

AUSTRALIA'S TAXATION REGULATION IMPACT STATEMENTS – HELPING OR HINDERING ACCOUNTABLE REPRESENTATIVE DEMOCRACY?

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I INTRODUCTION

The primary purpose of this paper is to critically examine the Australian experience with respect to Regulation Impact Statements (RISs) regarding taxation legislation. The first objective of this critical appraisal is to describe the contemporary Australian elaboration of accountable, representative democratic government which is reflected in taxation regulation impact assessment. The second objective is to demonstrate that the current iteration of the process of taxation regulatory impact analysis reflects a particular, contingent model of 'democratic' government which is neither conducive to meaningful democratic accountability nor consistent with sound policy making. The third objective is to identify mechanisms for overcoming this pathology at the core of the Australian tax legislative process. I will argue that this pathology might be remedied by adopting an alternative role for regulatory impact analysis, one which is framed in terms of meaningfully promoting broad, ongoing public accountability.

Regulation impact assessment emerged out of business resistance to what was portrayed as excessive environmental regulation imposed by 'unaccountable' public officials.¹ Its early proponents hoped that the process of regulatory impact assessment would place the onus upon proponents of new regulation to demonstrate a clear case for imposing another regulatory 'burden' on business – an onus which, the proponents hoped, would rarely be discharged. Regulatory impact analysis was born of a politically conservative urge to stem the regulatory tide and maintain, literally, business as usual.

However, regulatory impact assessment also gained broader support because it fitted comfortably within the discourse of bureaucratic rationality. Following Weber,² a prominent strand of sociological theory holds that the legitimacy of modern democratic states is founded less upon state action that embodies a social consensus upon contingent moral norms³ and more upon a state's capacity to comply with a social consensus upon procedural norms with respect to the process by which public policy is created.⁴ Thus, for example, Tyler suggests that the general public take the procedural aspects of state action as a proxy for the substantive legitimacy of state action. However there are myriad procedural norms for public policy making which might be adopted in a representative democracy, depending upon one's standpoint regarding the most appropriate roles for public officials and 'the public' in a 'democratic' policy making process. The contemporary discourse of public accountability expresses one model of democratic government under which public officials make decisions for which they provide an account, or explanation, to the general public.⁵ If Weber and Tyler are right, the general public assess such accounts upon the basis of the rationality of the

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¹ Thomas O McGarity, *Reinventing rationality: The Role of Regulatory analysis in the federal bureaucracy*, Cambridge Uni Press, Cambridge, 1991, ch 2.

² Max Weber, 'Science as a Vocation' in H.H. Gerth and C.W. Mills (eds), *From Max Weber*, Oxford University Press, Oxford, 1972, 138ff.

³ Seymour Lipset, *Political Man*, Doubleday, New York, 1963.

⁴ Tom R Tyler, *Why People Obey the Law*, 2006, afterword, 282; Amy Gangl, 'Procedural Justice Theory and Evaluations of the Lawmaking Process' (2003) 25 *Political Behavior* 119.

⁵ Michael Dowdle (ed), *Public Accountability*, Cambridge University Press, Cambridge, 2006.

policy making process rather than upon the morality of the substantive policy outcome. Thus, on this view, regulation is legitimate if government can demonstrate the procedural rationality underlying the substantive policies which it implements.

The emphasis upon quantitative and qualitative analysis within the Regulation Impact Statement literature⁶ is central to the portrayal of rational government which can provide a compelling account of rational legislative process. However, notwithstanding the detailed procedures regarding painstaking data collection and cost/benefit analyses, it is arguable that the official discourse of bureaucratic rationality serves the function of legitimising state action by promoting the myth of procedural rationality. Despite the technical capacity of the modern state, absolute truth is elusive when confronting the ‘wicked problems’ of public policy.⁷ Thus, it is doubtful whether an account can ever incontrovertibly demonstrate that a particular course of action is the best available.

‘Pure’ bureaucratic rationality might be a forlorn hope, despite regulatory impact analysis, but this does not mean that it should be abolished. It does mean that the limitations of regulatory impact analysis should be acknowledged and that institutional measures be incorporated within the legislative process with the object of identifying and minimizing arbitrary decision making. With appropriate information, ‘legislators’⁸ should be in a position to achieve better public policy outcomes than would be adopted by ignorant legislators. With appropriate information, legislators should be able to scrutinize the assertions of interest groups made in their claims for tax reform, they should be able to undertake performance reviews of extant legislation and they should be able to develop proposals for reform. Armed with appropriate information which is readily available in an accessible form, the general public would be better placed to call public officials to account in this era of public accountability.

Unfortunately, Australian Commonwealth tax legislation is developed in an environment where public access to credible and appropriate information is, at best, limited. At the end of the twentieth century, the Review of Business Taxation concluded as much,⁹ and the more recent Regulation Review Taskforce indicated that little had changed.¹⁰ One purpose of this paper is to demonstrate that little has changed in this regard by examining recent experience with Regulation Impact Statements. Moreover, this paper argues that little will change as a result of the Government’s draft Regulation Guidelines with respect to taxation Regulation Impact Statements.¹¹ The Australian Government reports that these guidelines comprise a significant innovation in the legislative process in general and the tax legislative process in particular.¹² In fact, if assessed against the norms of rational legislative action embodied in the government’s own guidelines with respect to non-tax legislation, the Australian Regulation Impact Statements with respect to tax legislation are an abject failure. Rather than

⁶ Australian Government, *Best Practice Regulation Handbook*, Productivity Commission, Canberra, 2006.

⁷ The concept of ‘wicked problems’ was elaborated in: Horst Rittel and Melvin Webber (1973), ‘Dilemmas in a General Theory of Planning’ 4 *Policy Sciences* 155.

⁸ Under a model of centralized state power, ‘legislators’ might be parliamentarians and perhaps their official advisors, while under a model of dispersed state power ‘legislator’s might be all members of a community. The adoption of either model of democratic government does not affect the point that I am making here – that regulatory impact analysis offers the prospect of better informed public policy which emerges from a process which acknowledges and responds to moral disunity within a particular community.

⁹ Commonwealth of Australia, *A Tax System Redesigned*, Final Report of the Review of Business Taxation (Chair: John Ralph AO), Treasury, Canberra, 1999, 149ff.

¹⁰ Commonwealth of Australia, *Rethinking Regulation*, Report of the Taskforce on Reducing Regulatory Burdens on Business, Productivity Commission, Canberra, 2006, 113, 148ff.

¹¹ Australian Government, *Best Practice Regulation Handbook*, Productivity Commission, Canberra, 2006.

¹² Commonwealth of Australia, *Regulation and its Review 2005-06*, Productivity Commission, Canberra, 2006, ch 1.

being a success for public accountability in this era of public disillusion with public officials, the tax Regulation Impact Statements offer little in terms of facilitating credible, informed public appraisal of the legislative interventions by public officials. Behind the veneer of public accountability and bureaucratic rationality created by the RIS process, much legislation is developed and/or modified behind closed doors in order to procure the favour of particular interests. And even where such cynicism is not apparent, it is clear that much legislation is enacted after little or no critical analysis. To be effective both as a public policy tool and a means of engendering legitimacy, the scope of the taxation RIS process must be expanded significantly and they must be incorporated within a framework of ongoing scrutiny of the taxation system.

II DEMOCRATIC POLITICAL THEORY AND NORMATIVE GUIDELINES FOR PUBLIC POLICY MAKING

Within democratic political theory there is considerable debate regarding the nature and extent of general public participation in public policy making. Even a cursory review of the literature in this field indicates that 'democratic political theory' misrepresents what is, in truth, a plethora of political theories which span a broad spectrum.¹³ In the contemporary Australian political environment, identifying the function of RISs will depend upon which of two 'mainstream' concepts of democratic government is adopted:

1. A centralized concept of state power which focuses upon a policy elite comprising politicians, bureaucrats and other key 'stakeholders' such as business representatives. Under this centralist model, legislators are charged with the business of government and the general populace is remote from the everyday business of government. However, the legislative elite is accountable to the general electorate by virtue of 'open and fair' elections.¹⁴ Such elitist theories of government variously despair at the collusion between government and 'special interests'¹⁵ or quite possibly endorse such elitism as a normative model;¹⁶ and
2. the participatory¹⁷ and civic republican¹⁸ strands of democratic theory emphasize the importance of active, informed and ongoing engagement of the general public, or at least some sections of the public, in the political process. These models of democratic government, which acknowledge the dispersal of state power throughout a community, envisage government in terms of a partnership between state functionaries and 'the people'. The active engagement of all of 'the people' in every policy decision is impractical in this age of 'big government'. However, the civic republican and participatory models of democratic government at least present an

¹³ Dowdle (ed), above n 5, 3ff. For consideration of alternate models of democratic government see: David Held, *Models of Democracy*, Polity Press, Cambridge, 2006 (3rd edn).

¹⁴ For a critical review of the extent to which the general public is placed in a position to critically assess the performance of its legislators see: Ian Shapiro, *The State of Democratic Theory*, Princeton University Press, Princeton, NJ, 2003, ch 5.

¹⁵ Robert Dahl, *A Preface to Economic Theory*, Polity, Cambridge, 1985, 50.

¹⁶ J Schumpeter, *History of Economic Analysis*, Oxford University Press, New York, 1954. Schumpeter is somewhat ambivalent as to whether his elitist model is merely descriptive or whether it is normative.

¹⁷ Carole Pateman, *Participation and Democratic Theory*, Cambridge Uni Press, Cambridge, 1970.

¹⁸ Deliberative democracy may be founded upon a rationalist norm, as in: Claus Offe and U Preuss, 'Democratic Institutions and Moral Resources' in David Held (ed), *Political Theory Today*, Polity Press, Cambridge, 1991. Other deliberative democrats embrace a pluralist norm: Chantal Mouffe, 'Democracy and Pluralism: A Critique of the Rationalist Approach' (1995) 16 *Cardozo Law Review* 1533; see also James Tully, 'The unfreedom of the moderns in comparison to their ideals of constitutional democracy' (2002) 65 *Modern Law Review* 204, 217.

ideal framed in terms of lowering the barriers to active engagement in public policy for those wishing to participate.

Under the first model of government, RISs are an instrument by which the technocratic policy elite refines its legislative outputs. Those responsible for developing legislation must ensure that they seek and take account of information provided by those 'directly affected' by legislation. As this model has come to be understood in contemporary times, the category of 'those directly affected by legislation' is generally accepted to comprise business regulatees.¹⁹ One aspect of the emergence of neoliberal philosophy has been the ascendance of the view that the function of government is to promote the public interest which is understood in terms of the creation of a favourable environment for private investment.²⁰ Indeed, as already noted, the genesis of the RIS process can be traced to a 'pro business' backlash against what was perceived to be undue state intervention into the 'private' domain.²¹

Under this first model of democratic government the general public is acknowledged by way of afterthought:

In accordance with the principles set out above, the Taskforce considers that no regulation should be introduced unless the need for government action and the superiority of the preferred option have been transparently demonstrated. This is not asking too much. Business has a right to expect that governments will follow good process when making decisions that impact on it, as indeed does any section of the economy or society.²²

Here there is acknowledgment of the role of the RIS process in enhancing the capacity of the general public to hold public officials to account,²³ but such references to broad public participation are fleeting and there is no detailed consideration of the barriers to public participation in the policy making process and nor is consideration given to how the RIS process might serve to lower those barriers to participation.

Although the impetus for RISs has been framed in terms of enhancing democratic accountability, it is a thin concept of accountability which underpins the elitist model of democratic government. In this discourse, the mainstream concept of transparency is taken to entail a minimalist description of the nature of public policy decisions made by central government.²⁴ In particular, the concept of transparency is not taken to entail the provision of information to the general public so that it might actively engage in the policy making process and meaningfully hold elected officials to account come election day.

Under the second concept of democratic government, public confidence in the exercise of state power is engendered by promoting broad and informed public participation in the process of government.²⁵ Norms derived from the second model of democracy evidence less emphasis upon gaining information from the public and more emphasis upon fostering and enabling active engagement with the public at all stages of the policy cycle – from agenda setting to post implementation evaluation. Thus, both deliberative and participatory models of democracy call for the dissemination of 'accessible'²⁶ information to the general public such that the decisions of public officials can be subjected to informed, critical scrutiny. Thus, the

¹⁹ For consideration of this point see section 3(i) below.

²⁰ Charles E Lindblom, *Politics and Markets*, Basic Books, New York, 1977, 122-3.

²¹ Thomas O McGarity, *Reinventing rationality: The Role of Regulatory analysis in the federal bureaucracy*, Cambridge Uni Press, Cambridge, 1991, ch 2.

²² Government of Australia, above n 11.

²³ OECD, *Background Document on Regulatory Reform in OECD Countries*, OECD, Paris, ND, 26.

²⁴ Mark Burton 'Is Participatory Tax Transparency Achievable?' (2006) 4(3) *Tax Notes International* 333-357.

²⁵ OECD, *Citizens as Partners*, OECD, Paris, 2001.

²⁶ Pauline Poland, *Online Consultation in GOL-IN Countries – Initiatives to Foster e-democracy*, A joint project of the Government On-line International Network, 2001.

OECD specified ten guiding principles for promoting the active engagement of citizens in public policy making. These principles include:

1. Commitment to active engagement on the part of those ultimately responsible for public policy;
2. Broad rights of the citizenry to access information, provide feedback, be consulted and actively participate in policy making;
3. Information provided to the citizenry should be objective, complete and accessible;
4. Mechanisms for promoting active engagement on the part of the citizenry should be adequately resourced;
5. There must be appropriate feedback provided to those engaged in the consultation process; and
6. Governments should adopt measures which build the capacity of citizens to actively engage in the process of shaping public policy.²⁷

Other examples of policies which promote active engagement in public policy formation on the part of the citizenry have also been adopted.²⁸ The broad proposition which emerges from these normative statements is that public policy formation is no longer generally conceived in terms of a top-down, hierarchical or inside-out manner. The emphasis given to inclusive consultation indicates that something more is envisaged – the active engagement of the citizenry in the formation, implementation and review of public policy. Of course, such democratic processes do not entail abdication from public accountability on the part of those charged with government – governors remain ultimately responsible for the legislative outcomes.

Under this model, the development and publication of an RIS would be an integral aspect of active engagement with the general community rather than specifically identified ‘stakeholders’.²⁹ Thus, under this model, the development of an RIS would include:

1. Community consultation upon agenda setting with a view to identifying the most pressing regulatory issues;
2. publication of a ‘green’ paper with respect to each high priority issue, outlining the nature of the perceived problem, providing a preliminary statement of relevant information known to government (and lacunae in that information), an outline of alternate courses of action and a statement of reasons for adopting the preferred course of action. Publication of such a green paper would be accompanied by an open invitation to make submissions to government and the provision of adequate time for such submissions to be made;
3. a process of open consultation with the general community, which allows adequate time for the information provided in the green paper to be disseminated and considered;
4. on-going review of any tax concessions resulting from this process be implemented, and this review to entail consideration of the validity of the policy underpinning the

²⁷ OECD, *Citizens as Partners*, OECD, Paris, 15.

²⁸ See, for example, European Commission, *The Commission’s contribution to the period of reflection and beyond: Plan-D for Democracy, Dialogue and Debate*, COM(2005) 494 final, Brussels, 2005; European Commission, *European Governance: White Paper*, COM(2001) 428 final, Brussels, 2001; European Commission, *Towards a reinforced culture of consultation and dialogue – general principles and minimum standards for consultation of interested parties by the Commission*, COM(2002) 704 final, Brussels, 2002.

²⁹ Enhancing access to information is one response to the public choice critique of democratic government. By lowering barriers to participation in the public policy ‘market’, participation in that market is not reserved for well resourced interest groups and, further, legislative favours purchased from corrupt/morally bankrupt politicians are liable to be exposed to public scrutiny.

- legislation as well as the effectiveness of the legislation in achieving the stated policy;
and
5. the entire legislative process, including preparation of the RIS, being subject to evaluation.

The preceding discussion of the significance of democratic political theory to the framing of an RIS process might be taken to suggest that the two models are mutually exclusive, but it is possible to construct a policy making model which incorporates elements of both models. Thus, the literature which largely adopts the first model does make fleeting reference to the pluralist policy making envisaged in the second category of policy making models.

III WHAT MODEL OF DEMOCRATIC ACCOUNTABILITY IS REFLECTED IN THE AUSTRALIAN TAXATION RIS PROCESS?

A The Genesis of Regulation Impact Statements in Australia

The origins of Regulation Impact Statements in Australia have been considered elsewhere.³⁰ Suffice to say that the impetus for Australian Regulation Impact Statements can be traced to the second wave of deregulatory fervour which swept the 'developed' world from the early 1980's. After the first rush of cutting regulation by repealing specific regulatory instruments, the process of creating legislation came to be conceived in terms of the hard science of economic analysis. On the assumption that all legislative costs and benefits could be measured, the cost/benefit statement was taken to be the basis for assessing the merits of proposed and existing legislation.

By the early 1990's the first traces of this outlook upon the legislative process could be discerned.³¹ However, the explicit adoption of Regulation Impact Statements in Australia originated from the Prime Minister's response³² to the report of the Small Business Deregulation Task Force.³³ The focus of this report and the Prime Minister's response was upon reducing the cost of regulation upon business. This emphasis has been retained, and now is reflected in the location of the Office of Best Practice Regulation within the Productivity Commission (rather than, for example, the Attorney-General's Department), the focus of the Commonwealth government's taskforce regarding the regulatory burden upon *business*³⁴ and the revised RIS requirements which incorporate a *business* compliance cost calculator.³⁵

In a sense this concentration upon the perceived plight of business at the hands of what is portrayed as an unaccountable and rampant bureaucracy is understandable. Certainly, it is true to say that the focus of the centralist model has been upon the second generation of deregulatory reform with the purpose of reducing the regulatory cost imposed upon

³⁰ Michael d'Ascenzo 'Regulation Impact Statements and compliance costs: an Australian perspective' in Chris Evans, Jeff Pope and John Hasseldine, *Tax Compliance Costs: A Festschrift for Cedric Sandford*, Prospect, Sydney, 2001, 353.

³¹ For the original proposal regarding the introduction of regulation impact statements see: Commonwealth of Australia, *An Assessment of Tax*, Report 326 of the Joint Committee of Public Accounts, AGPS, Canberra, 1993, 91. For an overview of the ATO practice with respect to Regulation Impact Statements see: D'Ascenzo, above n 30. For a comparative review of legislative practice with respect to regulation impact statements see: Chris Evans and Michael Walpole, *Compliance Cost Control: A Review of Tax Impact Statements in the OECD*, ATRF, Sydney, 1999.

³² The Hon John Howard MP, *More Time for Business*, 24 March 1997, Canberra.

³³ Commonwealth of Australia, *Rethinking Regulation*, Report of the Taskforce on Reducing Regulatory Burdens on Business (Gary Banks, Chair), Productivity Commission, Canberra, 2006

³⁴ John Howard, *Taskforce on Reducing the Regulatory Burden on Business*, Canberra, 12 October 2005.

³⁵ Commonwealth of Australia, above n 33, Appendix E.

businesses.³⁶ Thus, for example, the recent Australian Taskforce on Reducing Regulatory Burdens on Business³⁷ created the backdrop for review of the Australian RIS process – the emphasis upon consultation with business rather than the community at large represents the overt assumption that the ‘business’ interest in good regulatory practice is superior to the interest of the general community.

B Australian criteria for ‘adequate’ Regulation Impact Statements

The nature of RISs is set out in the *Best Practice Regulation Handbook* (the Handbook),³⁸ which states that an RIS has seven key elements:

1. Identification of the problem or issue which gives rise to the need for action;
2. The desired objectives;
3. The options (regulatory/non-regulatory) that may constitute viable means for achieving the desired objective;
4. An impact analysis, comprising an assessment of the impact (costs and benefits) on consumers, business, government and the community of each option;
5. A consultation statement, which must detail:
 - a. the consultation objective
 - b. how consultation was conducted;
 - c. the views of all of those consulted, including dissenting views;
 - d. how the various views were taken into account; and
 - e. if full consultation was not undertaken, provide a reasonable explanation for this omission
6. A recommended option; and
7. A strategy to implement and review the preferred option.³⁹

It is significant that these indicia of an acceptable RIS do not include reference to consultation upon agenda setting, to provision of information to the general public with a view to promoting active and informed public participation in the policy process and nor do they include reference to evaluation of the policy making process itself. As such, the Australian interpretation of ‘best practice’ may be something of a misnomer when a comparison is drawn to the practice adopted in other OECD countries such as the United Kingdom. No explanation is given for why the normative framework adopted in other countries has not been adopted in Australia. The Australian RIS framework with respect to general legislation is, then, a second best paradigm.

Nevertheless, Chapter 4 of the *Best Practice Regulation Handbook* explains in considerable detail the substantial research effort which must be undertaken in justifying regulatory intervention in the particular policy domain. Inevitably, in undertaking the gargantuan empirical and qualitative task which this aspiration entails, satisficing⁴⁰ and heuristics⁴¹ will constitute the ultimate foundation for the selection of the desired policy response.⁴² Rather

³⁶ See, for example, OECD, *The OECD Report on Regulatory Reform: Synthesis*, OECD, Paris, 1997, 5ff.

³⁷ Commonwealth of Australia, above n 33.

³⁸ Commonwealth of Australia, above n 11.

³⁹ Id, 3-4 to 3-5.

⁴⁰ Herbert Simon, ‘A Behavioral Model of Rational Choice’ (1955) 69 *Q J Econ* 99.

⁴¹ For a discussion of the relevant literature see: Edward L Rubin, ‘Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, But Throw out the Baby’ (2002) 87 *Cornell L Rev* 309, 315-6.

⁴² McGarity, above n 19.

than Weber's steel hard cage of bureaucratic rationality,⁴³ bureaucratic action is ultimately founded upon the soft science of intuition. There will inevitably be limits to the capacity of bureaucrats to fulfil this task. The Handbook therefore might best be understood as expressing an aspiration to bureaucratic rationality. Notwithstanding the subjective element within the RIS process, the aspiration to rational bureaucratic decision making expressed in this best practice regulation guide means that public policy makers must remain open to alternate viewpoints and engage with those viewpoints when raised. It remains to be seen whether this aspiration to bureaucratic rationality is carried into effect.

However, such an inquiry need never trouble those interested in the tax policy process because the *Best Practice Guide* substitutes significantly less onerous RIS requirements with respect to taxation legislation. According to the Guide, an RIS with respect to taxation legislation need only provide the following information:

1. Specification of the policy objective;
2. Identification of the implementation options with respect to achieving the stated policy objective;
3. Assessment of impacts of the various implementation options; and
4. Statement of preferred option.⁴⁴

As a result, the *Best Practice Guide* accepts what can only be described as a third best normative framework with respect to the development of Australian tax regulation. According to the *Best Practice Guide*, there is no need for an RIS to provide a critical review of the evidence justifying the particular policy measure. This exclusion therefore restricts the taxation RIS process to an appraisal of means to achieve a given government policy objective, rather than an appraisal of alternate policy ends. The effect of this exclusion is to suppress the development of views at odds with government policy and also to suppress the gathering of information which might call government policy into question. Without the benefit of such information, which might enable the identification of (possibly better) policy paths not taken, it is extremely difficult for the general public to hold a government to account for its policy choices. For example, the entrepreneurs' tax offset was developed in the Prime Minister's office during a federal election campaign,⁴⁵ no doubt with the object of shoring up support from the crucial small business lobby, support which was forthcoming after the measure was announced. At a cost of \$400 million per annum, this expensive program was not subjected to any rigorous review to determine whether this substantial investment was truly in the public interest.

It is also clear from the *Best Practice Guide* that consultation upon the merits of the government's measure is not mandatory, as the Guide observes that consultation will often be inappropriate, adding that 'consultation may have occurred during the drafting of tax legislation required to give effect to the Government's decision.'⁴⁶ The limited nature of any consultation which may occur is also indicated by the Treasury policy with respect to consultation, which holds that consultation is primarily a fact gathering exercise on the part of government, rather than a dialogue:

The aim of consultation is to gather information about the practical operation of the taxation system and improve the quality and effectiveness of changes to the system that the Government proposes. The community consultation process provides you, or your organization, as a stakeholder in the tax system, with an opportunity to express your views on

⁴³ Max Weber, 'Politics as a Vocation,' in H.H. Gerth and C.W. Mills (eds), *From Max Weber*, Oxford University Press, New York, 1972, 79.

⁴⁴ Commonwealth of Australia, above n 11, 5.4ff.

⁴⁵ Liberal Party of Australia, *Promoting an Enterprise Culture*, Melbourne, 26 September 2004.

⁴⁶ Commonwealth of Australia, above n 11, 5-7.

how proposed changes to the tax system will affect you. Consultation also encourages understanding of the range of stakeholder views. The community consultation process allows the Government to benefit from your practical experience, skills and knowledge and incorporate this into the tax design process.⁴⁷

This limited approach to community consultation appears inconsistent with many of the recommendations of the Board of Taxation, in particular:

1. That the government make a commitment to consult on the development of all substantive tax legislation initiatives, except in exceptional circumstances only;⁴⁸
2. That a consultation framework include input from external stakeholders, from agenda setting to finalization of the policy change;⁴⁹
3. That there be ongoing evaluation of consultation measures;⁵⁰ and
4. That adequate feedback be provided to external stakeholders who participate in the consultation process.⁵¹

Curiously, the only official justification⁵² for rejecting such recommendations in favour of the current practice is found in the *Best Practice Guide*, rather than in the Treasury statement regarding consultation. The *Best Practice Guide* indicates that the circumscribed practice of tax regulation development is warranted because:

1. Prior public consultation on taxation measures could release sensitive information regarding tax avoidance, which might be exploited until remedial legislation (if any) took effect;
2. Taxation measures may be announced in the annual Budget papers or in Ministerial statements, and prior public consultation upon such measures would jeopardize the integrity of the budget process or ‘inhibit the usefulness of such Ministerial statements’;
3. The incidence of a tax measure may be difficult to establish, and this may ‘place constraints on the public consultation process’; and
4. Review processes for taxation measures are already in place.⁵³

These issues do not represent an insurmountable barrier to broad public participation in tax system design, as discussed in the following paragraphs.

1. Responding to tax avoidance

The release of information regarding tax avoidance schemes as part of open consultation upon remedial measures might affect the Government revenue if remedial legislation is introduced with prospective effect – between the time consultation commences and the start date for the remedial legislation many more may exploit the tax minimization opportunity. This justification for denying open consultation upon measures to counteract tax avoidance is predicated upon the assumption that remedial legislation can only take effect prospectively, rather than taking effect from the time open consultation commences.

In general it is accepted that legislation should be introduced with prospective effect – that legislation should only take effect from the time that a proposed measure becomes law. The principle of prospectivity is founded upon the rule of law discourse which holds that it is

⁴⁷ The Treasury, *Engaging in Consultation on Tax Design*, Canberra, 2003, 2.

⁴⁸ Commonwealth of Australia, *Government Consultation with the Community on the Development of Taxation Legislation*, Board of Taxation, Canberra, 2002, 7.

⁴⁹ Id, 9.

⁵⁰ Id, 17.

⁵¹ Id, 17.

⁵² Although note the observations of the Board of Taxation: Commonwealth of Australia, above n 48, 7-8.

⁵³ Commonwealth of Australia, above n 11, 5-1.

inappropriate for law to be applied retrospectively. This principle of prospectivity, in turn, is a tenet of liberal legalism which maintains that a person should be able to plan their future activities with full knowledge of the law as currently in force – retrospectivity therefore breaches this principle.

However, the prospectivity principle is not absolute and, in fact, in taxation matters the Australian government routinely departs from the principle. In the past taxation policy has been announced and any resulting legislation took effect retrospectively, from the time at which the consultation phase was publicly announced.⁵⁴ There have also been cases where measures have been announced but not implemented.⁵⁵ Alternatively, as was the case with respect to legislation emanating from the Review of Business Taxation, some legislation was backdated to the date that tax minimization arrangements were publicized.⁵⁶ Once it is seen that the Australian government has not adhered to the prospectivity principle by applying remedial legislation retrospectively, it can be argued that there is little reason not to extend the period of retrospective operation to the commencement of open consultation upon remedial legislation. In this way, the government might signal to private markets its concern regarding particular tax schemes, engage in open consultation and protect its revenue. The retrospective impact of such remedial measures would be moderated by the fact that private markets were fully informed of anticipated government action.

Protection of government revenue is therefore not necessarily inconsistent with engaging in open consultation upon tax reform.

2. *Preserving the integrity of the Budget process and preserving the ‘usefulness’ of Ministerial announcements*

This rationalization of elitist tax policy design assumes that Budget announcements and Ministerial press releases should include ‘new’ policy material and this need not necessarily be the case. In fact, once again, in the past the Australian government has routinely made tax policy announcements outside of the Budget process.⁵⁷ Moreover, many such Ministerial announcements have heralded the commencement of a consultation process rather than constituting the announcement of final government policy.⁵⁸

Budget announcements could comprise a statement regarding the fiscal impact of altered tax policy which has been determined at the end of a process of consultation. Alternatively, Budget announcements might signal the existence of an issue requiring policy adjustment and commence the process of consultation. Similarly, Ministerial announcements might signal the commencement of government consultation with respect to a particular issue.

The suggestion that Budget integrity and the usefulness of Ministerial announcements somehow justifies elitist policy making is therefore misplaced. Rather, this rationalisation seems to be more about maintaining the fanfare of the Budget than developing sound public

⁵⁴ Thus, for example, the original capital gains rules were preceded by a policy announcement on 19 September 1985, with legislation being passed into law in June 1986 and a commencement date of 20 September 1985.

⁵⁵ As was the case with entity taxation – see Brett Freudenberg, ‘Entity Taxation: The Inconsistency between Stated Policy and Actual Application’ (2005) 1 *Journal of the Australasian Tax Teachers Association* 458.

⁵⁶ See, for example, the loss duplication rules: Peter Costello MP, *The New Business Tax System*, Media Release 058, 21 September 1999, Attachment Q ‘Reinforcing Tax System Integrity: Preventing Loss Duplication and Value Shifting’; see also Subdivision 165-CA, *Income Tax Assessment Act 1997* (Cth).

⁵⁷ Perhaps the most significant was the Government’s response to the Review of Business Taxation, announced on 21 September 1999: see Peter Costello, *Review of Business Taxation*, Media Release 56/1999, Canberra, 1999.

⁵⁸ Brett Freudenberg, ‘Entity Taxation: The Inconsistency between Stated Policy and Actual Application’ (2005) 1 *Journal of the Australasian Tax Teachers Association* 458.

policy.⁵⁹ It may also be motivated by the Treasurer's desire to maintain control of the media message emerging from the Budget by selectively leaking budget information to favoured journalists which thereby sustains the integrity of 'the drip.'⁶⁰

There is no credible reason why public consultation upon tax reform might not be undertaken well in advance of an announcement of the outcome of that consultation during the budget.

3. *Difficulty in ascertaining the incidence of tax measures*

This rationalization is predicated upon the view that only those directly affected by proposed legislation ought be consulted, and that consultation will only be undertaken where those directly affected can be identified before the proposed measure takes effect.

However, again, the assumption underlying this proposition is not absolute. It is not necessarily the case that government should only consult with those directly affected by legislation. Those 'indirectly' affected by taxation measures, for example those who will shoulder a greater proportion of the overall tax burden as a result of the grant of a tax expenditure, might validly claim that they are also directly affected by such a measure. After all, they pay more tax than they otherwise would need to pay. Further, if it is truly the community's taxation system, as the Commissioner of Taxation often states in his efforts to promote voluntary compliance,⁶¹ surely the general community has an interest in being heard as to how those tax laws should be framed.

Even if it is accepted that those 'directly affected' by a proposed measure have a special right to be heard and that it may be difficult to identify this class of taxpayers, this is hardly a reason to exclude consultation with the broader community. Indeed, it is more a reason to consult with the broader community in order to allow the unidentified stakeholders to come forward and advise the government as to how the proposed measure would impact upon them specifically.

4. *There are review mechanisms already in place*

Unfortunately, the review mechanisms referred to are not detailed in the Handbook and so one is left to speculate as to what they are. It is most probable that the Handbook is referring to review of taxation policy by government departments including the Australian Treasury, Prime Minister and Cabinet and the Australian Taxation Office.

Review by government departments is not transparent. It seems that the Commissioner of Taxation restricts himself to advising government when he considers that the law is not achieving its policy intent,⁶² notwithstanding that the policy intent of much legislation can be elusive.⁶³ Moreover, the content of this advice is not made public – the Commissioner restricts himself to providing aggregated data regarding the number of such advices to government each year.⁶⁴ This means that the task of scrutiny of the merits of legislation falls

⁵⁹ Allan Maslove, Michael Prince and G Bruce Doern, *Federal and Provincial Budgeting*, Uni of Toronto Press, Toronto, 1985, ch 2.

⁶⁰ Australian Press Council, (1994) 6 *Australian Press Council News* 1; Max Suich, 'Mark Latham's Bad Media Day', *The Age*, 21 January 2005, 17.

⁶¹ See, for example: Michael D'Ascenzo, 'It is the Community's Tax System', Speech delivered at the 18th Australasian Tax Teachers Association Conference, University of Melbourne, 30 January 2006.

⁶² Commonwealth of Australia, *Commissioner of Taxation Annual Report 2005-06*, Australian Taxation Office, Canberra, 2006, 27.

⁶³ See, for example: Commonwealth of Australia, *A Post-implementation Review of the Quality and Effectiveness of the Small Business Capital Gains Concessions in Division 152 of the Income Tax Assessment Act 1997*, The Board of Taxation, Canberra, 2005, 4.

⁶⁴ Commonwealth of Australia, *Commissioner of Taxation Annual Report 2005-06*, Australian Taxation Office, Canberra, 2006, 27.

to the Australian Treasury. Unfortunately, it is not possible to determine whether such scrutiny takes place, how rigorous any such scrutiny is and what action is taken in response to any such reviews. The extent of Treasury secrecy,⁶⁵ and the stated position of the current Secretary of the Treasury to the effect that he is not prepared to allow Freedom of Information requests to be used to embarrass the government,⁶⁶ means that there is little prospect that the general public can call politicians to account. There is an absence of credible research, grounded upon data which only government has access to because of the Commissioner's secrecy obligations,⁶⁷ which critically assesses what might be a rosy depiction of legislative success published by Ministers and their media advisors.

Reviews undertaken by the Board of Taxation and also government-initiated reviews such as the Review of Business Taxation are ad hoc, partial and subject to political interference. These mechanisms are no substitute for a systematic process of open public review of all taxation legislation, and active consultation with the general public at all stages of the policy cycle.

The preceding review of the Australian taxation RIS process suggests that accepted norms for best practice regulation are not incorporated into the Australian taxation RIS process. Indeed, while the Australian requirements with respect to Regulation Impact Statements for non-taxation legislation were recently made more stringent,⁶⁸ a comparison of the requirements for taxation Regulation Impact Statements indicates that little has changed with respect to critical appraisal of the merits of proposed legislation. Moreover, when one reviews the reasons proffered as justification for the Australian approach, it seems that those reasons have more to do with stifling dissenting views upon the merits of the government's tax policy rather than the development of meritorious tax policy.

D The failure of the current RIS process

1 The Government's glowing appraisal of the RIS process for taxation legislation

As previously noted, the *Best Practice Regulation Handbook* accepts that there is no need for an RIS to provide a critical review of the evidence justifying the particular policy measure. It is therefore unsurprising that such a low threshold for critical scrutiny of taxation legislation is easily met. In 2006 the Office of Regulation Review reported that 92% of RIS's prepared with respect to new tax 'regulations' were assessed as 'adequate' at the decision stage while 100% were assessed as adequate at the tabling stage.⁶⁹

2 Examples of the defective Australian taxation RIS process

Despite such positive performance reports, the recent history with respect to the provision of tax concessions is a sorry tale of publicly funded largesse provided upon the basis of vague claims regarding the merits of the particular concessions.⁷⁰ Thus, for example, small business tax concessions such as the entrepreneurs' tax offset⁷¹ are justified upon the basis that micro

⁶⁵ For discussion of which see: Mark Burton, 'Chaos, Rhetoric and the Legitimation of 'Democratic' Government: A Critical Review of the Australian Tax Legislative Process', Paper presented at REGNET Seminar, 10 April 2007.

⁶⁶ The Canberra Times, 'Riding Treasury's Roller coaster', *The Canberra Times*, 23 January 2006, 11

⁶⁷ See *Income Tax Assessment Act 1936* (Cth) s 16.

⁶⁸ See Commonwealth of Australia, above 11.

⁶⁹ Commonwealth of Australia, *Regulation and its Review 2005-06*, Productivity Commission, Melbourne, 2006, 40.

⁷⁰ Mark Burton, 'Small business tax advantages: towards holism with a suggested definition, typology and critical review' (2006) 4 *Journal of the Australasian Tax Teachers Association* 78-106.

⁷¹ *Income Tax Assessment Act 1997* (Cth) Subdivision 61-J.

businesses need assistance, although the case for this is not substantiated by reference to any data.

The entrepreneurs' tax offset was developed from within the Prime Minister's office in the midst of the 2004 federal election campaign – neither the personnel nor the time for the considered development of tax policy. In his policy statement, *Promoting an Enterprise Culture*,⁷² the Prime Minister announced that tax incentives would be introduced to promote the development of an 'entrepreneurial spirit' in Australia.⁷³ Such vague statements might be understandable in the context of an election campaign where politicians might wish to present a small target to their political foes, however the RIS accompanying the entrepreneurs offset legislation did nothing to refine the policy objective of this measure. Paragraph 1.41 of the Explanatory Memorandum states:

The objectives of this measure are to provide encouragement for enterprising Australians in the early days of their business, in particular to provide a greater benefit to businesses with greater productivity, and to provide incentives for the growth of small business especially the very small, micro and home-based businesses which are in the STS.⁷⁴

This statement of policy inaccurately represents the nature of the legislation in several ways:

- 1) Given that the availability of the offset is not limited according to the age of the enterprise, the measure clearly does not target small businesses in the startup phase. It is quite possible that a longstanding 'lifestyle business' will continue to obtain the benefit of the offset for many years, as the 'entrepreneur' may deliberately maintain a micro business for personal reasons such as maintaining a particular work/recreation balance. The public benefit from providing a tax concession to such 'entrepreneurs' is unclear;
- 2) Nor is it made clear just how the measure favours 'more productive' businesses. The combination of a turnover threshold with the fact that the offset only benefits those with taxable business profits means that the benefit of the offset will vary. But this variance is not necessarily tied to productivity. A micro business with a turnover of goods worth \$70,000 and a profit margin of just 10% will benefit little, while a service provider with the same turnover and minimal costs will obtain a substantial tax benefit. Superficially, the service provider is more productive because they have a greater profit, but this does not take account of the resources expended in generating that profit. If the service provider has to work 2000 hours per year (ie \$35 per hour) to generate that profit while the goods provider just works 100 hours per year (ie \$70 per hour), the goods provider might be considered to be more productive;
- 3) It is not clear that the offset will provide incentives for the growth of small business:
 - a) The Laffer curve suggests that a reduction in taxation rates is one factor which can reasonably be expected to affect investment choices (and particularly the work/leisure choice). However, there is a substantial body of literature that indicates that there is no clear correlation between the two variables. People may choose to work more for all sorts of reasons, including the fact that they do not necessarily see that work and leisure are dichotomous. It is possible that a reduction in tax rates will induce people to work more, but it is equally possible that people will work less as a result of the tax reduction because the tax reduction means that they can afford the same lifestyle while working less;
 - b) Moreover, the low turnover threshold means that many dynamic, expanding businesses will rapidly exceed the upper turnover threshold and therefore cease to

⁷² Above n 45.

⁷³ Id, 4.

⁷⁴ Explanatory Memorandum accompanying *Tax Laws Amendment (2004 Measures No. 7) Act 2005*.

qualify for the offset. For such businesses, the tax reduction afforded by the offset will be transient and hence limited. Incentives for growth are therefore more likely to be found from other sources such as competitive drive and the quest for greater profits to fund consumption/savings;

- 4) The low *turnover* threshold of just \$50,000, at which point the benefit of the offset begins to phase out, means that some ‘micro’ businesses will benefit while others will not, and it is not clear from the threshold criteria that those disqualified are not ‘enterprising’; and
- 5) The offset discriminates against full time micro business entrepreneurs as opposed to part time micro-business entrepreneurs. It is not clear why a person with taxable income of \$1 million derived from other sources should qualify for the entrepreneurs offset, while a person with a turnover of \$80,000 and total taxable income of \$20,000 should not benefit from this measure. Moreover, it is not clear why the first taxpayer with a high taxable income should obtain a greater cash benefit than a full time ‘entrepreneur’ with a low taxable income.

The absence of any credible review of the merits of the entrepreneurs’ tax offset means that this measure is not achieving the object for which it was purportedly introduced. Had such a review been undertaken, the \$400 million annual cost of this program may have been better targeted.

E Implications of the defective Australian RIS process

1 The quality of legislative outcomes

The construction of legislative policy behind closed doors and with apparently little or no effort to demonstrate how the expenditure of \$400 million procures the public benefit, as was the case with the entrepreneurs’ tax offset, is unlikely to be trumpeted as the paragon of legislative practice. The failure to establish the nature of the mischief to be remedied, the identification of alternate mechanisms for addressing that mischief and the selection of the most appropriate mechanism – usual steps in the construction of an RIS – meant that the vagaries and anomalies of the original policy were compounded in the drafting of the legislation itself.

Moreover, the failure to provide a critical assessment of the merits of the entrepreneurs’ offset in the accompanying RIS meant that the parliamentary oversight of this measure was severely limited. Although the Senate Economics Committee briefly discussed the targeting limitations of the legislation, its criticism was faint and it nevertheless concluded its report with an unreserved endorsement of the proposed measure.⁷⁵ Rather than calling the government to account and demanding evidence that this \$400 million per annum expenditure would be in the public interest, the Senate Economics Committee appears to have accepted the absence of credible information.

The development of legislation is doubtless a difficult task, and certainly far more complex than the idealized version of cost/benefit analysis would suggest. Crystallising the definition of the perceived issue to be addressed, identifying behavioural affects, grappling with linguistic imprecision, integrating new legislation into the extant legislative framework, accommodating the often competing claims of rival interests who often adopt different substantive standpoints are all matters which import considerable flexibility into the legislative process. However, while it might be accepted that Kantian rationalism is an unattainable rationalism, it is nevertheless true to say that this does not mean that any

⁷⁵ Commonwealth of Australia, *Provisions of the Taxation Laws Amendment (Measures No 7) Bill 2004*, Report of the Economics Legislation Committee, Parliament House, Canberra, 2005, 9.

legislative process is as good as any other. A sound RIS with respect to the entrepreneurs' offset would have identified the limitations of existing information, acknowledged the criticisms of the offset outline in section 4 of this paper and responded to those criticisms in justifying the elements of the offset. Moreover, the RIS would have identified performance measures against which the success of the offset could be measured by a post-implementation review.

The limited RIS accompanying the entrepreneurs' offset did none of these things, and thereby played a part in diminishing the quality of scrutiny of this measure.

2 *Legislative bias – concentration upon business compliance costs*

In section 2 of this paper it was noted that the RIS process arose from the emergent neoliberal critique of unrepresentative bureaucrats making and interpreting regulation without, it was said, paying due regard to the adverse impacts upon businesses.

The predominance of business interests in constructing the discursive realm in which the seeds of RISs grew is discernible in the contemporary Australian approach to RISs. The absence of appraisal of proposed tax measures on their merits, and the emphasis upon the 'compliance cost calculator' in the limited tax RIS process, mean that the process by which tax legislation is created favours business interests in myriad ways. For example, the influence of well-resourced business stakeholders who wield substantial influence 'behind closed doors' is enhanced if they are able to broker legislative deals which will not be subjected to credible, independent scrutiny by a well resourced professional government which adequately represents the 'public interest' (in the sense of reviewing the proposed measure from alternate perspectives). The emphasis upon calculating compliance costs, without paying due recognition to managerial benefits which might arise from implementation of a proposed regulation, also serves to skew the consideration of alternate regulatory measures.

3 *Accountability, Legitimacy and Voluntary Compliance*

The concept of accountability entails calling public officials to account for their decisions. The intersection of the concept of accountability, legitimacy and contemporary democratic theory has generated a concentration upon procedural legitimacy.⁷⁶ Under this model of procedural legitimacy, the general public is unable to understand the complexity of the modern policy environment. Accordingly, the general public purportedly uses the credibility of the process of government as a proxy for the substantive content of government policy.⁷⁷ If the process withstands scrutiny, the general public accepts that the substantive content of government policy must also be acceptable and will therefore accept the government's rule as legitimate.

Measured against the norm of procedural accountability, it is doubtful that the development of Australian taxation legislation is satisfactory. The departure from the norm of accountable government which is evident in the norms applied to RISs for other Australian legislation, and also the weakness of the rationalization for this departure, mean that the legitimacy of the Australian taxation system is open to threat. The limitations of the taxation RIS process mean that the general public cannot assess the substantive legitimacy of particular taxation measures and/or of the Australian taxation system overall. Further, these limitations mean that the Australian public cannot be assured that government has procedures in place to assess the substantive merits of its taxation system. Thus, the general public is not in a position to assess the substantive or the procedural legitimacy of the taxation system.

⁷⁶ Tyler,

⁷⁷ Id

The Centre for Tax System Integrity survey data indicated that there is considerable public skepticism regarding the extent to which the current tax system reflects the public interest, as opposed to the interests of those able to wield substantial influence amongst legislators and bureaucrats.⁷⁸ This suggests that a significant proportion of the Australian public questions the legitimacy of the Australian tax system. However, the practical significance of this finding is open to question.⁷⁹ It may be that the Australian public considers the tax system to be illegitimate and therefore does its utmost to minimize its tax contribution. Or it may be that the Australian public ignores this skepticism and is influenced by other factors, such as the perceived legitimacy of the Australian Taxation Office, in choosing to voluntarily comply with the law. Establishing a correlation between perceptions of substantive legitimacy/procedural legitimacy and actual voluntary compliance is therefore difficult. However, if such a correlation exists, an RIS process which adopted the norms outlined in section 2 above would enhance the legitimacy of Australian tax legislation and thereby promote voluntary compliance.

4 *Interpretative theory, purposive interpretation and principles based drafting*

Adoption of a broader tax RIS process which incorporates a thorough exposition and critique of the underlying legislative policy would generate a clearer enunciation and explanation of the legislative purpose. According to contemporary regulatory theory, this clearer enunciation of the legislative purpose would reduce the costs of administering the taxation law.⁸⁰ The Australian Government endorses principles based drafting of tax legislation wherever possible with a view to promoting tax simplicity.⁸¹ However, this objective is undermined by the omission of a comprehensive RIS process with respect to tax legislation. Perhaps fortunately, the legislative draftsman did not hazard a guess at the principle underlying the entrepreneurs tax offset, given the vague statement of purpose in the RIS such a statement would have been uninformative to those interpreting the legislation.

5 *The inefficacy of post implementation review*

The limitations of the Australian taxation RIS process also impede the conduct of credible post implementation reviews by the Board of Taxation. Ideally, in justifying a particular regulatory measure, an RIS would identify appropriate performance measures against which the legislation might be assessed in a post implementation review. The limited Australian tax RIS does not provide this information.

Moreover, the Board of Taxation interprets that part of its charter, which states that it will advise the Treasurer 'on the quality and effectiveness of tax legislation,'⁸² in a quite limited fashion. Rather than taking the opportunity to conduct a broad 'tax expenditure analysis' akin to that envisaged by Surrey,⁸³ the Board restricts the scope of its post implementation reviews by merely examining the technocratic aspects of legislation, being the extent to which the legislation:

- 1) Gives effect to the government's policy intent;

⁷⁸ Valerie Braithwaite, *Perceptions of Who's Not Paying Their Fair Share*, Working Paper No 54, Centre for Tax System Integrity, Canberra, 2004

⁷⁹ Valerie Braithwaite (ed), *Taxing Democracy*, Ashgate Publishing, Ashenden, 2003, 17, citing M Fishbein and I Ajzen, 'Attitudes Toward Objects as Predictors of Single and Multiple Behavioural Criteria' (1974) 81 *Psychological Review* 59; S Epstein, 'Aggregation and Beyond: Some Basic Issues on the Prediction of Behavior' (1983) 51 *Journal of Personality* 360.

⁸⁰ Commonwealth, above n 10, 109.

⁸¹ Id.

⁸² <http://www.taxboard.gov.au/content/charter.asp>

⁸³ Stanley Surrey, *Pathways to Tax Reform*, 1973

- 2) Is expressed in a clear, simple, comprehensible and workable manner;
- 3) Avoids unintended consequences of a substantive nature;
- 4) Takes account of actual taxpayer circumstances and commercial practices;
- 5) Is consistent with other tax legislation; and
- 6) Provides certainty.⁸⁴

IV CONCLUSION – WHY THE AUSTRALIAN RIS PROCESS HAS GONE AWRY AND WHAT IS TO BE DONE

There are two primary causes of the dysfunctional Australian tax RIS process. The first is the culture of government secrecy sustained by the Australian Treasury and the Treasurer. The second is the preeminence given to business compliance costs in the genesis, development and implementation of the RIS process.

The Australian Treasury perceives its role as confidential advisor to government⁸⁵ and therefore it is understandable that those who adhere to this elitist vision of democratic government would submit themselves to the government's strategic interest of not facilitating open and informed scrutiny of government taxation policy. At every turn the Australian Treasury seems to do what it can to limit the flow of information which may call the Government's tax policy into question – the current Secretary of the Treasury is reported to have commented that it is not his role to help people embarrass the government by releasing damaging Treasury documents under Freedom of Information laws.⁸⁶ It is therefore understandable that taxation regulation is singled out for generous exclusions from the more rigorous RIS process that applies to Commonwealth regulation more generally. Unless this culture of bureaucratic secrecy can be changed, it is unlikely that the taxation RIS process will be broadened to include a credible, critical, open review of the merits of proposed regulation.

The limitations of the RIS process are also a product of the institutional history of the RIS process. The neoliberal backlash against the regulatory state promoted the perception of the crushing burden of state regulation orchestrated by unrepresentative bureaucrats.⁸⁷ This pathogen, it was argued, could be eliminated by careful cost benefit analysis and consultation with those 'directly affected' by regulation (ie businesses).⁸⁸ This focus upon minimizing business compliance costs has served to limit the usefulness of regulation impact statements in terms of enhancing the quality of public policy because other considerations, such as the equity of the proposed taxation measure, are ignored. Moreover, the concentration upon those directly affected in terms of the business compliance costs of proposed regulations has meant that the RIS process has never been closely allied with the discourse of enhancing democratic participation and government accountability to the general populace. Decoupling the RIS process from this concentration upon business compliance costs and connecting it with the discourses of legislative legitimacy and broad, active and informed public participation in policy making would substantially enhance the value of the RIS process to the Commonwealth.

⁸⁴ See, for example: Commonwealth of Australia, *A Post-implementation Review of the Quality and Effectiveness of the Small Business Capital Gains Concessions in Division 152 of the Income Tax Assessment Act 1997*, The Board of Taxation, Canberra, 2005.

⁸⁵ Australian Government, *T-Notes: Some Information on Feedback*, The Treasury, ND, Canberra.

⁸⁶ The Canberra Times, 'Riding Treasury's Roller coaster', 23 January 2006, 11

⁸⁷ McGarity, above n 19.

⁸⁸ See, for example, OECD, *The OECD Report on Regulatory Reform: Synthesis*, OECD, Paris, 1997, 5ff.