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**Taxation Law Drafting Review - Report and Recommendations**

I provided you in June with a copy of the report and recommendations that I prepared as a result of the taxation law drafting review exercise.

You asked that I provide to you an overview of the report to accompany its public release (including in particular providing it to stakeholders who participated in the review process) and I do so in this letter.

This review has been productive and the attached report is a summary of the feedback that has been obtained and of the recommendations which have resulted from that feedback. I am very grateful to those who participated in the review for their thoughtful contributions and effort.

It should be emphasised that, because of the extent to which numerous stakeholders have contributed and have had often very specific individual views in relation to the matters to be considered, necessarily the report is a summary of the responses that have been received. The report would have become lengthy and complex if it incorporated all the comments from every individual participant, given the range of comments that have been received.

The attached is a copy of the report sent in June to you and the other senior officials at the Inland Revenue Department who commissioned the report.

Generally, it should be recognised that the overwhelming weight of commentary coming from those consulted has been that the aims of the process of rewriting the Income Tax Act remain valid and that generally the result of that process has been positive and successful in advancing those aims.

It should perhaps be noted at this stage that, inevitably, the process of producing taxation legislation in New Zealand involves significant pressures on those drafting the legislation to deal with external demands, tight timeframes and a continuously-evolving policy framework. One should not ever forget the extent to which this pressure process necessarily impacts upon the ability of the drafting team to produce an ideal result.

Equally, it has to be acknowledged that many of the comments from those consulted indicate that those stakeholders feel that further improvements could be made.

In any complex and iterative process such as drafting tax legislation there is always a need to seek continuous improvement and to focus on the skills development of those involved in producing the result, which should ideally be of the highest quality for both those producing it and for those using it.

In relation to the recommendations, there are three broad areas that will be the focus of future efforts to achieve ongoing improvement:

- 1 the use of existing and identification of further specific drafting tools to deliver legislation that is fit for purpose and accessible for those who need to use it; and
- 2 achieving higher skills for all those involved in the drafting unit and a team that produces collaborative and consistent results; and
- 3 the development of legislation by a consultative process involving policy analysts within Inland Revenue and other government departments and external stakeholders aimed at improving the practical ability for the legislation to be understood and complied with.

In any event, again, I want to acknowledge the contribution of those stakeholders, within Inland Revenue and externally, who have willingly spent time and effort contributing to this review.

I have no doubt that the result of this review will be to advance the process of achieving continuous improvement in the quality of New Zealand's tax legislation and the skills development for those involved at Inland Revenue in producing the legislation.



Graeme Smail  
Consultant

# Report on results of taxation law drafting review and recommendations

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- 1 This memorandum is sent to outline the results of and recommendations relating to the taxation law drafting review project undertaken during the period from June 2019 to November 2020. Attached to this memorandum is a schedule that summarises the recommendations and places them in categories of priority.

## **Background to review**

- 2 Policy & Strategy of Inland Revenue decided it was timely to undertake a review of the general approach adopted to taxation law drafting by the drafting unit that is part of Policy & Strategy. It has been about 30 years since the initial steps were commenced in relation to the project for rewriting the Income Tax Act 1976. The completion of that rewrite project has resulted in both the rewritten provisions in the Income Tax Act 2007 and many of the drafting principles adopted in relation to the drafting by the drafting unit of new legislation in the Income Tax Act 2007 and in other Inland Revenue Acts.
- 3 I was engaged as a consultant to assist Policy & Strategy in relation to this review project and to be the person primarily responsible for obtaining and collating contributions from various stakeholders.
- 4 The following stakeholders (or their representatives) external to Inland Revenue provided input:
  - Oliver Shaw
  - Corporate Taxpayer Group
  - Treasury
  - Chartered Accountants Australia and New Zealand
  - FEC Expert Adviser
  - Parliamentary Counsel Office, and
  - New Zealand Law Society
- 5 The following stakeholders from Inland Revenue provided input:
  - Paul Fulton
  - Gordon Witte
  - Keith Taylor
  - Sam Rowe
  - Scott Davidson
  - Carmel Peters
  - Office of the Chief Tax Counsel
  - Marie Pallot
  - Bary Hollow
  - Casey Plunket
  - Kieran Mecredy
  - Adrian Kelly
  - John Collins, and
  - Moira Thompson

- 6 Each of the stakeholders were interviewed and asked to comment and provide constructive input on the:
- the continued fitness for purpose of the objectives sought to be achieved through the rewrite project and of the drafting principles that were recommended and/or adopted during that process;
  - the extent to which those objectives and principles (or other best practice approaches) have been and continue to be achieved in relation to the preparation of taxation legislation in New Zealand; and
  - the extent to which taxation legislation prepared in New Zealand is able readily to be understood by the intended audience. (In this context, they were asked if they wanted to comment on the extent to which it is felt necessary or desirable to use secondary material (including in particular policy papers produced by officials) as a guide to understanding).
- 7 They were also asked to:
- provide some useful examples to illustrate their comments, where possible;
  - indicate whether there are specific areas of taxation legislation where they would recommend some post-enactment review and refinement in relation to the form of the current legislation;
  - suggest areas where they consider there is scope for beneficial change or improvement in the legislation preparation or presentation process; and
  - provide any other comments that they consider should be taken into account in the review exercise.

### **Background to rewrite project and drafting principles adopted**

- 8 The process for rewriting the Income Tax Act 1976 (and the resultant development of many of the legislative drafting guidelines that are applied by the drafting unit) stems from a series of discussion papers in the late 1980s and early 1990s, as prepared by various committees of experts.
- 9 The 1991 report of the Valabh Committee called 'Key Reforms to the Scheme of Tax Legislation' suggested certain key features for the approach to reform, including in particular:
- the division of the existing legislation into separate Acts;
  - the division of those Acts into parts and subparts;
  - the reorganisation of the legislation into a more logical and coherent scheme;
  - the consolidation of certain legislation;
  - the use of purpose clauses and extra-statutory references where appropriate; and
  - a commitment to modern drafting techniques and to plain language.
- 10 The 1993 second report of the Working Party on the Reorganisation of the Income Tax Act 1976 included the following:

Drafting should proceed on the basis of a commitment to use plain language. This is a commitment based on realism. It is recognised that no amount of elegant drafting

can reduce the complexity inherent in some proposals. However, even complex policy can be presented in a clear and user-friendly way. The legislation should always be drafted with users, and the different categories of users, in mind.

Improved comprehensibility of tax legislation will result from adhering to the following:

- *plain words should be preferred*

A simple word of everyday use should be preferred to a flowery, stuffy or unusual word. Legalese and couplets should be avoided. However, a simple word should be preferred only if it is apt, precise and accurate.

- *short sections should be preferred*

A section must have a coherence of meaning and purpose capable of being described in a brief section heading. Long sections comprising many subsections are likely to lose their way and ramble on. A section or subsection may contain more than one sentence if there is sufficient closeness of meaning to make this useful.

- *short sentences should be preferred*

Sentences should not be unnecessarily long. The aim of the New South Wales Parliamentary Counsels Office of 30 words and 5 lines should be kept in mind but not regarded as a rule. Unnecessary paragraphing should be avoided. For example, short sentences of 20 to 30 words should not as a general rule be paragraphed. Unless in a particular case paragraphing produces an easier to use result, the technique should not be used and the material should be presented in 2 or more shorter sentences.

...

- *graphic and other techniques including the use of examples should be used to assist communication*

Graphic material, diagrams, flow charts, logarithms, and user-friendly algebraic formulas should be used where they offer the best means of conveying or supplementing meaning. Examples can be included either as part of the text or in notes which are clearly not part of the text. Examples may direct the user to take a number of steps rather than just presenting one difficult to follow calculation.

- 11 The 1994 report called 'Organisational Review of the Inland Revenue Department' included the following:

The subject matter of tax legislation is complex. Currently the legislation attempts to deal with the complexity and to provide certainty and precision through the detailed expression of policies in the variety of complex circumstances in which they operate. As a result the intent is often blurred in a torrent of convoluted language in sentences of an average length, measured by a 1992 study, of 135 words. Tax practitioners, Treasury and IRD agree that the legislation is difficult to read and understand. That must have a direct bearing on the difficulties and the cost of administering the legislation and the difficulties and the cost for taxpayers of complying with the legislation.

. . .

Legislative drafting should provide for clearer expression of the purposes and intent of the legislation, and strive for greater simplification. If that drafting approach is adopted there should be less justification for attempting to provide in detail for every conceivable variety of circumstance.

More understandable legislation will also produce substantial savings in administration costs and compliance costs and will, at the same time, enhance the voluntary compliance strategy.

. . .

There will always be difficulties in applying tax legislation in marginal cases, however it is drafted. In these borderline cases clear language and structures and clear statements of intent will facilitate understanding and resolution of the problem. What is even more important is that the legislation is easy to administer and comply with in the great mass of cases not near the borderline. There, the key is the clarity of the intent and of the style of drafting.

12 The 1994 report called 'Rewriting the Income Tax Act' included the following:

Most New Zealand taxpayers seldom consult tax legislation. Instead, they gain a sufficient understanding of tax law from secondary sources, including Inland Revenue publications and guides published by private sector organisations.

Regardless of how readable or user-friendly the rewritten Act becomes, taxpayers will usually find it easier to obtain elsewhere the tax-related information they need. Such taxpayers will still benefit, however, from the rewrite. A rewritten Act that better communicates the law will assist the producers of secondary sources to better explain the law's application.

The primary audience for the Act itself will comprise groups such as:

- the courts;
- lawyers and accountants (particularly tax specialists);
- authors of secondary sources that explain the application of tax laws;
- Members of Parliament;
- tax policy analysts and people who want to make submissions on proposed legislation;
- Inland Revenue staff.

. . .

Complexity and ambiguity directly affect all users of the Income Tax Act. Most users of the Act want to use the Act to determine the tax rules applying to a particular taxpayer's situation. They will have in mind a taxpayer with specific characteristics (say, a resident company) that is contemplating or has engaged in a particular type of transaction (say, the purchase of a building).

They will avoid incurring unnecessary costs if they can:

- quickly find the rules applicable to a taxpayer's particular situation and they do not need to exert excessive effort to satisfy themselves that they have not overlooked any relevant rules;
- readily (and correctly) *understand* the rules.

Tax legislation will inevitably impose some costs on its users. The aim is to minimise these costs. There are at least three reasons why any modern tax act will always retain some element of complexity, thereby imposing costs on its users.

- Many of the policy objectives embodied in tax legislation are themselves complex. For example, tax systems go to considerable lengths to give equitable treatment to taxpayers who face widely differing circumstances.
- Many of the transactions and business organisations to which the law applies are themselves complex. Complex transactions and entities generally necessitate complex tax law.
- Some taxpayers will go to considerable lengths to devise sophisticated arrangements to minimise their tax liabilities. Since the Government needs to protect the tax base against erosion, it must often implement complicated rules to counter such arrangements. The need to protect the tax base in an open, deregulated economy has resulted in New Zealand governments introducing a number of wide-ranging domestic and international tax reforms over the past decade.

13 The Explanatory Note to the Bill that became the Income Tax Act 2007 summarised as follows the progressive rewriting of the provisions in the Income Tax Act 1976.

- The first stage of the rewrite project involved the reordering and renumbering of the Income Tax Act 1976. Core provisions were set out in Part B, like provisions were grouped, and an alpha-numeric numbering system was introduced. This stage was completed with the enactment of the Income Tax Act 1994.
- The second stage was the enactment of the Taxation (Core Provisions) Act 1996. This stage rewrote the core provisions in Part B to provide an overview of the scheme and purpose of the Act and to change the structure of the Act so that it operated on a gross basis for the determination of income and deductions.
- The third stage involved the rewriting of Parts A to E and Y of the 1994 Act and also re-enacted Parts F to O and the schedules. The result was the Income Tax Act 2004.
- This, fourth, stage completes the project by re-enacting Parts A to E, consolidating amendments made to those Parts since commencement of the Income Tax Act 2004, rewriting Parts F to O in the same style as Parts A to E, and re-enacting the schedules with necessary consequential amendments.

14 The principles that are currently applied to guide the drafting of new taxation legislation derive in significant part from the principles recommended for and sought to be applied in the rewrite project.

15 Against this background, the drafting unit is responsible for preparation of new legislation, involving the conversion into legislation of the policy proposals that are developed as a result of government decision-making and remedial matters.

- 16 However, it has to be recognised that the drafters within the drafting unit necessarily face various challenges in achieving a best practice result, including in particular:
- (a) the complexity and/or novelty and/or changing environment of the policy issues that are to be reflected in the legislation (for example, the increasing digitalisation of the economy allows non-residents to derive significant revenues from source countries without having a permanent establishment allowing source country taxation under tax treaties); and
  - (b) the general timing pressures that often arise in relation to preparation of new legislation; and
  - (c) the extent to which “last minute changes” or iterative policy development render it difficult to achieve an entirely coherent result in relation to the presentation of legislation.

**Conclusions: Appropriateness of rewrite principles and Income Tax Act structure**

- 17 Generally, stakeholders indicated that they thought that the rewrite of the Income Tax Act had been a great success and much better than the predecessor or the situation in other countries. There were only isolated exceptions.
- 18 Some stakeholders commented that Part B and the core provisions in particular were of great help to assist users of the Act.
- 19 A number of stakeholders commented that the splitting of regimes, particularly to fit the Part C, D and E construct, created continuing problems –
- in the preparation of new legislation; and
  - with readers gaining a full understanding of where relevant rule were located and how they fitted together.
- 20 There was general recognition that the splitting of regimes necessitated considerable effort being put into “sign-posting”.
- 21 The goal of plain language was generally viewed as appropriate and deserving of continuing focus.
- 22 However, some stakeholders commented that the plain language approach –
- did not always lead to a clear result and could be a superficial presentational matter;
  - is inevitably idealistic; and
  - is much easier to achieve when rewriting an existing regime rather than when doing amendments and/or drafting under time pressures.
- 23 **Recommendation:** It is recommended that the rewrite principles and current Income Tax Act structure (including the alpha-numeric numbering) continue to be adhered to.

**Conclusions: Drafting style and quality in practice**

- 24 Some stakeholders (both external and internal) expressed the view that haste in the legislative process had an adverse effect on quality, including comments that:



- often the time taken to develop the policy compresses the drafting time;
- drafting is often left to the end of the process, with drafters;
- working under real time pressure; and
- late developments always create significant problems and time pressures lead to imperfect legislation.

25 **Recommendation:** It is recommended that to the extent not already being done:

- efforts are made to avoid unreasonable compression of/unreasonable expectations for the time taken for drafting; and
- input be sought from the drafting unit members on options for improvement.

26 Many stakeholders (both external and internal) commented on the need to present legislation in a way that conveys the general messages initially and avoids those messages becoming obscured by detail, including comments that:

- technical accuracy is not enough – the legislation must communicate the general messages in a clear way;
- there is a need for more user-friendly drafting, concentrating on the major issues/concepts that the average reader who needs to use the legislation can follow;
- even tax specialists say they simply cannot understand some of the legislation;
- there is a major need to avoid detail in the legislation getting ahead of/obscuring communication of the key principles;
- the legislation should say upfront what is meant, to give readers a quick feel for what is meant (examples being sections EX 1 and EI 1 and EL 2);
- the drafting style is sometimes problematic – seems to involve setting out at the outset every possible qualifying or relevant point of detail, before getting to the basic rule;
- it is often hard for people without background to understand the law;
- people in the tax industry are finding it harder and harder to read the legislation;
- some drafters try to simplify and aid readers and some do not try;
- PAD people need to face up to criticism of the drafting coming from TICAL and others; sometimes there seems to be “issue capture” of legislation i.e. excess focus on a factual scenario rather than on underlying concepts;
- the 80:20 rule is very important – leave the 20% cases to the back end and signpost them; and
- there should be more focus on the needs of the reader.

27 **Recommendation:** It is recommended that:

- members of the drafting unit are encouraged to place a high emphasis when drafting on communicating clearly and simply the key concepts/principles;
- members of the drafting unit are advised of the extent of feedback from stakeholders that much more consistent effort needs to be made to improve readability;
- consideration be given to peer review and external consultancy use to assess readability of new legislation (either as a standard approach or periodically); and
- drafting unit members should undertake regular training on plain English communication techniques.

28 See further recommendations below on peer review and external consultancy use.

29 Conversely, some stakeholders noted that there were pressures that inevitably inhibited readability, including comments that:

- sometimes simple language is not helpful if the area is inherently complex;
- there is an inevitable conflict between the need for communication to readers and the need for precision;
- users commonly apply pressure to add detail;
- the quality of drafting generally is good and often matters are complex and hard to distill; and
- final legislation is a distillation of principles and operationalising the legislation will often mean use of secondary materials is inevitable;

30 A number of stakeholders (internal and external) commented on the relationships between external and internal stakeholders and drafters and noted apparent drafter rigidity, including comments that:

- there seems to be a disconnect between IRD policy advisers and the IRD drafters;
- IRD policy advisers say that the drafters are not open to suggestions/cannot be given directions on drafting points/concerns;
- in some cases, there was consultation on draft legislation and negative submissions but the policy advisers said that they could not get the drafter(s) to change the wording;
- policy advisers say that the drafter(s) simply refuses to change the legislation because “legally, it is correct”;
- some policy advisers are too junior to exercise the necessary amount of judgement and control;
- it is a wrong attitude for a drafter simply to refuse to change things;
- policy people giving drafting instructions met resistance and the drafter(s) would get very “locked in” to the particular drafting approach they wished to follow; and
- drafters get too fixated on style.

31 **Recommendation:** It is recommended that:

- a constructive approach to stakeholder feedback should be encouraged by management generally in discussions with drafters;
- in the case where there were a series of consistent comments concerning the apparent rigidity of one particular member of the drafting unit, there should be management discussions with that person to give them the opportunity to develop and modify their approach to dealing with internal and external stakeholders; and
- generally, drafters should be encouraged to regard policy analysts as a key audience for the legislative product and a source of valuable subject matter tax expertise.

32 A number of stakeholders (internal and external) commented on the inconsistency of drafting style between drafters, including comments that:

- different drafters have very different approaches;
- drafters should ideally cross-fertilise ideas amongst themselves but that does not seem to happen;
- there is insufficient management of the drafting team, with no real checking of quality, stylistic consistency or coherence;
- possibly a “chief drafter” could aid consistency;
- drafting instructions have to be tailored to the different drafters and it is hard for young analysts to know that;
- some drafters are happy to use formulae and some are not and there is similar inconsistency in the use of visual aids e.g. diagrams; and
- there is a need for and apparent lack of peer review exercises for drafters.

- 33 **Recommendation:** Efforts to improve drafting consistency should be advanced, including in particular:
- consideration given to appointing one of the drafting unit as a chief drafter, or recruiting in future a chief drafter, possibly one for each of the three major revenue acts; and
  - consideration given to peer review protocols (again, see further below); and
  - continued and extended focus on the Inland Revenue Act Conventions (IRAC) manual (see further below).
- 34 Some stakeholders commented on the adverse impact of or need for use of drafting tools to compensate for scattering provisions from regimes through various parts of the ITA, including:
- splitting of regimes can be dealt with by adequate sign-posting; and
  - ordering carefully and describing relationships helps the presentation but each case does tend to have its own challenges.
- 35 **Recommendation:** To the extent not already mandated:
- it should be mandatory, in the case of any new regime with provisions split between different parts of an act, for a “road map” to be provided to list and identify where all parts of the regime can be found; and
  - a standard format for “road mapping/sign-posting” should be settled on.
- 36 Some stakeholders commented on the use of formulae in legislation, including:
- sometimes formulae used are too complex and incorporate too many steps in one formula, inhibiting readers’ understanding whether the legislation does or does not apply in their case; but
  - the use of formulae and tables can help add clarity.
- 37 **Recommendation:** An exercise be undertaken to consider those provisions where formulae have been criticised for complexity, to identify and fix on some protocols for formulae to avoid complexity.
- 38 Some stakeholders commented on the use of “purpose” provisions, including:
- purpose provisions can be problematic; and
  - some feel purpose provisions still have a use but they may need periodically to be updated.
- 39 **Recommendation:** There should continue to be caution in attempting to use purpose provisions, to avoid conveying inaccuracy and oversimplification.
- 40 Some stakeholders commented on the use of communication aids to assist readers, including:
- having examples embedded is very useful;
  - drafters should look for opportunities to do innovative things to help readers (e.g. the reference to the OECD rules in the hybrid risk management rules);
  - generally, IRD policy is that brackets are not to be used (except for cross-references) but PCO use them to use them to signal hierarchy and the latter seems sensible; and

- flowcharts can aid communication.
- 41 **Recommendation:** Members of the drafting unit should be encouraged to:
- creatively use visual aids to communication; and
  - to the extent not already done, workshop techniques and recommended approaches to use of visual aids, with a view to achieving consistency.
- 42 A number of stakeholders commented on the use of defined terms, including comment that:
- use of a number of very similar defined terms causes confusion and inhibits readability;
  - lists of defined terms are hard to produce and maintain; and
  - any defined term should signal the concept.
- 43 **Recommendation:** Members of the drafting unit should be encouraged to avoid having multiple defined terms that are too similar and generally aim for defined terms that clearly signal the underlying concept.
- 44 **Recommendation:** Consideration should be given to seeking feedback from major external stakeholder groups in relation to the extent to which they see continued utility in the lists of defined terms or alternatively, say, anticipate hyperlinks making the lists obsolete.
- 45 Some stakeholders commented on the potential benefits of using a plain language consultancy review service or other method for guidance, including:
- an external provider (Write Limited) undertakes plain language reviews of the PCO legislation and the feedback is valuable even if not always feasible to adopt;
  - in other legislative drafting situations, a sense review by a language expert occurs (although Sharon tends to do that for the IRD drafting); and
  - possibly, artificial intelligence tools might be available to perform this task.
- 46 **Recommendation:** Consideration be given to identifying and engaging an external expert on plain language and/or artificial intelligence tools to review, either as a matter of standard course or periodically, draft legislation in order:
- to provide advice to drafters; and
  - to identify issues that consistently arise, either in relation to drafting generally or in relation to particular drafter.
- 47 Some stakeholders commented on the use of colons to mean “or”, including:
- use of punctuation instead of “or” is not user-friendly;
  - the use of a colon to mean “or” is unnecessarily obscure;
  - there is continual confusion with the use of colons meaning “or” and that approach does not seem to involve “plain language”; but
  - the opening words of a list can explain this.
- 48 **Recommendation:** A review be undertaken of all usages in the Income Tax Act of list ending in colons, to identify and correct any where there is insufficient communication by the opening words of the operation of the list.

- 48.1 **Recommendation:** Subject to prior consultation with members of the drafting unit and consideration of consistency with PCO guidelines, a decision should be made whether or not to continue using “colons” to mean “or” or “and/or” in future legislation.
- 49 Some stakeholders commented on the benefits of involving drafters in policy development, including:
- drafters might need to be more involved in policy development, to aid their understanding of the purpose;
  - the drafters are more likely to aware of practical realities if they are exposed to private sector participants;
  - a drafter alone cannot think of all the factual possibilities; and
  - the drafters do not report back to policy people on where policy matters are covered in the draft legislation and this should be a standard requirement.
- 50 **Recommendation:** To the extent reasonably possible, drafters should have some significant involvement during or be given fully-adequate explanation from the expert analysts concerning the policy development process.
- 51 **Recommendation:** As a standard practice, drafters should report back to policy advisers on where specific policy matters are dealt with in the draft legislation.
- 52 Some stakeholders queried what KPIs drafters were subject to.
- 53 **Recommendation:** Consideration be given to incorporating into drafters’ KPIs/performance reviews/career discussions:
- matters arising from this review that indicate need for further skill development; and
  - regular monitoring of achievement/improvement in relation to those matters.
- 54 PCO raised questions concerning the extent to which the drafting unit maximises benefits from its relationship with PCO, including comments that:
- PCO is continually working on better precedents for standardisation of drafting. While the IRD is involved, the drafters at the IRD do not appear to be engaged in that process; and
  - PCO does not think that the IRD drafters generally comply with PCO style guidelines.
- 55 **Recommendation:** These issues be discussed within the drafting unit and then be discussed with PCO, with a view to agreeing on ways to improve collaboration and extend IRD benefits from use of PCO resources.
- 56 It was noted that there is a need for more succession planning in the drafting unit, especially as the work volume seems to be increasing.
- 57 **Recommendation:** To the extent not already in place, a strategy be devised for succession management in the drafting unit.
- 58 Comments came from internal stakeholders concerning the Inland Revenue Acts Conventions (*IRAC*) manual including:

- more efforts need to go into IRAC development; and
- it is still important to focus on plain language principles and IRAC is helpful for training purposes.

59 **Recommendation:** Continued, systematic efforts should be made to develop and maintain the IRAC manual, for training and quality control purposes.

60 Conversely, a number of stakeholders had praise for the drafting quality and/or recognised the pressure on drafters, including comments that:

- drafters generally do a good job under pressure;
- policy u-turns make it very difficult for drafters;
- there is a difficult “trade-off” between simplicity and precision;
- it is harder to achieve clear presentation in circumstances where existing legislation is being amended; and
- generally the drafters produce an okay result.

61 **Recommendation:** Members of the drafting unit should be told of the positive feedback from various stakeholders.

#### **Conclusions: Priority areas for rewriting or post-implementation review**

62 Many stakeholders (especially internal stakeholders) referred to the Tax Administration Act (*TAA*) as a priority area.

63 Specific TAA areas mentioned as requiring work were:

- the remissions and refunds aspects;
- the objections and challenges aspects;
- the provisional tax rules; and
- the use of money interest rules.

64 **Recommendation:** Work on modernising the TAA continue as a priority area as part of the revision Bill programme.

65 Many stakeholders referred to the Goods and Services Tax Act (*GSTA*) as having lost its simple and clear structure and requiring a rewrite.

66 Some stakeholders have commented that the GSTA needs to revert to having a clear focus on its core provisions/essential linkage with section 8.

67 Other specific areas of the GSTA cited by stakeholders as requiring remedial work on clarity included:

- the GST rules for retirement villages and commercial dwellings;
- the definition of “financial services”;
- the change of use rules;
- the apportionment rules; and
- the input tax credit rules.

68 **Recommendation:** To the extent not already done, renumbering and rewriting the GSTA be made a priority area for future work as part of the next revision Bill programme.

- 69 A number of stakeholders expressed concern about the complexity and extent of the mixed use asset rules and the resultant obscuring of the rules that apply to the most common scenarios e.g. the average natural person bach owner will find them hard to work through.
- 70 A number of stakeholders expressed concern about the thin capitalisation rules and, in particular, the extent to which disparate fact scenarios (inbound and outbound), where the rules have a different rationale, are combined.
- 71 A number of stakeholders commented that the CFC and FIF rules have changed over time and important rules (e.g. comparative value method for FIFs) are “buried” under far less important rules.
- 72 Some stakeholders commented that the residential land loss/deduction ring fencing rules were either:
- initially proposed to be misplaced – should have been proposed to be in Part E rather than proposed to be in Part D; or
  - adopted a different conceptual approach to the tax loss component rules.
- 73 Some stakeholders commented that the trust rules were hard to work through (unless the reader had a lot of background on them).
- 74 Stakeholders generally favoured post-implementation reviews and some cited especially checking of the:
- R&D rules; and
  - BEPS rules.
- 75 Isolated stakeholder comments concerned:
- the FBT rules;
  - the hybrid rules;
  - the “burial” in Part B of the significance of the residence and source rules;
  - the land sale taxing rules;
  - the complex ASC formula in the dividend rules;
  - the financial arrangement rules (including in particular the use of IFRS); and
  - Part M generally.
- 76 **Recommendation:** Consideration should be given to each of the matters referred to in the preceding paragraphs 69 to 75 as areas to be listed for post-implementation review and/or rewriting.

**Conclusions: Other specific suggested ways for achieving improved results**

- 77 A number of stakeholders commented on the need for and apparent lack of peer review exercises for the drafters, including comment that:
- peer review was a normal and standard requirement for written work in many private sector environments;
  - generally, peer review would increase quality and consistency;
  - PCO has a peer review requirement with monitoring methodology to ensure an extremely high compliance level and “soft skills” training on co-operative behaviour; and
  - it is especially important for junior drafters.

78 **Recommendation:** There should be work undertaken to develop peer review protocols for the drafting unit, including consultation with PCO on how best to implement peer review and make effective, co-operative participation in peer review a KPI for members of the drafting unit.

79 Some (internal) stakeholders considered that the drafters needed to:

- become more “team-like”;
- cross-fertilise ideas more;
- work jointly on drafting; and/or
- avoid working in isolation and never leaving their office/cubicle.

80 **Recommendation:** An exercise be undertaken (possibly in conjunction with development of peer review protocols) of identifying training/skills development modules that can increase the extent of:

- co-operation within the drafting unit; and
- acceptance of training and guidance on the need for ways to enhance co-operative working in teams.

81 A specific suggestion also concerned establishment of the equivalent of the Rewrite Advisory Panel for a non-partisan and a co-operative means of quality control/post-implementation review.

82 **Recommendation:** Consideration should be given to this suggestion.

#### **Other matters raised by stakeholders: Legislative process issues and general approach to use of legislation**

83 A number of internal and external stakeholders expressed concern about the increasing complexity and/or length of tax legislation, including comments that:

- the scale and complexity seems always to be increasing (eg. foreign hybrids);
- complexity can mean the need for changes to draft legislation is only slowly realised or realised too late;
- the drive to eliminate administrative discretion leads to complexity (eg. purchase price allocation rules, arm’s length loan interest rate rules);
- the complexity induced by concern about leaving matters to be dealt with administratively means the basic rules are obscured by layers of detail (eg. purchase price allocation rules);
- the legislation becomes overly complex and hard to understand if it aims to cover all possible fact scenarios, rather than focussing on the major likely fact scenarios;
- avoidance concerns often lead to drafting that raises all possibilities at the outset of the presentation of the legislation, rather than starting with a general rule and leaving remoter possibilities for later parts or for application of the generally anti-tax avoidance provisions;
- the tapering down of the IRD investigation function capacity places more emphasis on the detail to be included in legislation;
- the ease of and acceptance of the need for a lot of remedial changes means that there is less pressure to ensure initial correctness;
- the ITA is now incredibly lengthy and far too prescriptive in dealing with minor peripheral issues;



- OCTC must take responsibility for requiring more and more detail in legislation to eliminate areas for discretion; and
  - the rest of IRD should provide more support for leaving detail to be dealt with in determinations and regulations.
- 84 Conversely, some stakeholders commented that the volume of legislation was necessary in certain respects, including comments that:
- it is better to have a high volume of legislation to allow necessary remedial changes to be made quickly;
  - users and/or submissions commonly apply pressure to add more detail to clarify how specific factual situations are dealt with; and
  - the move to eliminate discretions reflected criticism of discretions.
- 85 **Recommendation:** Policy advisers, OCTC and drafters should be/be made aware of the adverse consequences (on readability, risk of legislative error and increased risk of non-compliance due to misunderstanding) of:
- requiring the legislation to be extremely detailed and prescriptive; and
  - obscuring major principles.
- 86 A number of stakeholders commented adversely on the extent to which amendments to bills occur late in the FEC process, in particular by extensive SOPs, including comments that:
- major changes at the end of the FEC process are not desirable;
  - a major change made too late in the process eliminates the chance for submissions to respond;
  - ad-hoc changes sought by one taxpayer at a late stage may adversely affect other taxpayers who do not then have the opportunity to make submissions;
  - the FEC and its advisor are increasingly facing SOPs introducing a whole new regime at the last minute;
  - there used to be a presumption against frequent use of SOPs; and
  - lengthy SOPs indicate there is a process problem and leave users without access to an explanation of the rationale.
- 87 Conversely, some (internal) stakeholders commented that:
- a lot of last-minute changes reflect last minute criticism; and
  - drafters do not like extensive SOPs but there is often political pressure to make late changes.
- 88 **Recommendation:** The criticisms of and inherent costs of introducing major changes late in the legislative process by SOP be noted and taken into account, with a view to trying to reduce the extent of such changes.
- 89 Some stakeholders made other comments on the FEC process, including comments that:
- FEC is heavily influenced by IRD officials, who effectively become the FEC secretariat; and
  - the advice of IRD officials to the FEC should be impartial.
- 90 **Recommendation:** These concerns should be noted.

- 91 A number of stakeholders (external and internal) commented on the speed of the process and/or the ambitiousness of the work programme, including comments that:
- 90% of the time seems to be spent on policy development with only a rushed 10% on the actual legislation;
  - the timeframes are too tight;
  - politicians drive urgency, especially after an election;
  - the work programme is ambitious and there are only a limited number of stakeholders to comment on numerous discussion documents;
  - PCO develops legislation more systematically and predictably;
  - the time taken to develop policy compresses the drafting time;
  - ideally, the policy team could try to slow the process down but it was difficult to push back on Ministers;
  - drafting is often left to the end of the process, leaving drafters with limited time and scope;
  - remedies may not always be matters requiring urgency;
  - systemic timing issues leave drafters working under real pressure; and
  - the speed of the process adversely affects quality.
- 92 **Recommendation:** Consideration should be given to whether there are further steps that could be taken to manage better the process of scheduling drafting, including:
- systems to stagger the flow of instructions; and
  - assessment of the relationship between the time scheduled for policy development and the time scheduled for drafting.
- 93 One stakeholder commented that policy instructions from non-lawyers and/or those with limited understanding of the legislative structure mean drafters have to provide their own guidance.
- 94 **Recommendation:** Care should be taken to ensure that those giving ITA drafting instructions have had adequate training in the ITA structure.
- 95 Some stakeholders recommended more post-implementation review and/or commented that it seemed to be rare or inconsistent.
- 96 **Recommendation:** Post-implementation review should be considered as a standard matter for major change developed and implemented quickly.
- 97 Some external stakeholders referred to the *Roberts* case as indicating an unsatisfactory approach being taken by the IRD.
- 98 **Recommendation:** These concerns should be noted.
- 99 Isolated comments were made by stakeholders that:
- the commentary often does not match the wording in the Bill;
  - incorporating terms from other legislation can be problematic if the other legislation has a different policy purpose;
  - deeming provisions can be problematic and result in incorporation of inconsistent concepts; and
  - more IRD training on technical issues and the structure of the ITA seems advisable.

- 100 **Recommendation:** Those responsible for preparing commentaries should be made aware of the concern expressed on whether the commentary matches the wording in the Bill.
- 101 **Recommendation:** The drafting unit members should be made aware of (and possibly the IRAC should reflect) the concerns expressed about:
- using terms from other legislation; or
  - deeming provisions.

- 102 **Recommendation:** Those responsible for IRD training exercises be made aware of the comment made on that issue.

**Other matters raised by stakeholders: Consultation and exposure drafts/early stage consultation drafts**

- 103 There was universal support from stakeholders for utilising consultation as a means of improving the quality of draft legislation but a range of comments were made concerning:
- past experiences;
  - best practise going forward; and
  - practicalities.
- 104 There was commonly support for draft legislation to be released in the form of exposure drafts or similar, including comments that:
- producing draft legislation only at a late stage can mean there is little time for any effective consultation;
  - this allows more time to correct errors and improve drafting;
  - it would be ideal to establish a protocol that a certain percentage of new legislation has to go through an exposure draft stage or similar early stage consultation and/or make it mandatory for major new or complex initiatives;
  - under the GTPP, it is just as appropriate to seek comments on drafting as on policy;
  - seeking comments on drafting only at the FEC stage can waste Parliamentary time that should be focussed on policy matters;
  - releasing early drafts is very effective, especially in technical areas;
  - any concerns about the Attorney-General's protocol about waiver of Crown privilege can be (and is commonly in other departments) easily dealt with by general counsel sign off;
  - more effort in facilitating private sector input will reduce risk of errors; and
  - getting input into the form of the drafting only when the Bill is introduced is too late in the process.
- 105 However, some comment from stakeholders raised cautions about early and/or extensive consultation, including comments that:
- consultation at a time when the policy is not sufficiently settled can lead to problems of perceived inconsistency or time-wasting; and
  - consulting on multiple drafts while the policy is still evolving can erode stakeholder resources and goodwill.
- 106 Some stakeholders raised concern about:
- lack of time allowed for consultation; and
  - the need to allow for significant amounts of time if consultation is to be successful.

- 107 Some stakeholders commented on the extent of inconsistency in relation to the process of seeking consultation.
- 108 A number of stakeholders (mainly external) commented adversely on the extent to which changes were made late in the process without consultation.
- 109 A number of stakeholders, external and internal, commented on the advisability of involving the drafters in the process of consultation with external stakeholders, generally favourably, including comments that:
- it is better to involve drafters at the consultation phase;
  - it allows legislation to be developed iteratively; and
  - it does mean drafters give away some of their “power”.
- 110 Isolated comments were made that:
- getting input from multiple sources is the best way to flush out factual issues that need to be covered;
  - rapid changes to legislation to deal with recent court judgments seem to bypass the need for the GTPP;
  - three organisations tend to dominate the consultation space and there is a need to be careful about self-serving submissions;
  - the volume of legislation is pushing the boundaries of seeking “free advice” from those consulted;
  - consultation can involve use of language that a drafter does not want to use, leading to subsequent confusion or concern about inconsistency; and
  - there is an increasing need to consult early and/or extensively with the IRD systems experts, due to the significance of service delivery implications.
- 111 **Recommendation:** Continued effort be made to maximise the use of early stage (pre-Bill) consultation with relevant parties as a means of trying to improve the quality of policy development and final legislation.
- 112 **Recommendation:** Efforts should be made:
- to produce exposure drafts of legislation wherever reasonably possible; and
  - to address and deal with any perceived impediments to release of exposure drafts.

**Other matters raised by stakeholders: Location of drafting team**

- 113 The vast majority of internal stakeholders and some external stakeholders considered that locating the drafting unit at the IRD rather than PCO was advantageous, including comments that:
- tax law complexity requires specialist drafters;
  - close proximity of the drafters and the policy advisers speeds up the process and eases communications;
  - drafters are more likely to understand the policy and consistency issues;
  - the quality of IRD drafting is generally high and PCO quality is no better than comparable; and
  - PCO resource pressures could lead to “log jams”.
- 114 However, some external and the occasional internal stakeholders considered that a move back to PCO drafting needed to be considered, including comments that:

- it might allow drafters more power to impose a more measured and independent approach to advancing legislation;
- there is a broader range of drafting talent at PCO;
- there is a constitutional rationale or advantage for the independence of PCO from departments;
- PCO drafters may be more flexible and open to points raised by policy advisers;
- there could be significant advantages in relation to training, back-up resources and secondments; and
- it might well be inevitable anyway.

115 **Recommendation:** No consideration be given to any shifting of taxation law drafting back to PCO but efforts be made to obtain more benefit from PCO training and resources (including precedent drafting rules).

#### **Other comments**

116 It should be recognised that many of the stakeholders made comments which could be regarded as relatively subjective, superficial and reflective of the most recent experiences that those commentators had had in relation to the process of drafting legislation. However, that was probably inevitable given the diverse range of and nature of the interview process with stakeholders.

117 Some stakeholders were clearly keen for and would appreciate some feedback on the manner in which their contributions had been dealt with. Although I certainly was assiduous in terms of thanking all the stakeholders for their input into the process, I think it would be appropriate to consider some more formal way of acknowledging their contributions and indicating to them the manner in which their contributions have been taken into account in terms of a process seeking to improve the quality of draft legislation in the future.

118 **Recommendation:** A formal method be considered (possibly tailored to individual stakeholders) for thanking stakeholders and indicating to them the manner in which their contributions have been taken into account. (I am happy to assist in that development and communication.)

**June 2021**

## Summary of taxation law drafting recommendations

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**Note:** *The following broad categories are in descending order of priority for consideration. Within each category, the order of presentation has limited significance.*

### Category 1

- 1 **Recommendation:** It is recommended that the rewrite principles and current Income Tax Act structure (including the alpha-numeric numbering) continue to be adhered to.
- 2 **Recommendation:** It is recommended that:
  - members of the drafting unit are encouraged to place a high emphasis when drafting on communicating clearly and simply the key concepts/principles;
  - members of the drafting unit are advised of the extent of feedback from stakeholders that much more consistent effort needs to be made to improve readability;
  - consideration be given to peer review and external consultancy use to assess readability of new legislation (either as a standard approach or periodically); and
  - drafting unit members should undertake regular training on plain English communication techniques.
- 3 **Recommendation:** It is recommended that:
  - a constructive approach to stakeholder feedback should be encouraged by management generally in discussions with drafters;
  - in the case where there were a series of consistent comments concerning the apparent rigidity of one particular member of the drafting unit, there should be management discussions with that person to give them the opportunity to develop and modify their approach to dealing with internal and external stakeholders; and
  - generally, drafters should be encouraged to regard policy analysts as a key audience for the legislative product and a source of valuable subject matter tax expertise.
- 4 **Recommendation:** To the extent not already mandated:
  - it should be mandatory, in the case of any new regime with provisions split between different parts of an act, for a “road map” to be provided to list and identify where all parts of the regime can be found; and
  - a standard format for “road mapping/sign-posting” should be settled on.
- 5 **Recommendation:** Members of the drafting unit should be encouraged to avoid having multiple defined terms that are too similar and generally aim for defined terms that clearly signal the underlying concept.
- 6 **Recommendation:** Consideration be given to identifying and engaging an external expert on plain language and/or artificial intelligence tools to review, either as a matter of standard course or periodically, draft legislation in order:
  - to provide advice to drafters; and
  - to identify issues that consistently arise, either in relation to drafting generally or in relation to particular drafter.

- 7 **Recommendation:** To the extent not already in place, a strategy be devised for succession management in the drafting unit.
- 8 **Recommendation:** Members of the drafting unit should be told of the positive feedback from various stakeholders.
- 9 **Recommendation:** There should be work undertaken to develop peer review protocols for the drafting unit, including consultation with PCO on how best to implement peer review and make effective, co-operative participation in peer review a KPI for members of the drafting unit.
- 10 **Recommendation:** An exercise be undertaken (possibly in conjunction with development of peer review protocols) of identifying training/skills development modules that can increase the extent of:
- co-operation within the drafting unit; and
  - acceptance of training and guidance on the need for ways to enhance co-operative working in teams.
- 11 **Recommendation:** Continued effort be made to maximise the use of early stage (pre-Bill) consultation with relevant parties as a means of trying to improve the quality of policy development and final legislation.
- 12 **Recommendation:** Efforts should be made:
- to produce exposure drafts of legislation wherever reasonably possible; and
  - to address and deal with any perceived impediments to release of exposure drafts.
- 13 **Recommendation:** No consideration be given to any shifting of taxation law drafting back to PCO but efforts be made to obtain more benefit from PCO training and resources (including precedent drafting rules).
- 14 **Recommendation:** A formal method be considered (possibly tailored to individual stakeholders) for thanking stakeholders and indicating to them the manner in which their contributions have been taken into account.

### Category 2

- 15 **Recommendation:** It is recommended that to the extent not already being done:
- efforts are made to avoid unreasonable compression of/unreasonable expectations for the time taken for drafting; and
  - input be sought from the drafting unit members on options for improvement.
- 16 **Recommendation:** Efforts to improve drafting consistency should be advanced, including in particular:
- consideration given to appointing one of the drafting unit as a chief drafter, or recruiting in future a chief drafter, possibly one for each of the three major revenue acts; and
  - consideration given to peer review protocols (see above); and
  - continued and extended focus on the Inland Revenue Act Conventions (IRAC) manual (see further below).

- 17 **Recommendation:** Members of the drafting unit should be encouraged to:
- creatively use visual aids to communication; and
  - to the extent not already done, workshop techniques and recommended approaches to use of visual aids, with a view to achieving consistency.
- 18 **Recommendation:** A review be undertaken of all usages in the Income Tax Act of lists ending in colons, to identify and correct any where there is insufficient communication by the opening words of the operation of the list.
- 18.1 **Recommendation:** Subject to prior consultation with members of the drafting unit and PCO, a decision should be made whether or not to continue using “colons” to mean “or” or “and/or” in future legislation.
- 19 **Recommendation:** As a standard practice, drafters should report back to policy advisers on where specific policy matters are dealt with in the draft legislation.
- 20 **Recommendation:** Consideration be given to incorporating into drafters’ KPIs/performance reviews/career discussions:
- matters arising from this review that indicate need for further skill development; and
  - regular monitoring of achievement/improvement in relation to those matters.
- 21 **Recommendation:** Continued, systematic efforts should be made to develop and maintain the IRAC manual, for training and quality control purposes.
- 22 **Recommendation:** Work on modernising the TAA continue as a priority area as part of the revision Bill programme.
- 23 **Recommendation:** To the extent not already done, renumbering and rewriting the GSTA be made a priority area for future work as part of the next revision Bill programme.
- 24 **Recommendation:** Consideration should be given to each of the matters referred to paragraphs 24 to 30 of the full review report as areas to be listed for post-implementation review and/or rewriting.
- 25 **Recommendation:** Consideration should be given to the suggestion of the equivalent of the Rewrite Advisory Panel for a non-partisan and a co-operative means of quality control/post-implementation review.
- 26 **Recommendation:** Policy advisers, OCTC and drafters should be/be made aware of the adverse consequences (on readability, risk of legislative error and increased risk of non-compliance due to misunderstanding) of:
- requiring the legislation to be extremely detailed and prescriptive; and
  - obscuring major principles.
- 27 **Recommendation:** Consideration should be given to whether there are further steps that could be taken to manage better the process of scheduling drafting, including:
- systems to stagger the flow of instructions; and
  - assessment of the relationship between the time scheduled for policy development and the time scheduled for drafting.



- 28 **Recommendation:** Post-implementation review should be considered as a standard matter for major change developed and implemented quickly.
- 29 **Recommendation:** Issues concerning consistency with PCO approaches be discussed within the drafting unit and then be discussed with PCO, with a view to agreeing on ways to improve collaboration and extend IRD benefits from use of PCO resources.

### Category 3

- 30 **Recommendation:** An exercise be undertaken to consider those provisions where formulae have been criticised for complexity, to identify and fix on some protocols for formulae to avoid complexity.
- 31 **Recommendation:** There should continue to be caution in attempting to use purpose provisions, to avoid conveying inaccuracy and oversimplification.
- 32 **Recommendation:** Consideration should be given to seeking feedback from major external stakeholder groups in relation to the extent to which they see continued utility in the lists of defined terms or alternatively, say, anticipate hyperlinks making the lists obsolete.
- 33 **Recommendation:** To the extent reasonably possible, drafters should have some significant involvement during or be given fully-adequate explanation from the expert analysts concerning the policy development process.
- 34 **Recommendation:** The criticisms of and inherent costs of introducing major changes late in the legislative process by SOP be noted and taken into account, with a view to trying to reduce the extent of such changes.
- 35 **Recommendation:** The concerns in relation to the FEC process described in the full review report should be noted.
- 36 **Recommendation:** Care should be taken to ensure that those giving ITA drafting instructions have had adequate training in the ITA structure.
- 37 **Recommendation:** The concerns in relation to the *Roberts* case described in the full review report should be noted.
- 38 **Recommendation:** Those responsible for preparing commentaries should be made aware of the concern expressed on whether the commentary matches the wording in the Bill.
- 39 **Recommendation:** The drafting unit members should be made aware of (and possibly the IRAC should reflect) the concerns expressed about:
- using terms from other legislation; or
  - deeming provisions.

**Recommendation:** Those responsible for IRD training exercises be made aware of the comment made that more IRD training on technical issues and the structure of the ITA seems advisable.