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Abstract
Ten years ago the Revenue Law Journal was launched as a bold experiment by a new law school. The aim was for it to be a thoughtful and provocative academic journal. It was to provide a forum for insightful comment on the tax system and in depth analysis of topical issues. That it has succeeded is shown in its wide distribution to readers around the world. This article traces the development of the tax reform arguments over the last ten years through the editorial pages of the Journal.

Keywords
Revenue Law Journal, anniversary, Bond University

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TEN YEARS OF THE *REVENUE LAW JOURNAL*: A DIARY OF TAX REFORM

By Duncan Bentley[*]

Introduction

Ten years ago the *Revenue Law Journal* was launched as a bold experiment by a new law school. The aim was for it to be a thoughtful and provocative academic journal. It was to provide a forum for insightful comment on the tax system and in depth analysis of topical issues. That it has succeeded is shown in its wide distribution to readers around the world. This article traces the development of the tax reform arguments over the last ten years through the editorial pages of the *Journal*.

The early editorials are as topical today as when they were written. They include telling comments that are apt for current reforms. Some proposals have been superseded by events. It is interesting that the principles discussed have not.

The article should be read in the same way as a diary. Each editorial remains as it was originally printed and the names of the contributors are included. The article provides a snapshot of key issues in tax history over the past ten years. The hope is that the same points do not still have to be repeated ten years from now.

Editorial for the inaugural issue – February 1990

The publication of this inaugural issue of the *Revenue Law Journal* comes at an interesting stage in the development of Australian tax law. Australians are learning to live with capital gains tax and fringe benefits tax, though there are still many unsolved problems in these areas. Whatever their advantages in creating equity or fairness, both taxes

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bring disadvantages: they reduce the incentive to save and invest, they discourage business activity, and they increase paperwork and red tape.

Also, the courts are tending to move away from the literal approach to the interpretation of revenue legislation and to adopt a purposive approach *(Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297). It is to be hoped that this tendency will not be allowed to go too far. In modern times, when complex concepts lead to complex legislation, the ideal of predictability is all too easily discarded. Recall the words of Lord Diplock in *Black-Clawson International Ltd v Papierwerke Waldhof Aschaffenburg* AG [1975] AC 591, 638:

> The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. In construing it the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates.

There are dangers in denying to taxpayers that right to arrange their affairs in such a way as to minimise the amount of tax that the Income Tax Assessment Act requires them to pay. Moral indignation has its limits. It has been well said that: 'The quest, undertaken soberly and moderately, for ways of paring the tax bill, does not involve moral obloquy in any form.' (Molloy, *Estate Planning* (1970)).

Under an ideal tax system, any taxpayer should be able to find out, with a reasonable degree of certainty, what the revenue consequences of any transaction which he or she proposes to enter into will be. Those responsible for the drafting of revenue statutes could derive much help from the work which is now being done in relation to the use of plain English in legal drafting (see, eg, the Law Reform Commission of Victoria, Report No 9, *Plain English and the Law*). Australia's taxation and corporate legislation is excessively complex and wordy. Much lip-service has been paid to this problem, and there have been defences of drafting policies by the Commonwealth Attorney-General. In 1988, Mr Ralph Jacobi, a tenacious tax-reforming federal MHR of the 1970s and 1980s, and then Mr Robert Tickner MHR, asked the Attorney-General why the main Australian tax statute contained about one million words, while that of Hong Kong, for example, contained only about 60,000. Why,

they added a trifle ingenuously, did Australia need about fifteen times as many words as Hong Kong in its tax laws? The Attorney-General's answer was predictable enough, even patronising. Hong Kong tax laws are apparently simple ones. They do not purport to cover the same matters or perform the same functions as the Australian statute. So the two cannot fairly be compared. Well, comparisons there will be, many of them scrupulously fair and many of them in the pages of this journal, the editors hope. If Hong Kong's top personal tax rate of 17.5% is a symptom of its simplicity, then there is much good in it.

The tax avoidance boom contributed to the prolixity of our tax laws. Lawyers, especially judges, by focusing on narrow literal meanings, encouraged drafters to try and cover every gap and contingency. That process is doomed. More words mean more potential loopholes and scope for literal-minded escapees, and even less understanding of the tax laws by taxpayers. Clear, simple tax laws that express sound tax policy, and that are interpreted fairly by our courts, are the goal. If simplicity, fairness and economic rationality are the hallmarks of a good tax regime, we do not measure up particularly well. By constructive analysis and criticism, we hope that this journal can move us a little closer to good tax regimes in Australia and elsewhere in the Pacific region.

It is with great pleasure that the Taxation and Corporate Research Centre at Bond University, in association with the Federation Press, Sydney, launch this inaugural issue of the *Revenue Law Journal*.

Jim Corkery
George Hinde

November 1990

Plain English

Some insist that the tax laws in Australia must be complex so that equity can be done, even if we cannot understand how it is done. Others say that simplification is fraught with troubles because it will bring with it new and even more diabolical interpretation problems. That's the devil you know argument. It is more unlikely, but some believe the system cannot be any simpler, that we have done our best in the circumstances. KPMG Peat Marwick in its October 1990 Bulletin, *Taxing Topics*,

reported one Parliamentary Counsel as saying that the plain English redrafting of the Social Security Act meant it had to become much longer. The newsletter says: 'If the Government decides that tax simplification requires redrafting of the Tax Act, then we had all better quickly enrol ourselves in speed reading courses'.

We should not consult too seriously with those responsible for the drafting of the current commonwealth commercial laws. Fresh pens are needed. It is heartening to hear of Professor Kelly's pioneering work on Division 16E of the Income Tax Assessment Act, an unpalatable slug of words in our Act. He and his team at the Victorian Law Reform Commission are redrafting that Division. They show that simplification of language and expression, and a reduction in size of the Act, are possible. A simplification of concepts can follow later. Kelly wrote in Eric Risstrom's *Taxpayer* (11 August 1990 at p 230):

> The costs that the Act imposes on taxpayers because of its incomprehensibility must be enormous. Think of the additional time that has to be spent training officials in the Tax office to understand and administer its complex provisions.
>
> Think of the time needed to train accountants, tax agents and lawyers in the private sector. Think too of the time that both groups, in turn, have to spend keeping on top of the huge mass of opaque material, either to administer it or advise clients about its application to particular circumstances.
>
> And let's not forget about the completely artificial demand that is created for expert advice because taxpayers - who should be able to understand the legislation - simply can't.

David Kelly applied a computerised comprehensibility test to the original Credit Act. Right-Writer said it took 22-26 years of formal education to understand parts of that Act. The results on the Tax Act would be interesting.

In this issue of the *Revenue Law Journal* we publish an article outlining the Hong Kong tax regime, a much simpler system with a much shorter Act than ours. John Greig believes tax law 'need not be inordinately complex, convoluted and hampered by almost continual amendment and revision for it to be effective.'

Tax and education

Tax legislation is a powerful instrument of social policy. If you want more Australian movies made, or more gold mined, or trees grown, or a cleaner environment, then offer tax breaks to those who produce them. Professor Ross Buckley of Bond University advocates, as an instrument of environmental policy for Australia, the so called green taxes. They are used in Europe and North America. Education, one of Australia's greatest resources, can also be encouraged by tax policy.

Schools and public universities were tax exempt for some time. They are still exempt from income tax, sales tax, payroll tax, land tax and property tax. But new taxes are hitting schools and education. Fringe benefits tax and the training levy both apply to them. Consumption tax, when it is introduced, may also affect them.

Non-government educational institutions are being squeezed. Government subsidies are falling and funding allocations fail to match inflation. Schools turn to private funding to help replace subsidies and pay these new taxes. Yet, ironically, under the government formula, the more private funding the schools get, the lower the government subsidy they get. Self-help is penalised.

Bill Rowan, Business Manager of Santa Sabina College, Strathfield, New South Wales, writes:

> School administrators seek the best and most economic use of resources and would, in most cases, apply their financial resources to providing quality and excellence in the educational products that they offer. Administrators have seen more demands on their financial resources in the funding of government taxation initiatives, but at the same time they receive less government funding. In addition governments are requiring greater accountability and a larger say in the curriculum content and educational outcomes generally.

The United States has offered tax allowances to education from the early 1950's. According to John McNulty, (1973) 61 Calif LR 1 at 4, these concessions were introduced to help out financially burdened educational institutions and families facing higher education costs. Similar conditions exist in Australia today. McNulty continued (ibid at 8), 'In general, a tax apparatus can be designed to do almost anything that can be done with a

direct government outlay, by way of recognising or subsidising the personal costs of private education.'

It is time to debate an exemption from all taxes for recognised educational institutions. It is also time to consider deductibility for all education fees, expenses and donations.

Jim Corkery
George Hinde

1993

The times are indeed difficult for taxpayers and their tax advisers. The Income Tax Assessment Act 1936, already one of the world's longest pieces of tax legislation, is continually being amended. Australian tax legislation in general is becoming more complex and more confusing every day. But there may be light at the end of the tunnel. The activities in late 1992 of two Commonwealth Parliamentary Committees indicate that the Government is at last moving to simplify the drafting of taxation legislation.

The first of those committees was the House of Representatives Standing Committee on Legal and Constitutional Affairs. It was given the task of reviewing legislative and legal drafting at the Commonwealth level. Under the Chairmanship of Michael Lavarch MP, the Committee indicated, at its Hearings, its clear belief that the traditional style of legislative drafting is no longer adequate. After the 13 March 1993 Federal Election, Mr Lavarch, now Attorney-General, spoke forcefully of the need to simplify both the Corporations Law and the Income Tax Assessment Act 1936. That is a most welcome development. All practitioners and corporate taxpayers should encourage the Government to implement major rewriting projects on each of those pieces of legislation.

The second Committee is the Joint Committee of public Accounts. Its task was to inquire into the efficiency of the Australian Taxation Office. This provided an opportunity to reconsider the legislation administered by the Tax Office. Possibly the most significant submission to the Inquiry was made by Mr Brian Nolan, Second Commissioner of Taxation. With the then Commissioner, Mr Trevor Boucher, sitting alongside him (and with Mr Boucher's most earnest critic, Senator Bishop, of the

Committee), Mr Nolan spoke colourfully of the need for an overhaul of the existing 5000 pages of tax legislation. He referred to the tax law of this country as a vast cauldron of boiling spaghetti:

> We keep on pouring more cans in the top and it's hardly surprising then that we end up with indigestion.

Mr Nolan admitted that the process of simplifying tax laws has so far been piecemeal.

> It doesn't get to the core of the problem that we've been adding layer on layer over many decades now … the snowball that has been rolling down the hill for a long time now threatens to bury us.

As readers of this journal know, the Victorian Law Reform Commission, at the request of the Law Council of Australia, completed a pilot project aimed at demonstrating just how much simpler our tax legislation could be if it were rewritten in plain English.

It managed to reduce Div 16E of Pt III of the Income Tax Assessment Act to about a third of its length. The draft was intelligible to people with 12 years of formal education, not the 20+ of the original!

The Australian Taxation Office and the Office of Parliamentary Counsel provided valuable and helpful comments on our first draft. The second draft incorporates a number of changes to meet those comments. It is important to note that those changes involved no change whatever in our plain English drafting style. And we only had to add about 300 words to the 3000 in the first draft of the rewrite.

Perhaps not surprisingly, the head of the Office of Parliamentary Counsel (Ian Turnbull QC) leaped to the conclusion (*on the basis of a first draft for discussion purposes only*) that the exercise was not worthwhile. Readers can form their own judgment after reading his criticisms in *Taxation in Australia* Vol 27 No 2 August 1992, p 72 – and my rebuttal – in *Taxation in Australia* Vol 27 No 5, November 1992, p 270.

The most interesting fact to emerge from the responses of the Tax Office and the Office of Parliamentary Counsel is that only the latter really understands what Div 16E means. It identified approximately half as many 'problems' with our first draft as the Tax Office had. 'Interesting',

but certainly not surprising. Even Australia's leading lawyers no longer profess to understand the Tax Act. It is a maze which has neither entrance nor exit.

Further changes may yet be necessary. But we have demonstrated beyond doubt the error of those who attempt to justify laughable obscurity by saying that complex laws have to be written in complex language.

In 1992, the Commission put a detailed proposal for a rewrite of the whole of the Income Tax Act to Senator McMullan (now the Minister of Administrative Services), the Parliamentary Secretary to the Treasurer. We estimated that as much as $30 million a year could be saved in the administrative costs of the Australian Taxation Office; and as much as $150 million a year in compliance costs. The likely cost of the rewrite? In the vicinity of $10 million, over three years. Not a bad investment!

Of course, there is more to tax legislation than its drafting. Policy issues also need to be addressed. Complex drafting is often the result of needlessly complex policy, as well as of inconsistencies in the policies behind different parts of the law. As Mr Boucher himself has said, simplification is not just a matter of plain English. Policy must be simplified as well, and it must be made more coherent.

In this respect, it is noteworthy that the former head of ACOSS, Julian Disney, has recently been appointed Professor of Public Law at the Australian National University. Professor Disney is a member of the Australian Literacy Council and a keen supporter of plain English drafting in legislation. He also has a deep interest in removing the distortions created by inconsistencies in our tax legislation.

Speaking to the Australian Society of Labour Lawyers in Melbourne in May 1992, Professor Disney emphasised the need for not only the simplification of tax laws, but also the development of a code of ethics for professional tax advisers.

It is to be hoped that the legal and accountancy professions heed that advice. As the Victorian Law Reform Commission's recent report, *Restrictions on Legal Practice*, pointed out in some detail, what some lawyers call the 'ethical rules' often have very little to do with ethics. The term is sometimes nothing but a mask for anti-competitive practices.

You can imagine how the Bar, in particular, welcomed the Commission's report. But that's for another time.

David St L Kelly
Consultant to Phillips Fox, Melbourne
Former Chairman of the Law Reform Commission of Victoria

1994

Not since 1936 has there been such an opportunity for the reform of the Australian tax law. Voters may have dampened the fervour for tax reform, with the defeat of the Coalition and its consumption tax package at the last Federal election.

Yet the push for change goes on unabated. The Government has announced the introduction of a taxpayers' Charter of Rights, the appointment of a Taxation Ombudsman, a Small Taxation Claims Tribunal and another consultative group to include outsiders which will advise on major tax rulings. The innovations are commendable. They will open up new avenues of appeal for taxpayers. But they still do not go to the heart of the problem: the unnecessary complexity of the law.

The Government has 'streamlined' the Sales Tax laws. Although this could have been done much more effectively, according to the article in this volume by Robert de Liefde, it is a welcome start. A review is under way of the Fringe Benefits Tax compliance laws. And former Second Commissioner Brian Nolan heads up the Tax Law Improvement Project instituted by the Treasurer.

Unfortunately, the reforming zeal of Attorney-General, Michael Lavarch, a devotee of clear drafting, is not the prime force behind this project. Speeches by Mr Nolan suggest that scope for real improvement is limited to improving the appearance and some of the language of the tax law. Mr Nolan once described the tax law as a vast cauldron of boiling spaghetti with can after can being poured on top. A prescription of a little oil to stop the spaghetti from sticking is not enough.

The Australian Tax Office ('ATO') has shown the way of reform with its management of the move to self-assessment. The transformation of the ATO into a proactive, business-like organisation has been heartening. We gain a glimpse into the new vision of the ATO, and its intent to keep

Australia at the forefront of modern tax administration, from John Wickerson's article in our second issue commenting on recommendations of the Senate Inquiry into the ATO.

This effectiveness in administration and tax collection does not always carry over into the interpretation of the law by the ATO. Nor is it reflected in its input into the formulation of the tax law. The Government's announcement of the appointment of two outsiders to a consultative body advising on major tax rulings offers little encouragement. Most articles in the first issue highlight shortcomings in the application of the laws. Perhaps it is indeed time, as Duncan Bentley suggests in his article, that the interpretive function is removed from the ATO and placed in the hands of an independent body.

Tax rulings become the final interpretation of the law for the vast majority of taxpayers. Taxpayers have not the time, the money nor the flinty constitution necessary to resort to the judicial process. It is unlikely that a Small Taxation Claims Tribunal will open up the review process significantly, as long as the law remains so complex that most issues will be forced into an appeal for further clarification by the courts. This means that the major interpreter of the law is, in fact, the enforcement agency. This offends against the separation of powers doctrine on which our democracy rests. For this, if for no other reason, an independent interpretive body is an attractive proposition.

We fully support the introduction of a taxpayer's Charter of Rights. The draft Taxpayer's Charter put forward by the Taxation Institute of Australia has great merit. It could well form the basis for discussion as the new Charter of Rights is drawn up. The crucial question, is what force will the new Charter of Rights have? We favour, as a minimum, the semi-entrenchment of the New Zealand bill of rights, so that the rights are upheld unless a law specifically states that they are not to apply.

The momentum for reform must not be stalled by bureaucratic fear of change. The ATO have themselves shown the advantages of change in the administrative and collection arenas. They should be at the forefront of the drive for reform of the Australian tax laws, not diluting the benefits with cries of 'too hard'.

Senator Parer recently commented that,

> The Income Tax Assessment Act today is a complex and incomprehensible mass of convoluted, legalistic and pedantic provisions.

When our published tax laws stretch to a world record 6715 pages, when a judge of the High Court describes the tax legislation as 'a legislative jungle in which even the non-specialist lawyer and accountant are likely to lose their way in the search to identify the provisions relevant to a particular case', and when a former Federal Chief Justice says that 'legislation that has such effects is quite unacceptable in a democratic society', it is clear that an overhaul is not only overdue on its merits but also politically wise. What further agitation is required before effective action is taken?

Duncan Bentley
Jim Corkery

1995

The Taxpayers' Charter

The Australian Taxation Office (ATO) has recently released the Taxpayers' Charter in Discussion Draft form. As was foreshadowed in a number of statements by the Treasurer, the Commissioner and others, the Charter is really a public mission statement. It aims to set out the mission not just of the ATO but also of its 'clients', the taxpaying public, in relation to their tax affairs.

There was always going to be controversy over the final version of any Charter. The stakeholders were working to different agendas. The ATO was intent on producing a statement to inform taxpayers and their advisers of their existing rights and responsibilities. Most of the professional and taxpayer representative bodies wanted to do more. They put forward the concept of a safety net going beyond the existing legal rights of taxpayers.[1] For example, they wanted legislative protection against the potential excesses of a Commissioner who has powers to breach the basic rights of natural justice that are not even

1 For example, see 'Taxpayers' Bill of Rights' (1993) 28 *Taxation in Australia* 50.

given to the police.[2] The professional and taxpayer representative bodies also wanted legislative certainty.

The ATO appeared to argue that a legal safety net is unnecessary as the Commissioner has voluntarily limited the exercise of his powers. For example, he has restricted his use of his access and information gathering powers in most circumstances. The ATO also seemed content that issues of legislative uncertainty are being dealt with by the Tax Law Improvement Project.

Certainly, the draft Charter is written in the new pyramid style of simplification. The key principles are set out. These are followed by brief explanations of each right and responsibility, which refer in turn to more detailed explanations contained in various ATO pamphlets. The style is simple, clear and effective. The content is comprehensive, containing the most important rights and responsibilities of taxpayers under the existing law. The draft Charter fulfils the purpose intended by the ATO and the Taxpayers' Charter Team should be commended for an excellent product.

What then of the concerns of the professional and representative bodies? Firstly there is the issue of a safety net to protect taxpayers from the extremes of the Commissioner's powers. As is set out in the draft Charter, the Commonwealth Ombudsman provides a useful check to ensure the proper administration of the tax laws. Independent investigations by the ombudsman and public reports and statements by the office of the ombudsman provide a strong incentive to the ATO to act well within the scope of the Commissioner's powers.

Further, the Administrative Appeals Tribunal (AAT), when it reviews a decision of the Commissioner, may exercise all the powers and discretions of the Commissioner. The AAT will be able to review decisions of the Commissioner to ensure that they are consistent with the rights contained in the Charter. It is well within the scope of the AAT's powers to assume that the Commissioner intends to act in accordance with a Charter that the ATO has promoted so strongly. If it takes this

2 In *Donovan v FCT* (1992) 23 ATR 129, the common law right of privilege against self-incrimination was found to be implicitly abrogated in sections 263 and 264 of the Income Tax Assessment Act. For further discussion of the extent of the Commissioner's powers, see Bentley D, 'The Commissioner's powers: democracy fraying at the edges?' (1994) 4 Revenue LJ 85.

approach, the AAT has the power to vary, set aside or remit for further consideration any decisions of the Commissioner that do not conform to the principles set out in the Charter. How effective will the AAT be, acting in this way as a safety net for taxpayers to protect them against the extreme operations of the Commissioner's powers? It will depend very much upon how willing the individual members of the AAT are to act as guardians of taxpayers' rights.[3]

The first stage of review of a breach of the Taxpayers' Charter appears, from the draft, to rest in the hands of a Taxpayers' Charter Review Unit. It is to the benefit of both the ATO and the taxpayer if disputes are resolved quickly with minimum cost. For the effective resolution of disputes, it is also important that any review body is seen to be independent and free from bias by both taxpayers and the ATO. Accordingly, if disputes cannot be resolved through the normal ATO channels, the ATO should set up an informal review panel at an early stage. The composition of this panel would be important and should include a senior officer of the ATO and a senior taxpayer representative. An independent chairperson would be ideal: for example, a senior member of the staff of the Commonwealth Ombudsman or a member of the AAT. Effective resolution of most disputes concerning the Charter at the earliest possible opportunity is, after all, what the Charter is all about.

Secondly, there is the issue of legislative certainty. The Tax Law Improvement Project has gone a long way towards making the meaning of the tax law clearer. However, the current volume of legislation is expected to increase further. The time and resources given to drafting, reviewing and considering legislation are diminishing. The government has said that it does not have the space in its legislative program for annual technical correction bills to correct mistakes in the law and clarify poor drafting or unintended consequences of legislation. Accordingly, it is inevitable that from time to time there will be sections of the tax law that are uncertain. Where this occurs, the courts should have the right to decide matters in favour of the taxpayer until the meaning of the law is clarified. This can be achieved without legislating the Taxpayers' Charter. All that is needed is an interpretation clause, either in the Acts

3 For further discussion of the possible methods of enforcement of a taxpayers' charter of rights, see Bentley D, 'A taxpayers' charter: opportunity or token gesture?' (1994) 12 *Australian Tax Forum* 1.

Interpretation Act, or at the beginning of each tax statute. The clause will simply legislate the long established common law presumption that where the tax law is uncertain, the courts are required to interpret the legislation in the taxpayer's favour.

The Taxpayers' Charter is the next step forward in the transformation of the ATO into one of the most efficient and forward looking tax administrations in the world. Taxpayers and their representatives should not be disappointed with the outcome. Neither should they reduce their pressure for change. It is in good part due to this pressure that the ATO has attained its current high standard of administration. As taxpayers struggle to comply with arguably one of the most complex tax systems in the world, so the ATO struggles to administer it. High standards, cooperation and a willingness to change are some of the best weapons in the fight to get governments to simplify that system.

Capital gains tax: ten years on

The 10th birthday of the introduction of the capital gain and loss (CGT) provisions has now passed. The tax collections from capital gains rose to about $700 million in 1995/96. Both major political parties are committed to the preservation of a tax that makes an increasing contribution to the revenue base. Certainly, from a policy standpoint, there are strong arguments to support that point of view. Given that the CGT provisions are here to stay, the Tax Law Improvement Project (TLIP) assumes great importance in the area. The 10 years of its operation have shown that Part IIIA is overly complex, far more wide-ranging than was originally proposed and has onerous record keeping requirements. The irony is that most Australians affected by CGT probably do not yet know it and are doing little to protect themselves against it and keeping all the records necessary to do so. Unlike most very complex tax provisions, CGT affects a significant proportion of taxpayers. Accordingly, from the equity stand-point alone, the simplification of the CGT provisions should be vigorously pursued in accordance with the aims of TLIP to rewrite the tax law:

- with a better structure and arrangement;
- so that it can be more easily understood; and
- to simplify the legislative and administrative rules.

A major benefit of the TLIP is to reduce compliance costs. That means putting more money in taxpayers' pockets.

This is in line with the *Taxation Manifesto*, recently issued by the Institute of Chartered Accountants. In it some of the suggestions of leading CGT expert, Michael Inglis, included the introduction of a flat rate of tax on CGT of 25%, an exemption for individuals for net gains of $10,000 each year, indexing capital losses as they do in the UK and allowing capital losses as a deduction against income. These proposals do go to policy, which the TLIP has consistently refused to change as being outside its brief, except in some areas, where the changes were revenue neutral. The Taxation Manifest purports to be broadly revenue neutral too. So why not look at the changes suggested, which are certainly in accordance with the aims of the TLIP?

Duncan Bentley
Jim Corkery

1996

Tax education

Tax courses have proliferated around Australia in recent years. Masters in Taxation have become increasingly important for those specialising in tax. It is interesting, therefore, that under the uniform recognition rules, tax is no longer a subject required by lawyers for admission to legal practice.

The trend has been for lawyers to give up tax practice to accountants. Nonetheless, it would seem foolhardy for any lawyer to practise in any area without at least a passing knowledge of the rudiments of tax law. This is particularly so, given that the Commissioner has argued that sections 160M(6) and (7) operate so broadly in relation to damages awards and compensation receipts – something with which any lawyer in general practice will come into contact.

It was argued in the context of the National Review of Standards for the Tax Profession that lawyers are trained in legal reasoning and the interpretation of statutes. Accordingly, they do not need any further training to be able to understand the tax law. We would be loath to put our tax affairs in the hands of a lawyer who has never had to look at a tax law before.

Tax policy

Examine the judgments in cases involving most areas of equity or the common law. You will find references to foreign judgments scattered among the pages. Tax is different. Occasional reference to early English cases that have shaped our law can be found. So, too, can the odd mention of a New Zealand case. But judges are restricted to the statutes that they are interpreting. In the highly codified tax law area there is little room for judges to use comparisons and gain insights from other jurisdictions.

Comparison and insight should happen during the formulation of the law. Yet, there is little sign that this is done. When the professional bodies put forward proposals for reform from time to time, usually based on a careful analysis of the operation of similar laws in other jurisdictions, the response from government is muted, if it can be heard at all. Politicians have their own agendas driven by domestic policy needs. They do not seem to want to create an efficient and carefully constructed set of rules, designed to achieve clear and specific objectives. Rather they produce an unattractive hodge-podge that is subject to immediate and continued correction.

The 'non-contentious' first tranche of the new Tax Act required 250 amendments even before it could pass through parliament. If there were so many errors before parliament, it can be guaranteed that many more will need patching-up by later legislation. The House of Representatives Standing Committee on Legal and Constitutional Affairs reported in 1993 that each page of primary legislation receives an average of five minutes scrutiny by parliament. To discover 250 amendments, upon such limited scrutiny, leaves the taxpayer with little confidence that all the errors have been found. If there are more errors, there will be a long wait before they can be amended, based upon the experience of the Australian Taxation Office ('ATO') in attempting to gain space on the legislative agenda for previous Technical Corrections bills.

Tax laws impact more than almost any other laws on the ordinary citizen. They should be designed and crafted out of the finest materials. Those materials should include the experience of other jurisdictions. We should learn from the mistakes already made elsewhere and should incorporate the latest ideas from both inside and outside Australia. Taxpayers are

tired of the ATO and politicians trying to defend what is, to a large extent, indefensible. Tax law design in Australia is no science or art. It is a mish-mash.

Co-operation: a help or a hindrance?

The ATO is to be commended for its policy of involving the tax community in the development of its rulings, internal policies and guidelines. Community involvement in the tax administration and collection processes provide essential feedback. Research has long shown that compliance should improve as a direct result.

The tax community has entered into this arrangement wholeheartedly. The professional bodies provide detailed and extensive comments on almost every ruling that issues. They attend numerous meetings called by the ATO. An immense amount of time and effort, with the associated expense, is contributed to this process. Do the results reflect the input?

Increasingly, the final rulings reflect little of the contribution made by the professional bodies. Legislation is introduced that pays scant regard to the concerns of the tax community, expressed when the law was in draft form. At National Tax Liaison Group Meetings, the minutes show a willingness to listen but little action from the ATO. ATO officers may satisfy taxpayer concerns in small matters, but on larger issues there is constant delay and little obvious result.

Is the involvement worth the cost for the taxpaying community? Surely not, if they are not being heard. Surely not, if the ATO holds out the final rulings, legislation or other 'result' as the product of co-operation between the ATO and the professional bodies, when it does not, in fact, respond to the professional bodies' reasonable concerns. It could be more productive for the professional bodies to operate independently of the ATO. Then, if their contribution is ignored, they can oppose the relevant law or ruling publicly without the ATO holding it out as a joint effort. The ATO might then realise that involvement of the taxpaying community comes at a cost: a willingness by the ATO to listen to, and take account of, their reasonable concerns and interests.

Duncan Bentley
Jim Corkery

1997

Taxpayers' rights

Our theme in this volume is taxpayers' rights around the world. To our knowledge, there has been no such comprehensive coverage of the topic in English. The articles provide fascinating insights into the different issues that are claiming the spotlight around the world. Predictably, many issues are the same, although the treatments differ.

The inspiration for comparative analysis springs from the question, 'Why does your system treat this issue differently from ours?' We can make great progress from a pooling of ideas, if only we dare to listen.

Yet, there is seldom the same internationalism in revenue law as there is in many other areas of the law. Perhaps it is because revenue law has such a distinctly domestic focus. Even international tax is seen very much from the perspective of the resident of the particular country. The rules in other jurisdictions are perceived as being too complex to investigate in any detail. The common assertion that a person can only possibly be familiar with the tax laws of one jurisdiction, and even then imperfectly, may have led us to give up too quickly on becoming acquainted with the general principles of tax law that operate in other jurisdictions.

This volume offers a comparative analysis of taxpayers' rights. What is taken for granted in one system may be a novel and exciting proposal within another. Take the Swedish system of advance rulings. It was established in 1951 and the rulings are given by an independent body, with the status of a court. In some other jurisdictions, rulings are only available in respect of a limited range of transactions or persons. For example, private tax rulings in the Netherlands are only applicable to international enterprises. In all but the Swedish system, the rulings are given by the revenue authorities. Certainly, in Australia, this has led to increased tension within the system, as taxpayers view as biased any ruling issued by the taxation authorities. Perhaps the cost of creating an independent body to issue rulings would be far outweighed by the reduction in dispute settlement costs. Taxpayers would likely accept rulings issued by an independent authority as a true representation of the law, and litigation, with all the associated transaction costs, should decrease.

It is encouraging to see that taxpayers' rights are on the agenda in so many countries. It is disappointing to see how difficult it is to create and strengthen such rights, particularly when wider ranging social rights are favoured by governments, particularly in the European Union. Consider search and seizure powers and protection against self-incrimination, which are areas where many countries allow greater power to the revenue authorities than they do to the police. Information gathering by revenue authorities is another area of concern in an information age. Perhaps taxpayers in democracies should make more of the political fact that those with the power to change the laws will usually only limit their exercise of power if it is the only way they can stay in control.

Strong taxpayer rights may have to wait for the introduction of a general Bill of Rights of the kind introduced in Canada and South Africa. Provisions such as the South African constitutional entrenchment of the right to administrative justice could impact powerfully on tax administration. The introduction of the Canadian Charter led to numerous amendments to the tax law, and the Declaration of Taxpayer Rights. What is surprising is that few tax administrations seem convinced by the research showing that a positive relationship with taxpayers can improve compliance significantly.

The politics of tax reform

Around the world, taxpayers are saying that the tax laws are too complex and need urgent simplification. Graeme Cooper argues that it depends what you mean by simplification.[4] It is difficult to find a consistent definition. The current Australian Tax Law Improvement Project, responsible for re-writing the tax law, seems to think that it means expressing the tax law in language the taxpayer can understand.

When taxpayers say they want simple tax laws, they are talking mainly about ease of compliance. Modern transactions are often complex, whether they relate to running a business from home using all the latest technology or conducting a small export business. This means that simplification of compliance usually means putting taxpayers into broad categories and sacrificing a large element of equity and neutrality. There

4 On tax simplification we highly recommend Cooper GS, 'Themes and Issues in Tax Simplification' (1993) 10 Australian Tax Forum 417.

is then little scope for allowing special claims, except through complicated opt-out clauses that require full substantiation. The question is whether taxpayer interest groups will permit their politicians to simplify the system if it means that any group, particularly a vociferous group, is disadvantaged.

In Australia, nearly all taxpayers lodge their returns through a tax agent and, to take just one group, there are hundreds of pages of public rulings to guide employees as to which work-related expenses are deductible. Taxpayers can't have it both ways. If individuals want long lists of deductions, they cannot expect it necessarily to be easy to obtain them.

A system resembling the United Kingdom style would simplify matters. Abolish work-related deductions for individuals not in business. Deduct tax at source on salary or wages through the pay-as-you-earn system. Require deduction of tax at source from payments of unfranked dividends and interest at a low rate of tax. Compress tax rates to two levels. These can be lower than current rates to compensate for lost deductions. Compliance and administration costs should drop significantly. Most non-business individual taxpayers would not have to lodge returns and, with appropriate monitoring systems in place, the Australian Taxation Office could be sure that the right amount of tax had been paid.

For business taxpayers an incentive system could improve compliance, along the lines of the Japanese blue returns. Businesses that show a required standard of accounting and record-keeping could be given rewards. In Japan, the rewards include increased depreciation allowances or the right to carry back losses to preceding years.

Comprehensive and detailed reforms have been proposed ad nauseam. Governments are remarkably unready to adopt them. Politically it is too difficult. Even successful reform can only hope to make what is unpleasant a little less unpleasant. Bad or poorly-timed reform can be disastrous for those in power, or those seeking it. Yet Australia needs tax reform urgently for its economic well-being. Politics should not inhibit this. Perhaps it is time for an independent Reserve Bank to take control, not just of interest rate policy, but also of tax policy. The government could provide an agenda to the Reserve Bank, who could implement it in the most effective way, but only to the extent it was possible and sensible.

Duncan Bentley

1998

Tax reform is one of those marvellous terms that sounds visionary and idealistic, evoking thoughts of change and new deals. The reality is grubbier. Grand theories are dissected and dismembered by various interest groups. Political reality creates alarming distortions that challenge the minds of administrators and tax professionals for years afterwards. Yet where politicians with large political mandates or powerful personalities ignore consultation and the democratic process they often do so at their peril. Margaret Thatcher's 'poll tax' is a recent example. It is time to widen the debate to address some of the current distortions that have a significant impact on voters. We need to consider such things as whether expenditures are given most efficiently through the tax system; whether ill-considered drafting of tax law is inevitable; and what we can do to alleviate perceptions of inequity in the context of growing bureaucracy.

A disappointing aspect of tax reform talk is the apparent lack of intellectual substance to the views put forward. The *Revenue Law Journal* tries to contribute to critical tax thinking with its articles. Other groups do the same. In our new book review section we give a brief overview of some of the important collections of essays that do provide a theoretical basis for many of the views so glibly held by their popular exponents. Popular debate is the means by which civilisations advance. But if it is not grounded in theory it is meaningless. Civilisation is in mortal danger if the main reason for doing something is because it appeals to the self-interest short-term of a majority of voters. There must be rational arguments in favour of what is to be done.

A failing of any group is the inability to think outside the box. We seem to accept as givens the constraints of our society. Edward de Bono is successful because he challenges people to think laterally; to turn an idea on its head; to seek fresh solutions. We need to do more of this in the tax reform debate. Professor Richard Krever has again recently pointed out that if we want to move away from a complex tax system in Australia we need to remove expenditures from the tax system. Its current complexity is largely driven by the inclusion of any number of concessions to interest groups such as the socially disadvantaged, business groups, primary producers, and cultural groups. If we want a simple tax system we should remove concessions, exemptions, credits,

and rebates of this kind and find some other way to deliver the same benefits. There seems to have been little analysis as to the most efficient method of providing these benefits. If we find that the tax system is the best form of delivery then we must put up with a complex tax system. If not, we should change.

Richard Gordon and Victor Thuronyi raise another issue in a chapter on the design of the tax legislative process, in the book *Tax Law Design and Drafting*, reviewed at the end of this volume. They identify a lack of co-ordination and consultation in the legislative process as a major international problem in the design of tax legislation. They quote Professor Brian Arnold's research, which shows that, 'the three major components of tax policy formulation (policy development, technical analysis, and statutory drafting) should be performed by a single agency.'[5] In Australia Professor Arnold found that significant problems arose as the functions were divided among three different units: the Tax Policy Division of the Treasury, the Legislative Services Group of the Australian Taxation Office ('ATO') and the Office of Parliamentary Counsel. It is interesting to note the difference in quality between recent legislative amendments produced through these channels and the far superior efforts of the Tax Law Improvement Project ('TLIP'), which is almost solely responsible for the rewrite of the complete tax law. Once the TLIP is finished, we shall doubtless return to the inefficient processes that helped to produce the drafting absurdities in the old law, and wonder why the standard of tax law begins to deteriorate once again.

Another issue we face in reviewing our tax system is the power of the executive and its bureaucracy. Fundamental to any democratic system is the principle that the organs of government are subject to the rule of law. In recent years the executive arm of government has grown in importance, increasingly and, perhaps necessarily, usurping the role of the legislature. Many of the powers that the executive arm exercises are too broad, too complex, too detailed, for the legislature to do more than to act in a monitoring role. The size and extent of the activity of the executive and its public service places a heavy burden on the courts, as they seek to uphold the rule of law, particularly when it requires the overturning of executive decisions.

5 In Thuronyi V (ed), *Tax Law Design And Drafting* (1996 International Monetary Fund) 5, quoting Arnold B, 'The Process of Tax Policy Formulation in Australia, Canada and New Zealand' (1990) 7 *Australian Tax Forum* 379.

The problem for the courts is that administrative decision-making is often not subject to the law, except in narrow procedural areas. This leaves large tracts of what effectively is the law, unguarded by an independent and impartial judiciary. It strikes at the heart of the democratic form of government. Sir Gerard Brennan, Chief Justice of Australia, recently recalled Lord Hailsham's statement that, 'We live under an elective dictatorship, absolute in theory if hitherto thought tolerable in practice'.[6] The Chief Justice noted that, in Australia, the 'description is close to the mark... But there are dangers in maintaining a structure which lends itself to the concentration of political power in the Executive Government. There is a risk of efficiency turning to tyranny… The traditional checks and balances are inadequate to protect minorities and the interests of individuals'.

Whether or not this is true, it is vitally important, if it is the way people see government. Our reaction to government is often determined by our perception of its fairness. The perception will have most effect at the major interface between the government and the people: the operation of the tax system. Tax compliance research has long shown this to be so. The ATO, along with other tax administrations, has changed the way it operates to try and build positive relationships with taxpayers. The efficient operation of a system of self-assessment depends upon it.

When people feel powerless against governments and bureaucracy, which they feel act unfairly, they tend to stage their own, small rebellions. Enough dissatisfaction with the tax system can undermine its operation. Picture Saturday morning soccer for the under eights in a suburb where the median income is below the national average. The parents include teachers, retailers, wholesalers, and builders. They spend 40 minutes sharing how they manage to avoid declaring taxable income. Picture a group of secretaries discussing ways to supplement their incomes by taking on typing in the evenings. They are horrified when one of their number suggests that they should declare the income in their tax returns. These are hardly the high income earners who are the focus of ATO comment in the press and whose misuse of trust structures threatens to undermine their future legal use by anyone. Picture a meeting with tax officials and tax advisers. The advisers seek informal clarification on the

6 In his 1976 Dimbleby Lecture, cited in the 1998 Inaugural Sir Gerard Brennan Lecture at Bond University, 21 February 1998, at 15.

ATO view of certain offshore structures. The ATO officials express concern at their inability to track most offshore transactions that taxpayers do not declare. Note the ATO Commissioner's Award for Research in Taxation is for papers addressing the impact of tax havens and bank secrecy in administering Australia's tax system. Various claims are made as to the amount of money in, or transferred through, tax havens: some suggest that it is more than half of global funds.

Are these simply the musings of a lawyer using anecdotal evidence? Dr William Glen's research lends support.[7] In a number of different groups of students surveyed, a majority indicated that they did not agree that individual members of the public in general should under-report some income in their income tax return, even where there are special circumstances, like unfair tax laws or economic hard times. However, a majority did say that they would not always report cash in hand from odd jobs on their own income tax returns, where they knew the employers kept no wage records of the payments. Anecdote, research, and the estimated size of the cash economy suggest that the public do not see tax evasion as theft of funds from their fellow citizens. Rather, they view it as simply keeping back some of what is rightfully theirs from a government that is asking too much of them.

Equity has a major influence in tax system design. However, it is valid to ask whether equity is really served by a system that is seen as inequitable; by a system that is seen as there to be fleeced. Whatever the inequities of presumptive taxation, are they really greater than the hidden inequities in the current system? Increased use of thresholds and exemptions is a feature of recent legislation. Would it really be inequitable to move to a combination of collection at source and presumptive taxes? Might it also prove more efficient to move expenditures out of the tax system? Should we pay heed to international research and change our process of legislative drafting?

Most people accept that we need an efficient tax system, with well-drafted legislation; that the system should be fair and seen to be fair, but in the context of the system as a whole; and that taxpayers should endorse the collection of taxes as a legitimate act of Government. These issues and many others deserve informed debate. Let us hope that there

7 'The influence of gender and education on tax avoidance and tax evasion', Third International Conference on Tax Administration, 16-17 April 1998, Sydney.

is an opportunity to pursue such debate in the current reform process. Let us hope that the arguments of those who have studied the questions are not lost when they are distilled into 'sound-bites' for media distribution.

Duncan Bentley
Jim Corkery

1999

Change is exciting. Change is challenging. We find it especially interesting to contemplate the opportunities it brings while relaxing by the pool with a glass of good red wine. We are less enthusiastic about it when it changes the changes that we are in the process of making. Australian business has to cope with that and more. This volume of the *Revenue Law Journal* is late. The main reason for the delay was that we had three good articles ready for publication. Unfortunately, the law changed and we could not publish them after all. An article on the operation of the capital gains tax ('CGT') retirement exemption is undergoing its third rewrite in a year. If the author has the fortitude, we hope to publish it in the next volume.

We have great sympathy with the view of the Taxation Institute of Australia, that any introduction of Option 2 of the Ralph reforms should be delayed until at least 2002. For non-Australian readers, in its simplest form, Option 2 will determine taxable income using a cashflow/tax value approach and align taxation law more closely with accounting principles. It will radically alter the current business tax system. A committee chaired by John Ralph proposed Option 2 in a comprehensive report on the Australian tax system. The current government favours its introduction on 1 July 2001, following consultation with business. Many other proposals from the report have already been introduced, particularly a major overhaul of the CGT. A value-added-tax, the Goods and Services Tax ('GST'), also comes into effect from 1 July 2000.

The introduction of the Ralph reforms and the New Tax System will stretch the resources of business, the tax profession and the Australian Taxation Office ('ATO') to the limit. There needs to be at least two years before another fundamental change is made to the tax system. Otherwise there is a real risk that the system will not be able to cope. That does not mean it will fall over in a crumpled heap. It means that businesses will

not make a proper job of introducing the further changes into their already overstretched systems. It means that advisers will not have the resources to ensure that the implementation takes place. It means that the ATO will not be managing an efficient changeover, but responding desperately to an increasingly belligerent 'clientele'.

There are political problems with any delay. If the Government does not introduce the changes from 2001, it will be too close to an election to do it any later. Option 2 does not have the unequivocal support of the Federal Opposition. It is quite likely that Option 2 will be dumped unceremoniously in the aftermath of a Labor election victory. Experience suggests that the Government may lose the next election. Most governments that introduce a consumption tax are voted out at the election following the tax's introduction. Politically, any introduction of Option 2 will be, as Sir Humphrey Appleby would say, 'a courageous decision'.

A concern for the taxpaying community is that the Federal Opposition is already campaigning for a roll-back of the GST. The Shadow Treasurer recently praised the British budget cuts of the VAT rate, including cuts on installation of energy saving materials in all homes and various other energy saving measures for the less well-off. He concluded his press release by praising the European Union for cutting the VAT in some labour intensive service industries to help create more jobs and crack down on the black economy. Why is a roll-back of the GST a concern? First, because it creates more change and, as we said in our last editorial, there may be better ways to deliver benefits to the less well-off than through the tax system. Try telling that to a politician of any colour. Second, because it will make the GST even more complex.

Peter Wilmott, a former Director General for Indirect Tax in the European Commission and VAT Commissioner in the UK's Customs and Excise, speaks about the VAT system in a book review.[8]

> Its basic principles are easily obscured by the complexities forced on politicians by the pressures of lobbies and interest groups, a process that makes VAT much less suited to the needs of developing and emerging economies than its rapid spread would suggest. Nor is there always a clear vision of the needs of the tax

8 <http://www.amazon.com/exec/obidos/ts/book-reviews/0952044218/102-2830714-0684863#09520442184000> (at 29 March 2000).

> itself. It works best when allowed to shift the whole burden of the tax forward to the final consumer. However, technical difficulties and political opportunism combine to frustrate this beneficial effect of the tax, by setting aside very significant sectors of economic activity as areas where the deduction of VAT is 'blocked', and the transparent forward shifting of the burden is stopped in its tracks. The result is a cascade tax that is hard for the final consumer to see and impossible for businesses like banks and insurance companies to deduct. The only visible response is the blossoming avoidance industry, growing fat on fees from companies eager to restructure in 'VAT efficient' ways.

Change is one of the key factors that make a tax system complex. Another is tinkering with the existing system to cater to specific interest groups. If Australia needed a major overhaul of its tax system, its politicians have a moral duty to introduce any further changes so that they fit within the basic principles that underlie the new system. Otherwise, we simply revert over time to the imbroglio of rules that we have just replaced. *Plus ça change, plus c'est la même chose*.

Duncan Bentley
Jim Corkery