding Our Head Up High - Achievements and Challenges for the Australian Economy", (An address to the Australian Institute of Company Directors in Perth on 12 July 2004), available at <<http://assistant.treasurer.gov.au/atr/content/speeches/2004/010.asp>> (as at 10 January 2005).

²⁸ Response to Item 4 of the 17 June 2004 meeting of the Australian Taxation Office's National Tax Liaison Group (NTLG), available at <<http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/49746.htm&pc=001/005/036/001/002&mnu=6547&mfp=001&st=&cy=1>> (as at 10 January 2005). The Treasury further noted that they are "working on ways of making the legislation less difficult to understand including drafting it in a plain, non-technical style."

²⁹ Treasury (Australia), *Review of Aspects of Income Tax Self Assessment*, (Canberra, 2004), Discussion Paper, p 89.

³⁰ Treasury (Australia), "Coherent Principles - A Better Way to Design Our Tax Laws", (A draft paper presented to a meeting between the Commissioner of Taxation and professional association CEOs on 21 February 2005), pp 2-3.

³¹ See n 30, p 3.

Although "coherent principles drafting" was intended to apply to changes to both old legislation³² and all new legislation,³³ the Treasury has subsequently advised that the process has not been applied yet and that it would not be used in all cases, but only where it was appropriate (such as in respect of the proposed Taxation of Financial Arrangements (TOFA) stages 3 and 4).³⁴

Despite these high level statements, it is not clear what "coherent principles" drafted legislation looks like or how the drafting process will operate in practice. It is being presented very much as a "suck it and see" approach rather than a clearly articulated, analysed and documented process, let alone being a discussed process.

2.3 The Claimed Advantages of "Coherent Principles Drafting"

Despite this lack of clarity, the then Minister and the Treasury claim that using high level principles rather than black letter approaches to draft tax law has the benefits that:³⁵

- The volume of the law is likely to be reduced as additional detail is used only where the high level principles by themselves are insufficient;
- Law based on principles (ie, the legislation identifies the generic characteristics of the "product") is less likely to need to be altered in the face of market innovations (for example, the development of new financial products) or to repair structural or technical defects; and;
- These effects may reduce the amount of time Parliament needs to devote to tax legislation.

It is not suggested that these benefits cannot result but, in light of the lack of detail, these claimed advantages are yet to be proven. The potential downsides of such a potentially radical new approach to drafting must also be placed in the equation. As well, it needs to be kept in mind that issues of drafting come rather late in the policy design to policy implementation continuum and "coherent principles drafting" is part of the tax law design process, not the process itself.

2.4 Concerns With the 'New' Drafting Process

There are concerns about the impact of this change. These concerns, discussed below, are magnified given that this change has been imposed by the Treasury without any consultation.

The major concern is that the potential lack of detail in tax laws drafted under this approach may result in uncertainty. However, the then Minister dismissed such concerns in stating that:³⁶

³² It was stated by senior Treasury staff during the consultation on the Review of International Tax Arrangements proposals that this drafting approach has already been used.

³³ Response to Item 4 of the 17 June 2004 meeting of the Australian Taxation Office's National Tax Liaison Group (NTLG), available at <<http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/49746.htm&pc=001/005/036/001/002&mnu=6547&mfp=001&st=&cy=1>> (as at 10 January 2005).

³⁴ Treasury (Australia), "Coherent Principles – A Better Way to Design Our Tax Laws", (A draft paper presented to a meeting between the Commissioner of Taxation and professional association CEOs on 21 February 2005).

³⁵ Treasury (Australia), *Review of Aspects of Income Tax Self Assessment*, (Canberra, 2004), Discussion Paper, p 89. Senator Coonan also made the same claims in similar wording; see H Coonan, "Address to open the Corporate Tax Association Conference", (Paper presented at the Corporate Tax Association Conference, Sydney, 23 May 2004), available at <<http://assistant.treasurer.gov.au/atr/content/speeches/2004/004.asp>> (as at 10 January 2005).

³⁶ H Coonan, n 35; and Treasury (Australia), n 35, p 89 (which uses identical wording).

"[w]here necessary, additional detail can be provided in the law, the explanatory memorandum or subordinate legislation. Elaboration of the practical effects can also occur through rulings."

The Minister stated on another occasion.³⁷

"... unlike some general principles approaches, the coherent principles approach can accommodate detailed or specific rules - but only when needed, and not as a matter of course."

The Treasury and the Government called this process of using subsidiary legislation, ATO rulings or other educational products to explain what the law means "unfolding".

However, the suggested unfolding solutions (the subordinate legislation response and the rulings solution) are not always the best solution for spelling out the operation of law and legislative intent. In many cases, subordinate legislation will not be the ideal solution as often:

- Scrutiny by Parliament of subordinate legislation is far less than for legislation;
- Drafting instructions are subjected to less scrutiny than legislation drafting instructions;
- Consultation is often not conducted in respect of subordinate legislation; and
- Subordinate legislation is drafted by the less experienced Office of Legislative Drafting (OLD) in the Attorney-General's Department.

This meant that subordinate legislation could potentially subvert the policy intent through poor drafting.

Further, the use of subordinate legislation may not reduce the length or complexity of the entire regulatory measure. For example, a similar experiment in the Corporation law area has seen the Corporations Act 2001 (Cth) incur modest growth while the regulations have bloomed.

The second major concern is that the use of rulings to "fill the gaps" could be seen as merely a means of shifting small 'p' policy back to the ATO or, in certain circumstances, allowing the ATO to "make" law through rulings. Again, to counter such concerns, the then Minister responded by noting that:³⁸

"If experience with the law once it is enacted suggests that an ATO Ruling may be needed, the principled framework in the law will provide a sounder basis for the ruling than does the present black letter detail approach.

"But that does not mean that it will be left to the ATO to invent the law. Law that is expressed as a framework of clear operative principles will set clear parameters for the ATO's interpretation."

The Treasury endorsed this view by stating:³⁹

³⁷ H Coonan, "Holding Our Head Up High - Achievements and Challenges for the Australian Economy", (An address to the Australian Institute of Company Directors in Perth on 12 July 2004), available at <<http://assistant.treasurer.gov.au/atr/content/speeches/2004/010.asp>> (as at 10 January 2005).

³⁸ See n 37.

³⁹ Response to Item 4 of the 17 June 2004 meeting of the Australian Taxation Office's National Tax Liaison Group (NTLG), available at <<http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/49746.htm&pc=001/005/036/001/002&mnu=6547&mfp=001&st=&cy=1>> (as at 10 January 2005).

"[t]here is an understanding that there still may need to be extra detail provided in the accompanying material, however, Treasury do not want to see the Tax Office having to issue large numbers of rulings or having to "invent" the law. Treasury's aim is to provide certainty via the law. The principle should be sufficiently clear that taxpayers can determine whether their case falls within it or not, without the need for supplementary material or public rulings."

Given the inability of the Australian Treasury and the Australian Government in the past to deliver clear law, there is no assurance that they will get it right under "coherent principles drafting". Thus, the concerns remain. As noted previously, concerns over the delivery of clear law are twofold: the drafting of the law as a matter of technical practice and the shaping of the concept that requires statutory expression. It is this latter issue and how a tax policy system can best fashion that concept that is usually considered and discussed when the role of consultation is debated. In this way, using "coherent principles drafting" as the case in point to consider and contrast Australia and New Zealand's tax policy processes may add weight to any insights that can be gleaned from that discussion.

3.0 AUSTRALIA'S TAX POLICY PROCESS

As mentioned in the introduction, in order to highlight the scope of Australia's new tax policy development structure and consultative arrangements, the pre-1 July 2002 situation will be briefly described before the current arrangements are explored.

3.1 Tax Policy Development - Administrative Structure

3.1.1 Pre 1 July 2002 structure

Up to 1 July 2002, in theory, the Tax Policy Division of Treasury had the responsibility for policy, the Office of Parliamentary Counsel (OPC) the responsibility for drafting legislation (with subordinate legislation (regulations) being drafted in the OLD), and the ATO the responsibility for implementation and administration.⁴⁰ In practice, these demarcation lines, particularly between Treasury and the ATO were blurred. Both this approach to tax policy development and, in particular, tax law development has been subject to severe widespread criticism, including those made by Professor Brian Arnold,⁴¹ the Commonwealth Parliament's Joint Committee of Public Accounts,⁴² and more recently by the RBT.⁴³

⁴⁰ For a history of the development of tax policy in Australia, see M Dirkis, "Observations on the Development of Australia's Income Tax Policy and Income Tax Law", (2002) Vol 56:10 *Bulletin for International Fiscal Documentation* 522. The following examination of Australia's tax policy process is updated from the information in this article.

⁴¹ B Arnold, *Arnold Report on the Implementation Issues arising from the Foreign Investment Fund Legislation*, (Australia 1992), p 60. See also B Arnold, "The Process of Tax Policy Formation in Australia, Canada and New Zealand", (1990) Vol 7 *Australian Tax Forum* 379.

⁴² The Joint Committee of Public Accounts, *Report No 326 - An Assessment of Tax: A Report on an Inquiry into the Australian Taxation Office*, (Canberra, 1993), recommended that the policy sections of the Australian Treasury, the ATO, and the OPC should be merged into one centralised body in order to ensure simplification of current tax legislation and reform of legislative drafting system. However, in its 9 August 1994 response to the Report, the then Labor Government rejected this recommendation.

⁴³ In Review of Business Taxation, *A Strong Foundation: Discussion Paper 1: Establishing Objectives, Principles and Processes* (Canberra, 1998); and Review of Business Taxation, *A Tax System Redesigned*, (Canberra, 1999).

The debate again rekindled in early 2002.⁴⁴ Prior to this most recent debate, in 2000, the Board of Taxation⁴⁵ was charged with the responsibility of overseeing consultation in respect of tax reform measures.⁴⁶ It engaged the accounting firm KPMG to undertake a review of consultation to devise a world's best practice model.⁴⁷ In the light of the report,⁴⁸ the Board of Taxation made a number of recommendations,⁴⁹ which were in the main adopted by the Australian Government on 2 May 2002.⁵⁰

3.1.2 *The current administrative structure*

As part of the adoption of the Board of Taxation's recommendations referred to in the above paragraph, the Treasurer accepted the Board's recommendation⁵¹ to transfer ATO policy staff to Treasury.⁵² The Board's recommendation was based upon the findings of the KPMG's report that:⁵³

"[a] single and specialist Government agency or unit should be created with the responsibility for advising on tax policy and drafting tax legislation, bringing together the relevant expertise from the Treasury, the ATO and OPC."

However, the Board recommended the creation of a Tax Policy and Legislative Unit (TPLU), consisting of ATO and Treasury staff, to be located within the Treasury.⁵⁴ OPC would remain separate, retaining responsibility for the drafting of tax legislation, as a service provider to the TPLU. The Board felt that the Australian Government could consider bringing legislative drafters' skills within the single

⁴⁴ This issue was flagged by Helen Coonan, Minister for Revenue and Assistant Treasurer, in her 27 February 2002 speech to the Sydney Institute, "Safety in Numbers - Tax Reform and the National Nest Egg", p 6, and in evidence to the Senate Economic Legislation Committee, Estimates Hearings, 20 February 2002, p E75.

⁴⁵ The Board of Taxation is a non-statutory advisory board, which was established on 10 August 2000 to advise the Government (Treasurer) on the development and implementation of taxation legislation, as well as the ongoing operation of the tax system; see P Costello, "The New Business Tax System", *Press Release 58* (21 September 1999); and P Costello, "Board of Taxation: Membership", *Press Release 83* (10 August 2000).

⁴⁶ The Board of Taxation on its website states that "[a] key objective of the Board is to ensure that there is full and effective community consultation in the design and implementation of tax legislation. This includes monitoring and advising on the consultative and educative processes for the development of tax law". See <<http://www.taxboard.gov.au>> (as at 10 January 2005).

⁴⁷ Board of Taxation, "Review of Community Consultation Arrangements for Taxation Legislation", *Press Release 2* (5 May 2001). The objective of the Review was "... to identify potential improvements to the consultation process." The Board has subsequently called for a radical overhaul of tax law development; see F Buffini, "Tax board wants overhaul of law process", *Australian Financial Review* (9 January 2002), p 3.

⁴⁸ A summary of the KPMG report's findings are in the Board of Taxation, *Government Consultation with the Community on the Development of Taxation Legislation - A Report to the Treasurer and the Minister for Revenue and Assistant Treasurer*, (Canberra, 2002), Appendix B, available at <<http://www.taxboard.gov.au>> (as at 10 January 2005).

⁴⁹ See n 48.

⁵⁰ P Costello, "Reforms to community consultation processes and Agency accountabilities in tax design", *Press Release 22* (2 May 2002).

⁵¹ See n 48, Recommendation 10, pp 19-22.

⁵² P Costello, "Reforms to community consultation processes and Agency accountabilities in tax design", *Press Release 22* (2 May 2002).

⁵³ See n 48, Appendix B, p 28.

⁵⁴ See n 48, Recommendation 10, pp 19-22, and para 71.

unit, but this was not essential and the improved tax design and consultation processes should contribute to the more efficient use of OPC's tax drafting resources.⁵⁵

The Treasurer, in accepting the Board's recommendation concluded that:⁵⁶

"The new arrangements will ... [provide] 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."

This is not generally accepted as being the case. The Treasury's culture is considered to be imbued with even higher levels of secrecy than the ATO as they are closer to the Australian Government and the political process (as advisers to Ministers). Therefore, any comments made by Treasury officers are more likely to be politically dangerous than when these issues were dealt with by the ATO. This political sensitivity means approvals to consult are often needed and the ability to make comment or be open in solutions is more limited. This could result in less open consultation and discussion and a policy team further isolated from the community. Thus, the Treasurer's words that "the transfer will bring the accountability for tax policy and legislative design more directly under Ministerial control" ring true.

Further, by leaving OPC outside the equation, accountability for poorly drafted law remains elusive. Emblematic of this is the analysis of the TLIP process in a paper produced by OPC staff in which there is nearly no acknowledgement of the failings of the TLIP process and outcomes; rather there is an insular focus on the technical aspects of the exercise of drafting.⁵⁷ In addition, the drafting process has been "politicised" through the titling of bills and measures to reflect particular political perspectives.⁵⁸ For example, "A New Tax System" sits as part of the title of acts related to this initiative such as: A New Tax System (Goods and Services Tax) Act 1999 which is the legislative basis of Australia's Goods and Services Tax.

3.2 Australia's Post 1 July 2002 Consultative Arrangements for Tax Policy Development

The consultative arrangements that apply from 1 July are that:⁵⁹

"... 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 ...;

⁵⁵ Board of Taxation, *Government Consultation with the Community on the Development of Taxation Legislation - A Report to the Treasurer and the Minister for Revenue and Assistant Treasurer*, (Canberra, 2002), pp 21-22, para 76.

⁵⁶ P Costello, "Reforms to community consultation processes and Agency accountabilities in tax design", *Press Release 22* (2 May 2002), available at <<http://www.treasurer.gov.au/tst/content/pressreleases/2002/022.asp>> (as at 7 June 2005).

⁵⁷ V Robinson, "Rewriting legislation: Australian Federal Experience", (Paper presented in Ottawa, Canada in March 2001), available at <<http://www.opc.gov.au/plain/pdf/rewriting.pdf>> (as at 19 January 2005), pp 32-34.

⁵⁸ H Penfold, "The Australian approach in the new drafting environment", (Paper presented at the CIAJ/ICAJ Conference in Ottawa, Canada, 12 September 2002), available at <<http://www.opc.gov.au/plain/docs.htm>> (as at 10 January 2005), p 1.

⁵⁹ See n 56.

- 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 stated circumstances noted above where the Government would not accept "mandatory" community consultation were "... cases where there is commercial or market sensitivity, or revenue or tax avoidance sensitivity." The Treasurer also noted that "... the timing of policy change will at times determine the extent and form of consultation that can be undertaken."⁶⁰

The Treasurer has also asked the Board of Taxation to undertake an ongoing role in monitoring the processes of consultation. The Treasury also agreed to the Board conducting post-implementation reviews of major pieces of tax legislation to ensure that government policy intent has been effectively translated. Such reviews could be in addition to, or complement, reviews undertaken within the Treasury and the ATO.⁶¹ To assist in this process, on 9 July 2002 the Board of Taxation appointed 22 tax professionals to an advisory Panel.⁶²

Overall, it is very difficult to discern a Treasury and Government commitment to consultation as the standard practice, let alone consultation on policy as opposed to the detail of its implementation. As an example, it took Treasury over 18 months after the Treasurer's announcement to release a document setting out its view of the consultative process.⁶³ The document is no more than two and a half pages of text and makes no generic commitment to consultation: it merely broadens the range of circumstances where consultation is not appropriate to include *political sensitivities*. To counter criticism, in late May 2004, Treasury published its report to the Board of Taxation entitled "Treasury's Consultation Processes on Announced Tax Measures" current as at 30 April 2004, and repeated the exercise as at 31 October 2004.⁶⁴

⁶⁰ See n 56.

⁶¹ See n 56.

⁶² Board of Taxation, "Board of Taxation Advisory Panel", *Press Release* (9 July 2002).

⁶³ Treasury (Australia), *Engaging in Consultation on Tax Design*, (Canberra, 2004), available at <<http://www.treasury.gov.au/contentitem.asp?pageId=&ContentID=784>> (as at 10 January 2005).

⁶⁴ Treasury (Australia), "Treasury's Consultation Processes on Announced Tax Measures (As at 31 October 2004)", available at <<http://www.treasury.gov.au/documents/935/PDF/consultation.pdf>> (as at 8 January 2005). However, the report does not name who has been consulted nor reveal the nature of that consultation (drop in visit or formal). This information is only known to the Government and the Treasury. This leads to perceptions of no consultation on a range of issues.

4.0 WAS CONSULTATION ON "COHERENT PRINCIPLES DRAFTING" REQUIRED UNDER AUSTRALIA'S CURRENT POLICY ARRANGEMENTS?

In the light of the above principles, whether consultation on "coherent principles drafting" was required depends upon whether the adoption of a drafting style is a "substantive tax legislation initiative" and it does not fall within one of the exceptions. The drafting style would be a "substantive tax legislation initiative" and should have been consulted upon. Supporting this rather self-evident conclusion is the fact that the Government and the Treasury have sold the initiative as having the potential to substantially influence the tax law and policy landscape.

In an argument that would seem to detract from the importance of the change to drafting approach, the Treasury would argue that as consultation is conducted on a number of legislative measures, the impact of the drafting style in respect of those measures will be dealt with. However, the Treasury often does not consult⁶⁵ nor does it always provide adequate time for consultation.⁶⁶ Thus, this argument carries little weight. Further, any such discussion of the overall impact of "coherent principles drafting" in an issue by issue consultation process could well be marginalised or dismissed as being outside the scope of the specific issue being consulted on at that time.

If the conclusion that consultation was required and moreover desirable is clear, it is important to look across the Tasman to see if the conclusion would be so definitive. In doing this, there are interesting insights into the tax policy process (set out in part 8) that are drawn into stark relief by such a discussion.

5.0 NEW ZEALAND'S TAX POLICY APPROACH

As set out in the introduction, in exploring whether the New Zealand GTPP would require consultation as part of introducing a new tax legislation drafting methodology, it is first necessary to set out the New Zealand approach to tax policy development and the context in which that occurs. In doing so, it must be kept in mind that the insights that can be drawn from the hypothetical application of that approach to "coherent principles drafting" go further than just whether it would have been required to be consulted on. Those insights go to highlighting some of the fundamental considerations in any good tax policy process.

5.1 The New Zealand Approach to Tax Policy Design

In order to highlight the scope of New Zealand's GTPP, the pre-1995 situation will be briefly considered before looking at current arrangements in more detail.

⁶⁵ There are a number of examples over the last 12 months where consultation has not occurred, two of which are:

- The deductibility of travel between two places of work measures (s 25-100) contained in the Taxation Laws Amendment (2004 Measures No 1) Act 2004 (Cth) were not exposed to any consultation as they were viewed as minor technical changes. The poor drafting has given rise to the need to administer the rules on intent, not the words of the law; and
- The initial briefing on tranches 3 and 4 of Taxation of Financial Arrangements reforms (TOFA) were conducted with financial institutions exclusively, not with the professions that advise on such issues.

⁶⁶ For example, on 22 November 2004 the Australian Treasury invited the Taxation Institute of Australia to participate in a 'round-table' meeting on 24 November 2004 to discuss the development of certain superannuation regulations. It allowed less than two days for the Taxation Institute to identify and nominate an appropriately qualified representative with the time to spend a half a day out of the office in attending and adding value to this consultation process.

5.1.1 The New Zealand tax policy process pre-1995

Pre-1995 views varied on the effectiveness of New Zealand's tax policy formulation landscape. There was a view that the system was one conducted with "the traditional secrecy of tax policy formulation and the associated budgetary process."⁶⁷ Yet others described it as 'unique' with its widespread use of consultative committees employed as part of its policy development process and a corresponding openness of the Government to engage in public debate.⁶⁸ This latter view was formed in light of the high level of consultation conducted in association with the huge tax system changes of the mid-1980s. This consultation was being carried out at earlier stages in tax policy formulation than was the then norm in Australia and elsewhere.

In many ways, this transparency of process started to become expected and the use of consultative committees gained a firm foothold.⁶⁹ This set a path that led to the GTPP's door and set in place a culture change as regards how tax policy would be progressed.

The wellspring report leading to the adoption of the GTPP was that of the Organisational Review Committee chaired by Sir Ivor Richardson (the Richardson Committee).⁷⁰ The Richardson Committee saw that an ad hoc approach to consultation did not provide consistent professional and public input at all (especially in the early) stages of tax policy development and as a result, the quality of the output suffered accordingly. In doing so, the report recognised the limits of openness in the context of budget secrecy and the timing of consultation.⁷¹

5.1.2 The New Zealand tax policy process under the Generic Tax Policy Process - post 1995

The GTPP does not have the force of law; it is simply a policy adopted by the Executive and as such, can be ignored or terminated without reference to Parliament.⁷² The GTPP was a recommendation of the Richardson Committee⁷³ that was adopted by Cabinet in 1994 during the review process.⁷⁴ The following description of the GTPP and the context of its introduction draws heavily on the Government's description of the GTPP in operation. It must be kept in mind that the assessment of a process that is dependent on consultation and openness, such as the GTPP, is often characterised by divergent

⁶⁷ AJ Sawyer, "Broadening the Scope of Consultation and Strategic Focus in Tax Policy Formulation – Some Recent Developments", (1996) Vol 2:1 *New Zealand Journal of Taxation Law and Policy* 17, p 39.

⁶⁸ B Arnold, "The Process of Tax Policy Formation in Australia, Canada and New Zealand", (1990) Vol 7 *Australian Tax Forum* 379, pp 390-391. Arnold points (at pp 391-392) to the obvious and ubiquitous concern that there is always the concern that these committees are 'captured' or predisposed to agree with the official/government position. For a detailed description and analysis of the pre-GTPP position, see AJ Sawyer, n 67, pp 19-23; and C Sandford, *Successful Tax Reform* (Bath, Fiscal Publications, 1993), Ch 4. From a New Zealand practitioner's perspective, see J Owens, "Chartered Accountants' Role in NZ Tax Policy and implementation", (Paper presented at the 14th Australasian Tax Teachers' Association Conference, Auckland, 18 January 2002), p 6, where he refers to "the avalanche of discussion papers since 1985."

⁶⁹ C Sandford, n 68, Ch 4 generally, and pp 66-69 in particular.

⁷⁰ Organisational Review Committee, *Organisational Review of the Inland Revenue Department*, (Wellington, April 1994), Report to the Minister of Revenue (and on Tax Policy also to the Minister of Finance).

⁷¹ See n 70.

⁷² See n 67, p 24.

⁷³ See n 70.

⁷⁴ See n 67, pp 23-24. See also J Owens, n 68, pp 2 and 5-6.

views: one person's openness may be another's obfuscation. This matter of the "quality" of consultation is further discussed in section 7.1 of this article.

The New Zealand GTPP, set out in diagrammatic form in the Appendix, is explained by the Policy Advice Division of Inland Revenue as having five key development stages:⁷⁵

- (1) Strategic: Which involves the development of an economic strategy, fiscal strategy and three-year revenue strategy. ...
- (2) Tactical: Which involves the development of a three-year work programme and an annual resource plan to implement the revenue strategy. ...
- (3) Operational: Which consists of detailed policy design, detailed consultation, and gaining Ministerial and Cabinet approval of recommendations. ...
- (4) Legislative: In which the detailed policy recommendation is translated into legislation. ...
- (5) Implementation and review: Which includes the post-implementation review of new legislation, after it has had time to 'bed in', and identification of remedial issues that need correcting for the new legislation to have its intended effect.

The description above is clear and the process that it sets out is logical⁷⁶ and accords with accepted writings in the area of policy development and implementation.⁷⁷ The diagram in the Appendix provides further detail as to the steps within each of the five phases of the GTPP.

It must be emphasised that the GTPP is neither strictly linear nor prescriptive, and it must be remembered that the stages 'blur, overlap and intermingle.'⁷⁸ Rather, it is, as it says, a generic process that can be adapted to suit individual circumstances and it recognises that each phase is not independent.⁷⁹

The stated primary objectives of the GTPP are set out as:⁸⁰

- (a) Encourage earlier, explicit consideration of key policy elements and trade-offs by Ministers;

⁷⁵ Inland Revenue Policy Advice Division, "The Policy Development Process", available at <<http://www.taxpolicy.ird.govt.nz/corporate/process.html>> (as at 9 January 2005). See also Inland Revenue, *Supplementary Briefing Papers: Volume 1 - Tax Policy*, (Wellington, November 1999), available at <<http://www.taxpolicy.ird.govt.nz/publications/files/volume1.pdf>> (as at 1 January 2005).

⁷⁶ For further detail on each of the steps, see AJ Sawyer, "Broadening the Scope of Consultation and Strategic Focus in Tax Policy Formulation - Some Recent Developments", (1996) Vol 2:1 *New Zealand Journal of Taxation Law and Policy* 17, pp 24-27.

⁷⁷ These views are conveniently collected in C Sandford, *Why Tax Systems Differ*, (Bath, Fiscal Publications, 2000), and with particular reference to New Zealand at pp 162-163. The analysis in that text is focused towards the big changes in tax systems in the 1980s and 1990s but is obviously of universal application.

⁷⁸ W Parsons, *Public Policy - An Introduction to the Theory and Practice of Policy Analysis*, (Cheltenham, Edward Elgar, 1995), p 17. Also see J Owens, "Chartered Accountants' Role in NZ Tax Policy and implementation", (Paper presented at the 14th Australasian Tax Teachers' Association Conference, Auckland, 18 January 2002), p 7, who notes the blurring between the various GTPP phases in practice.

⁷⁹ Inland Revenue, *Briefing for the Incoming Minister of Revenue*, (Wellington, August 2002), pp 13-14, available at <<http://www.ird.govt.nz/aboutir/reports/mor-brief.pdf>> (as at 4 January 2005); and AJ Sawyer, n 76, p 24.

⁸⁰ Inland Revenue, n 75, p 2. As originally presented, the GTPP objectives were expressed as the first three objectives listed above and these are elaborated on in AJ Sawyer, n 76, p 27.

- (b) Provide opportunities for substantial external input into the policy formulation process, which is intended to increase transparency and to provide for greater contestability and quality of advice at both the conceptual and detailed design stages;
- (c) Clarify the responsibilities and accountabilities of participants in the process;
- (d) Improve the management of the tax policy process; and
- (e) Ensure that the performance of tax policy initiatives, as well as the process of reform, is reviewed regularly.

Points (a) and (b) above are seen by many, including the Government, as a defining feature of the GTPP, in particular the importance accorded to consultation.⁸¹ There is professional and academic opinion that the GTPP is not delivering its potential and that, as in Australia, consultation seems directed to the legislative and operational steps as opposed to policy formulation.⁸²

This continued government commitment to transparent consultation (albeit stated, as opposed to proved) over the 10 years of the GTPP is important given that the GTPP does not have the force of law and can be easily terminated or ignored. In fact, the GTPP was put on hold for a period of about 12 months, following the general election in November 1999.⁸³ The need to put promised tax system changes quickly in place was cited as the reason for its suspension. At its reinstatement (as the Good Tax Policy Process [sic]) by the responsible Minister, he pointed to the future stating "it is not always appropriate or wise in tax issues to telegraph your intentions in advance".⁸⁴ This raises the concern that a consultative process is only as good as the ease by which it can be avoided, either by express exceptions within it, or ignoring its requirements. As discussed in section 7.1 of this article, consideration needs to be directed at the accountability any such policy process engenders to those involved which is an important consideration when assessing the efficacy of the process. In the case of the nearly 12-month suspension of the GTPP in New Zealand, there was sufficient accountability to require that it be expressly stated that it was suspended and then publicly announcing its reinstatement.

⁸¹ R Oliver, "Appropriate Ethical Standards During Consultation", (Paper prepared for the Streamlining Stakeholder Management, Partnerships and Consultation Within the Public Sector Conference, 2 November 1999), available at <<http://www.taxpolicy.ird.govt.nz/news/presentations/ethics.html>> (as at 2 January 2005); and Inland Revenue, n 75, p 2. In the context of statements from the responsible Minister, see M Cullen, "Speech to the 2003 Institute of Chartered Accountants of New Zealand Tax Conference", (Christchurch, 10 October 2003), available at <<http://www.taxpolicy.ird.govt.nz/index.php?view=257>> (as at 2 January 2005). This commitment to GTPP consultative practice appears accepted in many quarters; see, for example, P Moss, "Towards Community Ownership of the Tax System: the Taxation Ombudsman's Perspective", (Paper presented to the 6th International Conference on Tax Administration, *Challenges of Globalising Tax Systems*, Sydney, 15-16 April 2004), available at <http://www.comb.gov.au/publications_information/speeches/atax-14april04.pdf> (as at 2 January 2005), p 9.

⁸² PriceWaterhouseCoopers, "Submissions on the Issues Paper", (Submissions for the Tax Review 2001, 1 August 2001), available at <<http://www.treasury.govt.nz/taxreview2001/Subs2/B209pwc.pdf>> (as at 1 January 2005), pp 3-4; and AJ Sawyer, "Proposals to Reduce Compliance Costs - A Mixed Response by the New Zealand Government", (2002) Vol 56:7 *Bulletin For International Fiscal Documentation* 333, p 336.

⁸³ Information obtained from personal communication with Adrian J Sawyer at the University of Canterbury, Christchurch.

⁸⁴ M Cullen, "Speech to the 'Business to Business Show'", (Westpac Trust Stadium, Christchurch, 24 August 2000).

5.2 The Current New Zealand Tax Policy Administrative Structure

In contrast to the Australian position, tax laws are drafted by the Law Drafting Unit within the Policy Advice Division of Inland Revenue and not by a separate office of Parliamentary Counsel.⁸⁵ This is a direct result of recommendations made by the Richardson Committee that believed that the integration of drafting with the policymakers was highly desirable.⁸⁶ The authors have not been able to locate material that criticises this position. In fact, most writings on the subject point to this being a desirable circumstance.⁸⁷

As discussed at section 3.1.2 above, this was the original position recommended by the Board of Taxation but was not implemented by the Australian Government. It is submitted that this separation of OPC and Treasury in Australia has created an opportunity to avoid responsibility.⁸⁸ The Australian OPC, by implication, sees a closer relationship between the persons giving the drafting instructions and the OPC (as occurs in tax law drafting in New Zealand) as desirable. They list the major issues that impact on preparing well-drafted legislation as being:

- The inexperience of those briefing it;
- Tight deadlines; and
- The politicisation of the drafting process (explained in section 3.1.2 of this article).⁸⁹

The New Zealand administrative structure, along with the GTPP, goes some way in addressing these issues by having the drafting "deadlines" part of the GTPP debate in the context of having a published tax policy work programme for the year ahead⁹⁰ and the drafters 'imbedded' in the policy expertise of the Policy Advice Division. Even if this does not "cure" things, it at least clearly sets out the accountability for any failings (as opposed to the potential to avoid accountability in the Australian system discussed at section 3.1.2), as well as clearly delineating the political responsibility.

The respective roles played by the Policy Advice Division of Inland Revenue (that has a presence in the tax policy debate in its own right, as opposed to being seen as "just a part of the IRD"), and the

⁸⁵ In fact, laws drafted by Inland Revenue represented at least 45 percent of the volume of all laws enacted in New Zealand in the year ended 30 June 2004; see Parliamentary Counsel Office, *Annual Report for the Year Ended 30 June 2004*, (Wellington, September 2004), p 8. Inland Revenue, *Supplementary Briefing Papers: Volume 1 - Tax Policy*, (Wellington, November 1999), p 2, available at <<http://www.taxpolicy.ird.govt.nz/publications/files/volume1.pdf>> (as at 1 January 2005), p 1, notes that the Law Drafting Unit does not draft the regulations.

⁸⁶ Inland Revenue, n 85; and Organisational Review Committee, *Organisational Review of the Inland Revenue Department*, (Wellington, April 1994), Report to the Minister of Revenue (and on Tax Policy also to the Minister of Finance).

⁸⁷ B Arnold, "The Process of Tax Policy Formation in Australia, Canada and New Zealand", (1990) Vol 7 *Australian Tax Forum* 379, p 382; and C Sandford, *Successful Tax Reform*, (Bath, Fiscal Publications, 1993), p 194.

⁸⁸ M Dirkis, "Observations on the Development of Australia's Income Tax Policy and Income Tax Law", (2002) Vol 56:10 *Bulletin for International Fiscal Documentation* 522, pp 532-533.

⁸⁹ H Penfold, "The Australian approach in the new drafting environment", (Paper presented at the CIAJ/ICAJ Conference in Ottawa, Canada, 12 September 2002), available at <<http://www.opc.gov.au/plain/docs.htm>> (as at 10 January 2005), pp 1-2.

⁹⁰ Inland Revenue Policy Advice Division, "Tax policy work programme to December 2005", available at <<http://www.taxpolicy.ird.govt.nz/publications/files/workprog04.pdf#xml=http://taxpolicy.ird.govt.nz.master.com/tehis/master/search/mysite.txt?q=tax+policy+work+programme&prox=&sufs=0&order=r&id=40013a7b5440260c&cmd=xml>> (as at 9 January 2005); and announced in M Cullen, "Speech to the 2004 Institute of Chartered Accountants of New Zealand Tax Conference", (Christchurch, 15 October 2004), available at <<http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=21223>> (as at 1 January 2005).

Treasury appear to be settled,⁹¹ from an outsider's perspective. A review of the current topics in this *Journal* and the professional press does not reveal a great deal of friction between them in the public domain.

Finally, it should be noted that New Zealand is a unicameral unitary state and as such, has no upper house. This has placed a greater prominence on multi-party parliamentary select committees as forums for reflection and debate of policy, legislative proposals and operational review. The role of such committees is recognised within the GTTP and the review of New Zealand's GST shows that they can be very active players in the public debate and consultation over tax policy.⁹² The relevant New Zealand House of Representatives select committee is known as the Finance and Expenditure Committee (FEC). Another example of the FEC's impact as part of the GTTP is the inclusion of product rulings in the New Zealand binding rulings model.⁹³

6.0 WOULD CONSULTATION ON A NEW TAX DRAFTING STYLE (SUCH AS "COHERENT PRINCIPLES DRAFTING") BE REQUIRED UNDER THE GENERIC TAX POLICY PROCESS?

At the outset, it is important to identify the 'spirit' of application of the GTTP. From an Australian perspective, this takes a degree of faith because the concept of a generic non-legislative tax policy process that has committed the Government to considerable expense, consultation *and* has involved transparency and accountability over a 10-year span is a novel concept (regardless of its success).

The fact that the GTTP in New Zealand was suspended in order to 'facilitate' election promises demonstrates that political pressures and expedience will have precedence at the end of the day. However, the post-2000 tax policy development climate and process discussed at sections 5.1.2 and 5.2 above demonstrates an embedding of a culture of transparency and community engagement by government and tax administration as the norm (and not just at the implementation and review phases). This approach where consultation and transparency appear as the norm is reflected on in section 7.1.

That said, it would seem from the outset that a very wide ambit was given to what encompasses New Zealand tax policy and its design. The language of the extract from the Richardson Committee below most definitely gives the flavour that anything that will impact on the operation of the tax system in the community is within the purview of the GTTP.⁹⁴

“• Key strategic issues should be resolved early in the policy development process. ...

⁹¹ Documented in Inland Revenue, *Supplementary Briefing Papers: Volume 1 - Tax Policy*, (Wellington, November 1999), available at <<http://www.taxpolicy.ird.govt.nz/publications/files/volume1.pdf>> (as at 1 January 2005), p 4; see also Appendix B: Protocol between Inland Revenue and the Treasury.

⁹² Described in detail by AJ Maples in "First Comprehensive "Remedial" Review of New Zealand's Goods and Services Tax", (2001) Vol 55:1 *Bulletin For International Fiscal Documentation* 22. See also AJ Maples, "GST Under the Spotlight: The First Comprehensive Review of the Goods and Services Tax Act", (2001) Vol 7:1 *New Zealand Journal of Taxation Law and Policy* 42.

⁹³ AJ Sawyer, "What are the lessons for Australia from New Zealand's First Comprehensive Remedial Review of its Binding Rulings Regime?", (2000) Vol 29:3 *Australian Tax Review* 133, p 156.

⁹⁴ Quoted in R Oliver, "Appropriate Ethical Standards During Consultation", (Paper prepared for the Streamlining Stakeholder Management, Partnerships and Consultation Within the Public Sector Conference, 2 November 1999) available at <<http://www.taxpolicy.ird.govt.nz/news/presentations/ethics.html>> (as at 2 January 2005).

- “• The fundamental intentions of tax policy should be thoroughly debated to ensure a wide exchange of views and understanding, and consistency with other Government policies. Once agreed, the intentions should be communicated as soon as practicable to all people involved. ...
- “• The policy development process should specify trade-offs relevant to the policy (such as ... compliance and administrative costs ... social objectives and implementation).
- “• Appropriate external people and/or other government departments should be consulted at all stages of the policy development process, and particularly at the early stages, unless there are specific reasons for excluding them. ...
- “• The management of tax policy, and the drafting of any subsequent legislation should reflect best practices. ...”

As such, it is submitted that “coherent principles drafting” would be subject to consultation if it was intended to be adopted in New Zealand. As set out in section 2 of this article, this new drafting style is a large shift in practice and policy that could have significant impact on the tax system and is being introduced by the Treasury and the Government because it has that potential. Thus, under the GTPP, it is likely that such a change would be the subject of early consultation.

The fact that the drafting of legislation is done within the tax system in New Zealand (as opposed to a separate OPC as in Australia), makes such an initiative a clearer candidate for the GTPP’s application. From a practical perspective, it is the approach of the Government to planning tax policy work and its willingness to consult on matters of general tax system policy that most strongly suggests that “coherent principles drafting” would be subjected to consultation under the GTPP.

In a recent article, Sawyer takes the opposing view of the utility of the GTPP in the context of decisions over legislative drafting stating, in the context of the New Zealand Income Tax rewrite project, that the GTPP:⁹⁵

“[i]s merely a mechanism for dealing with policy changes. The GTPP does not, and indeed cannot, influence directly the policy decisions initiated as part of the rewrite process in New Zealand as this comes within the bounds of the overall rewrite project which has as its focus improving understandability and readability without changing the law.”

There is of course merit in Sawyer’s position, and that would seem to be the position taken (or potential justification) by the Australian Government for not consulting on “coherent principles drafting”. However, “coherent principles drafting” represents a potential impact on the tax system that is greater than any rewrite. In the New Zealand administrative structures, this is an issue within the tax system, not the OPC as it interfaces with the tax system in Australia. Accordingly, despite this argument, the better view is that the GTPP would require consultation, and early consultation, on a proposal to adopt “coherent principles drafting”.

Remembering that the GTPP is a very broad process, a change in drafting may be picked up at a later stage of the process, regardless of whether consultation was undertaken at the start. There is no reason that the FEC, when undertaking its annual financial review of the 2003-04 performance and current operations of Inland Revenue, could not call such a thing to account. As drafting tax legislation is

⁹⁵ AJ Sawyer, “Rewriting Tax Legislation: Reflections on the New Zealand Experience”, (2003) Vol 57:12 *Bulletin for International Fiscal Documentation* 578, p 584.

within Inland Revenue and part of its operations, the drafting style adopted would be reviewable within the FEC's mandate. To support this proposition by way of example, in its recent review of Inland Revenue, the FEC made adverse comment on, and suggested revision of, certain operational policy aspects of the child support regime managed by Inland Revenue.⁹⁶

A current example supporting the position of this article is that the New Zealand tax rewrite was squarely placed within the GTPP by the Government.⁹⁷ Consultation over the rewrite and the Government moving its position based on that consultation was considered consistent with the effective operation of the GTPP.⁹⁸ The aim of the rewrite (as was TLIP in Australia) was to make the tax legislation clear, plainly expressed, and easy to use without changing its meaning. As in Australia, activity as regards to rewriting with a view to simplifying the New Zealand tax laws also has a long and, unfortunately, chequered history and this outcome represents the culmination of a long process of consultation that in its current form dates back to recommendations of the Richardson Committee acted on by the Government in 1994.⁹⁹ Consistent with the GTPP (and unlike Australia), process review has been formally acknowledged with an independent Rewrite Advisory Panel established (at the recommendation of the FEC) to consider and report to the Government on any unintended changes to the law arising from the rewrite.¹⁰⁰

Thus, in the light of the above discussion, it appears that "coherent principles drafting" would be subjected to consultation under the GTPP.

7.0 CONCLUSION

This article has not sought to:

- Evaluate the relative merits of Australia's and New Zealand's tax policy processes;
- Expressly evaluate whether they operate successfully; or
- Explore whether "[p]aying taxes is very much like alcohol, tobacco, heroin, or wild women. It is a habit ... costly, addictive, soul-destroying, and unnecessary. But it differs in one way from alcohol, tobacco, heroin, or wild women: It offers you no compensating pleasures ... neither pleasure, nor satisfaction, nor tranquillity!"¹⁰¹

Rather, the article has focused on whether the introduction of a new tax drafting style would be a matter that should be the subject of consultation under the tax policy processes in Australia and New Zealand. From the above discussion, it is clear that the introduction of a new tax drafting style would

⁹⁶ Finance and Expenditure Committee, *2003/04 Financial Review of the Inland Revenue Department*, (Wellington, November 2004), available at <<http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/IRD%20finrev%20report.pdf>> (as at on 3 January 2005), p 4. These comments focus on the substantive policy issues rather than the policy process itself.

⁹⁷ On 7 May 2004, the New Zealand Parliament enacted the 2,089-page long Income Tax Act 2004, which applies from the 2005-06 tax year.

⁹⁸ See n 95, p 581.

⁹⁹ See n 95, generally, and in particular pp 580-581.

¹⁰⁰ Rewrite Advisory Panel, "Background to the Income Tax Act 2004", available at <<http://www.rewriteadvisory.govt.nz/bg.php>> (as at 9 January 2005).

¹⁰¹ P Clyne, *How Not to Pay Any Taxes: A Handbook for Tax Rebels*, (1979), Introduction.

be a matter that *should* be the subject of consultation under the tax policy processes in Australia and New Zealand. The fact that it was not the subject of consultation in Australia is illustrative of how easily consultation can be avoided when a government and/or administration is so minded.

If there is no detailed evaluation of the two trans-Tasman tax policy processes, the question needs to be asked as to what can be gleaned from a comparison between how those two processes treat a specific tax law initiative: "coherent principles drafting". Here, it is submitted that this comparison permits the drawing of four useful insights into the role and operation of tax policy processes that assert the importance of consultation. It should not be assumed from the following that the authors consider the New Zealand approach the panacea for the concerns expressed over the Australian tax policy process. In fact, the four insights provide some critique to the GTPP in operation. Rather, New Zealand has had in place a process (the GTPP) for a considerable time and its juxtaposition with the Australian situation can provide some reflection and guidance to the on-going development of both tax policy processes.

7.1 Four Key Insights

7.1.1 *Pragmatism prevails over economic principle and perceived political rationality over economic rationality in consultation*¹⁰²

Central to any reflection on a consultative process is how easily it can be avoided when a government or administration is so minded. The practical restriction on this is the level of community knowledge and acceptance of the relevant process. As set out in sections 6 and 5.1.2 of this article, the GTPP appears, to an outsider to the jurisdiction, to be taken seriously both in terms of process and accountability to follow that process. Here, it needs to be remembered that the GTPP was suspended for a year with the stated reason to expedite election promises. But that suspension was at least a positive decision by the Government, rather than the selective application of the GTPP, and the Government held itself accountable for that action.

However, good process is not of itself a guarantor of good outcomes. The feedback loop needs to be completed by the Government listening and taking seriously the inputs that consultation provides. As set out in the first half of this article, the Australian position is that significant doubt exists as regards the commitment to change a tax policy position in the face of the results of consultation. That is not to say that there needs to be a change in the face of policy criticism; instead, the Government is there to govern and not to follow. Yet, it is submitted that there needs to be an engagement with the debate. In this regard, the lack of criticism that the authors can find, especially as regards such a mammoth thing as the new Income Tax Act 2004 carrying 2,000 plus pages, commencing from the 2005-06 year, suggests that there is a New Zealand Government engagement with the process of consultation.

The power of consultation should not be overplayed. What is important is accountability. There is a need for transparency of process and engagement in good faith by the Government in the policy debate at all its phases. This comes with a cost both in terms of resources and time. Though, something that tempered the pace of change in a tax system would hardly be seen as a bad thing just because of that fact alone.

¹⁰² C Sandford, *Why Tax Systems Differ*, (Bath, Fiscal Publications, 2000), p 195: "we have to accept that in the last resort pragmatism is likely to prevail over economic principle, perceived political rationality over economic rationality".

Finally, all the clever drafting in the world cannot fix ill-conceived, gratuitously complex tax policy.¹⁰³ Thus, it is important that matters are put out to the public as early as practicable and governments are willing to seriously consider their views. In this regard, there is a lesson for Australia from the New Zealand tax policy infrastructure and processes. That is not to say that the GTPP is a panacea, as it is shown in this article that the GTPP is not of universal applicability, nor is it incapable of being manipulated by the Government. Rather, it is the New Zealand recognition that it is a political decision to engage in consultation and this openness comes at a cost of politicians and government departments being accountable and having to explain themselves in some detail and/or argue their case and seek to take the community with them (that is, lead rather than follow public opinion).¹⁰⁴

7.1.2 Differences of tax policy significance between Australia's and New Zealand's systems of government

At the end of the day, tax policy and administration is squarely in the political arena.¹⁰⁵ The most obvious differences between the jurisdictions are constitutional and parliamentary. New Zealand is a unitary unicameral state where Australia is fortunate enough to be a federation, and the Commonwealth Parliament has both a House of Representatives and a Senate.

In New Zealand, the changes to the parliamentary electoral rules to Mixed Member Proportional representation (MMP) have meant that governments are more likely to be coalitions. This necessitates compromise in order to establish that coalition which commentators at the time saw as a significant potential challenge for the then new GTPP.¹⁰⁶ The GTPP has been held as a success in the environment of MMP where politics are less stable. The Policy Advice Division has promoted it as providing an appropriate set format for the debates and compromises to be considered when the broad strategies and forward work plans are being determined within the GTPP and finally published.¹⁰⁷

Caution needs to be exercised in translating the above experience to Australia where there is an independent Upper House with a power of tax law veto as opposed to shifting coalitions under the threat of electoral test. But there is force to the proposition that if something has gone through an agreed process (such as the GTPP that includes public consultation), the Australian Senate would need to exercise caution if it wished to use its veto.

7.1.3 Brief assessment of whether the Generic Tax Policy Process rhetoric is matched by reality

The GTPP's performance needs to be considered as it works in reality, a world that is not so systematic and linear. In the case of the GTPP that has been in place for nearly 10 years, its general

¹⁰³ Sir Peter North, "Problems of Law Reform", (2002) *New Zealand Law Review* 393, pp 412-413; AJ Sawyer, "Rewriting Tax Legislation: Reflections on the New Zealand Experience", (2003) Vol 57:12 *Bulletin for International Fiscal Documentation* 578, pp 582-584; and J Prebble, "Why is Tax Law Incomprehensible?", (1994) *British Tax Review* 380.

¹⁰⁴ See n 102, pp 184-186.

¹⁰⁵ See n 102, pp 195-196.

¹⁰⁶ AJ Sawyer, "Broadening the Scope of Consultation and Strategic Focus in Tax Policy Formulation – Some Recent Developments", (1996) Vol 2:1 *New Zealand Journal of Taxation Law and Policy* 17, pp 37-39.

¹⁰⁷ R Oliver, "Appropriate Ethical Standards During Consultation", (Paper prepared for the Streamlining Stakeholder Management, Partnerships and Consultation Within the Public Sector Conference, 2 November 1999), available at <<http://www.taxpolicy.ird.govt.nz/news/presentations/ethics.html>> (as at 2 January 2005).

acceptance and application is hard to gauge accurately without having been actively involved in the tax administration and policy debates within the jurisdiction. This is posited not as an excuse but as a reality check.

A tax policy process that is good on paper may suffer the death of a thousand cuts. By this, it is meant that it may not be applied consistently, as is submitted to be the case in Australia, and if it is applied there is always the concern that it can be either token, the forums "stacked", the time frames for outside input unrealistically short, the matters consulted on restricted and/or the comments raised not engaged with. The cumulative effect of such things, if they occur in New Zealand, and the commensurate respect accorded to any process such as the GTPP, is hard to determine.

There is published tax professionals' opinion that the GTPP is not delivering its potential and, like the consultative processes in Australia, is directed to getting tax changes put into force: the legislative and operational phases. Accordingly, they are the focus of consultation, rather than broader and fundamental issues of policy, its design and appropriateness. These concerns were accepted by a Ministerial Panel on Business Compliance Costs in its 2001 report, *Finding the Balance: Maximising Compliance at Minimum Cost*.¹⁰⁸ In tones reminiscent of the Australian position, PricewaterhouseCoopers in a submission to the New Zealand Tax Review 2001, referring for support to a then current government-commissioned report on business compliance costs,¹⁰⁹ states:¹¹⁰

"[C]onsultation with business and other stakeholders occurs too late in the legislative process to provide serious input or challenge [to the Government's position]."

These concerns were acknowledged (in part) by the Government in its response to the Ministerial Panel on Business Compliance Costs' report,¹¹¹ which included acknowledging the importance of consultation and input early in the stages of the GTPP and that there was scope to make more robust Regulatory Impact Statements and associated documents to support this consultation.¹¹²

Sawyer also expresses very significant concern over the Government's commitment (rather lack thereof) to the GTPP in the context of its setting up the Tax Review 2001¹¹³ (which had broad parallels to the RBT in Australia). The cited announcements of the Minister for Revenue make it clear that the announcement of the inquiry and the setting of its terms of reference were done outside of the GTPP, as

¹⁰⁸ Ministerial Panel on Business Compliance Costs, *Finding the Balance: Maximising Compliance at Minimum Cost*, (Wellington, July 2001), Ch 7: Tax, Section 7.6: Legislative Design and Policy, particularly pp 121-123, available at <<http://www.businesscompliance.govt.nz/reports/final/index.html>> (as at 10 January 2005); see also AJ Sawyer, "Proposals to Reduce Compliance Costs - A Mixed Response by the New Zealand Government", (2002) Vol 56:7 *Bulletin For International Fiscal Documentation* 333, p 334.

¹⁰⁹ See n 108.

¹¹⁰ PricewaterhouseCoopers, "Submissions on the Issues Paper", (Submissions for the Tax Review 2001, 1 August 2001), available at <<http://www.treasury.govt.nz/taxreview2001/Subs2/B209pwc.pdf>> (as at 1 January 2005), p 4.

¹¹¹ Ministry of Economic Development, Regulatory and Competition Policy Branch, *Striking the Balance: Government Response to the Ministerial Panel on Business Compliance Costs*, (Wellington, December 2001), available at <<http://www.med.govt.nz/buslt/compliance/balance/index.html>> (as at 11 January 2005).

¹¹² AJ Sawyer, n 108, p 336. Sawyer discusses more generally the Government's response to the Ministerial Panel on Business Compliance Costs report (n 108).

¹¹³ AJ Sawyer, "Inquiry into New Zealand's Tax System Announced", (2000) Vol 21 *Tax Notes International* 990, pp 990-992.

opposed to acknowledging an "exclusion clause" within the GTPP.¹¹⁴ In the article, Sawyer suggests more generally that the spirit of transparency within the GTPP was not being upheld by the then Government and noting the political nature of the restrictions in the reference and the RBT-like strict revenue neutrality constraint placed on the Tax Review 2001 process.¹¹⁵

As is the case in Australia, there are New Zealand examples of revenue protection based claims justifying unilateral government action. The Minister for Revenue invoked revenue protection as the reason why the two then current tax initiatives in 2003 (to protect the revenue in certain instances of transactions involving Australian unit trusts and some sale and leaseback transactions), were progressed outside of the GTPP. In doing so, the Minister re-affirmed the commitment to the GTPP and that revenue protection would fall outside of its purview.¹¹⁶ Though one is always suspicious when there is a consistent stressing of the Government's commitment to the GTPP and meaningful consultative engagement with the community,¹¹⁷ in an environment where there are consistent suggestions that this is not matched in reality.

That said, the openness of the New Zealand process, the breadth of the policy put out for consultation, and the willingness of the Government to change its position (in terms of both policy and detail) based on feedback, stands in contrast to the Australian position.¹¹⁸ Here, it is important to recognise that there will always be vested interests expressed forcefully during consultation and that to be accountable to the process and the public, governments need to enter into a debate with these groups but not necessarily change their position.¹¹⁹

Another difficulty in assessing the performance of consultation within the GTPP is that attention to detail in crafting the process of consultation to fit the circumstances and maximise transparency is important,¹²⁰ yet it is rarely opened to scrutiny. In this regard, it goes without saying that consultation must be transparent, genuine and undertaken in good faith.¹²¹ An example of this transparency and its

¹¹⁴ See n 113, p 991, quoting from a speech by the Minister for Revenue referenced at n 6.

¹¹⁵ See n 113, pp 991-993.

¹¹⁶ M Cullen, "Speech to the 2003 Institute of Chartered Accountants of New Zealand Tax Conference", (Christchurch, 10 October 2003), available at <<http://www.cch.co.nz/tax/pssrels/taxspeech.asp>> (as at 12 January 2005), p 5. This commitment to GTPP appears accepted in many quarters as genuine; see, for example, P Moss, "Towards Community Ownership of the Tax System: the Taxation Ombudsman's Perspective", (Paper presented at the 6th International Conference on Tax Administration, *Challenges of Globalising Tax Systems*, Sydney, 15-16 April 2004), available at <http://www.comb.gov.au/publications_information/speeches/atax-14april04.pdf> (as at 2 January 2005), p 9.

¹¹⁷ Predating the speech above in 2003, see M Cullen, "Speech to the International Fiscal Association New Zealand Branch 24th Annual Conference", (2 March 2001); and more recently M Cullen, "Speech to the 2004 Institute of Chartered Accountants of New Zealand Tax Conference", (Christchurch, 15 October 2004), available at <<http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=21223>> as at 10 January 2005.

¹¹⁸ C Sandford, *Why Tax Systems Differ*, (Bath, Fiscal Publications, 2000), pp 163 and 181.

¹¹⁹ See n 118, p 183, referring to the tax changes brought in by Roger Douglas in New Zealand. See also AJ Sawyer, "What are the lessons for Australia from New Zealand's First Comprehensive Remedial Review of its Binding Rulings Regime?", (2000) Vol 29:3 *Australian Tax Review* 133, p 167.

¹²⁰ See n 118, p 194; and Sir Peter North, "Problems of Law Reform", (2002) *New Zealand Law Review* 393, p 398.

¹²¹ AJ Sawyer, "Broadening the Scope of Consultation and Strategic Focus in Tax Policy Formulation - Some Recent Developments", (1996) Vol 2:1 *New Zealand Journal of Taxation Law and Policy* 17, pp 27 and 37.

handmaiden accountability is the dissemination of contestable advice (ie independent forecasts and advice) from the Treasury and Inland Revenue.¹²²

The downside side of this is that the consultative processes can be manipulated in order to facilitate a government agenda.¹²³ Consultation may also be used to identify at an early stage and neutralise the policy's critics.¹²⁴ As well, too much consultation, like too much legislation, can cause weariness and disengagement from the process.¹²⁵ Finally, and specific to New Zealand, there is concern that there is rather a thin base from which to draw professional input into the consultative process.¹²⁶

Consultation done properly is a costly and addictive process. Once started by the Government, the community usually wants more and there are very real costs in time and resources to put out quality information and provide considered feedback,¹²⁷ a cost that is borne by both the Government and the public that engage in the process.

Finally, a routine practice of openness in policy development has the potential to take some of the political heat out of tax policy and 'normalise' its discussion and debate rather than there being the big focus on the annual budget or some other announcement from the Government.¹²⁸ Thus, the debate is more likely to be considered and less likely to be politically charged and controlled. There are, of course, exceptions to this proposition such as the ever emotive debates over lowering the headline rates of tax, whichever side of the Tasman they occur.

7.1.4 Summary of the context in which the Generic Tax Policy Process can operate effectively: transparency and accountability

Often overlooked in an assessment of the consultative and transparent policy development processes are the culture of the players and the context of the processes operation. The importance of organisational culture is recognised by Inland Revenue:¹²⁹

¹²² AJ Sawyer, "Broadening the Scope of Consultation and Strategic Focus in Tax Policy Formulation – Some Recent Developments", (1996) Vol 2:1 *New Zealand Journal of Taxation Law and Policy* 17, p 25.

¹²³ See n 122, p 22.

¹²⁴ C Sandford, *Why Tax Systems Differ*, (Bath, Fiscal Publications, 2000), pp 181-184; and Sir Peter North, "Problems of Law Reform", (2002) *New Zealand Law Review* 393, pp 396-398.

¹²⁵ See Sir Peter North, n 122, pp 396-398; and AJ Sawyer, n 122, p 30.

¹²⁶ See AJ Sawyer, n 122, p 29.

¹²⁷ Inland Revenue, *Briefing for the Incoming Minister of Revenue*, (Wellington, August 2002), pp 13-14, available at <<http://www.ird.govt.nz/aboutir/reports/mor-brief.pdf>> (as at 4 January 2005).

¹²⁸ T Pippas, "Tax Announcements Could be Thin", available at <<http://www.budget2002.nzoom.com/analysis/story.php?id=7>> (as at 2 January 2005); and M Cullen, "Speech to the 2003 Institute of Chartered Accountants of New Zealand Tax Conference", (Christchurch, 10 October 2003), available at <<http://www.taxpolicy.ird.govt.nz/index.php?view=257>> (as at 2 January 2005). The stated acceptance of consultation as 'normal' in the New Zealand context is seen in a recent speech by the Minister of Revenue where, in the context of many reactive tax issues, there is the constant reference to public documents seeking input; see M Cullen, "Speech to the 2004 Institute of Chartered Accountants of New Zealand Tax Conference", (Christchurch, 15 October 2004), available at <<http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=21223>> (as at 1 January 2005).

¹²⁹ R Oliver, "Appropriate Ethical Standards During Consultation", (Paper prepared for the Streamlining Stakeholder Management, Partnerships and Consultation Within the Public Sector Conference, 2 November 1999), available at <<http://www.taxpolicy.ird.govt.nz/news/presentations/ethics.html>> (as at 2 January 2005).

"If you are going to focus on communication and relationship building it is necessary to move away from the relatively closed and reactive manner traditional in public policy organisations."

There are some that would say that this 'relationship building' fails to recognise the power dynamic between the governors and the governed: the politics of the situation. But that goes against the grain of the research in this area. The standard of New Zealand openness is exemplified by Inland Revenue posting its briefing to the incoming Minister;¹³⁰ in Australia, these are more likely to find themselves on a quick trip to the shredder rather than the web. In this regard, Australia still awaits the release of a report on an assessment of world best practice consultative tax policy practices commissioned by the Board of Taxation.¹³¹

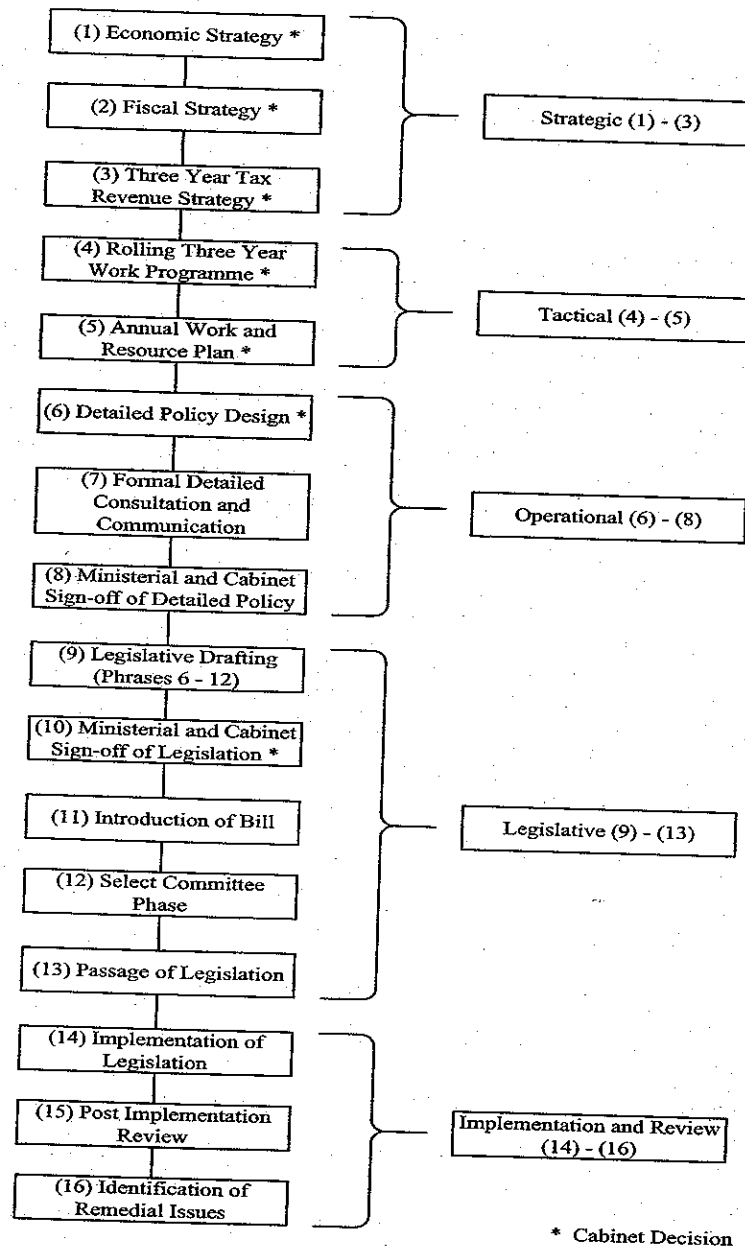
Accepted for publication on 8 June 2005

¹³⁰ See n 127.

¹³¹ To date, only a summary of the KPMG report's findings available in the Board of Taxation, Government Consultation with the Community on the Development of Taxation Legislation - A Report to the Treasurer and the Minister for Revenue and Assistant Treasurer, (Canberra, 2002), Appendix B, available at <<http://www.taxboard.gov.au>> (as at 10 January 2005).

APPENDIX

The New Zealand Generic Tax Policy Process¹³²



¹³² Inland Revenue, *Supplementary Briefing Papers: Volume 1 - Tax Policy*, (Wellington, November 1999), p 3, available at <http://www.taxpolicy.ird.govt.nz/publications/files/volume1.pdf> (as at 1 January 2005).