

# ***Tax Law Improvement in Australia and the UK: The Need for a Strategy for Simplification***

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## ***Abstract***

In both Australia and the UK, programmes are under way to simplify tax legislation by rewriting it. This paper demonstrates that tax simplification is a complicated concept and concludes that sustainable improvement is unlikely to be achieved if reform is limited only to linguistic changes. Tax law is complicated because there are powerful pressures that tend to increase the complexity of modern tax systems and these should also be considered in any simplification programme. In addition, tax simplification may be promoted by the greater use of purposive legislation — that is, legislation drafted in terms of general principles rather than much more comprehensive legislation designed to deal with every likely possibility. The paper examines the progress of the Australian Tax Law Improvement Project and argues that what is needed is a strategy for tax simplification that is incorporated into the process of generating tax policy itself.

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## **I. INTRODUCTION**

In the May 1996 issue of *Fiscal Studies*, Davidson (1996) described the work done by the Tax Law Review Committee (TLRC) since its inauguration in October 1994 and which includes an interim report and a final report (Tax Law Review Committee, 1995 and 1996). The central proposals relate to the rewriting

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of tax legislation in plain English and the provision of explanatory memoranda. The Inland Revenue has also followed this approach (Inland Revenue, 1995a and 1995b) and encouraged discussion with the publication of a consultative document (Inland Revenue, 1996a) which generated a formal response (Inland Revenue, 1996b). The Inland Revenue project is setting out to rewrite most of the UK's primary direct tax legislation over a period of about five years, and further details and subsequent developments can be found on the Inland Revenue's Tax Law Simplification Project Home Page on the Internet.<sup>1</sup>

Such proposals for rewriting tax legislation are very welcome. However, they may be insufficient to achieve the goal of simplification. Tax simplification is not a simple topic. As an early example, Lloyd George, when Chancellor of the Exchequer, once returned a complicated paper to the Board of Inland Revenue and demanded that it be rewritten in words of one syllable. This was duly done. However, it is reported that the topic remained as complicated as before and the monosyllables made it rather harder to understand (Johnston, 1965). Since that time, primary tax legislation has continued to grow both in length and in complexity. For instance, in the UK, a further 1,300 pages of legislation have been added over only a five-year period (Beighton, 1995). The position is similar in other countries. For example, in Australia, the bulk of the tax law is contained in the Income Tax Assessment Act. When enacted in 1936, it consisted of 126 pages of legislation. Each year, it has been subject to amendment, and additions have vastly outnumbered deletions. Prior to simplification, the original Act had been extended to over 5,000 pages. Australia has taken a robust stance on simplification and this will be described below.

Trends towards greater complexity, of course, have a number of undesirable consequences, such as uncertainty for business and personal taxpayers and inflated costs of administration and compliance. Indeed, overly complex and obscure legislation might reduce the willingness of taxpayers to comply voluntarily with the requirements of the tax system. Complexity will also increase administrative and compliance costs and make useful discussion of tax policy more difficult. A further important consideration is that the introduction of self-assessment shifts the onus of responsibility firmly from the revenue authorities to the taxpayers (James, 1995). It is, therefore, even more important than before that taxpayers should be able to establish their tax position without undue difficulty or expense.

The result has been various initiatives for improvement. In Australia, the process started with a report produced by the Joint Committee of Public Accounts in November 1993<sup>2</sup> which recommended the establishment of the Tax Law Improvement Project (TLIP). It was allocated \$Aus 10 million (about £5 million) and over 40 full-time staff and was expected to take three years to complete its

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<sup>1</sup><http://www.open.gov.uk/inrev/rewrit>.

<sup>2</sup>Summarised in Tax Law Improvement Team (1994, p. 6).

work. Subsequently, there has been a need to have further funding approved for the project until June 1999 and it may turn out that the task takes even longer.

Potentially, there is much that can be done to improve tax language, and the present authors have already explored a range of aspects with respect to the UK (James and Lewis, 1977), Australia (James, Lewis and Wallschutzky, 1981) and in general (James, Lewis and Allison, 1987). It might well be argued that greater official attention to these issues might have led to a more satisfactory situation today. Furthermore, it might be that the UK and Australian initiatives are too narrow. There are important reasons why tax legislation has become complex. These include the underlying complexity of the tax system and the changing requirements of tax policy. If these factors are not contained, tax legislation will always be complex, no matter how many times it is rewritten.

The purpose of this paper, therefore, is to examine some of the issues involved and the Australian experience. The first stage is to consider the meaning of simplification. It is clear from even a cursory examination of the debate that not everyone is referring to the same phenomenon. It is also apparent that, while the aim of simplification appears to command widespread support, its achievement seems to be as difficult as ever. This leads on to the second task, which is to make it clear that there are some important reasons why tax systems become complex and these should be taken into account in any programme for tax simplification that aspires to be successful in the long term. Third, as the Australian TLIP seems to be considerably further ahead than the UK initiative in some important ways, it is useful to review its progress. The general conclusion that emerges is that it may be better to devise a strategy for tax simplification rather than just a rewrite of tax law. If the other factors responsible for increasing complexity are not tackled, the danger is that, however excellent any redrafted legislation may be, its clarity will not survive.

It has been suggested to the present authors that it is very difficult to accomplish changes to these other factors, such as tax policy, and so an attempt to achieve an overall programme of simplification might result in no progress at all. This view then concludes that simplifying the language would at least be an improvement. This approach might be a little complacent. It is true that it is unlikely that the most desirable situation could be attained without difficulty. Yet there should be an awareness of what that situation might be and the nature of the problems involved in moving towards it. If a strategy for simplification could be devised, it might be able to identify and take advantage of opportunities for simplification when they arose. Then we should be moving in the right direction, even if progress were slow and uneven.

Failure to develop an overall strategy for simplification may mean that no significant long-run improvement is achieved. A telling illustration is provided by the Australian TLIP, under which Australian tax law was being rewritten in a simplified form but it appears that, at least initially, new legislation was still being produced in the old style faster than existing legislation was being improved. If

that situation had continued, simplification would have got further and further behind.

## II. SIMPLIFICATION IS A COMPLICATED CONCEPT

In a penetrating analysis of tax simplification, Cooper (1993) pointed out that, when commentators refer to the simplicity or complexity of a tax system, they may be referring to one or more of at least seven different issues. These are:

1. Predictability. In this context, a rule would be simple if that rule and its scope were easily and accurately understood by taxpayers and their advisers whenever necessary.
2. Proportionality. A rule would be simple if the complexity of the solution were no more than reasonably necessary to achieve the intended aim.
3. Consistency. This would apply where a rule deals with similar issues in the same way and without the need to make arbitrary distinctions.
4. Compliance. A rule would be simple if it were easy for taxpayers to comply without incurring excessive costs.
5. Administration. A rule would be simple if it were easy for a revenue authority to administer.
6. Co-ordination. A rule would be simple if it fitted appropriately with other tax rules; it would be complicated if its relationship with other rules were obscure.
7. Expression. A rule would be simple if it were clearly expressed.

It is not difficult to provide examples of the term 'simplification' being used to mean any one of these possibilities and sometimes more than one. Frequently it is not clear what meaning is being assigned to the term, and sometimes it seems to be used synonymously with 'improvement' without being clear what improvement means either.

Cooper also suggests that complexity can be found at four different levels of a tax system. The first is in the choice of the tax base, whatever that may be. The second level is the design of the rules to be applied to the tax base, and the third is in the expression of those rules. The final level of complexity is related to the administrative requirements imposed on taxpayers. The Tax Law Review Committee's final report (1996, para. 6.10) listed three types of complexity — linguistic, policy and compliance — and acknowledged that a comprehensive tax reform would have to address all three areas. It also acknowledged that 'without policy changes the benefits from rewriting legislation are limited' (para. 12) but related its proposals only to a rewrite of existing legislation with a view to making linguistic improvements.

Although Cooper's analysis may seem to indicate that the idea of simplification is in fact quite complex, any successful strategy would have to be clear about precisely what it is intended to achieve. It is only then that its success or otherwise

can be evaluated and modification made to the strategy as necessary. A strategy aimed at one meaning of simplification or one level in a tax system is unlikely to simplify anything successfully in other respects. The result is likely to be further complication and confusion. It is also likely to reinforce the view, reported above, that overall simplification is too difficult to achieve and so something less should be done.

*Dealing with the Forces for Complexity*

A strategy for simplification should incorporate more than linguistic improvements to existing legislation. As will be suggested below, there are two possible aspects to such an approach — one is to incorporate simplification into the tax policymaking process itself and the other is to change the type of primary tax legislation enacted.

If measures such as these are not developed, there is the serious risk that any gains from a programme of linguistic improvement will be eroded by the more pressing concerns of other tax policy issues, as is clear from the Australian experience. There the work of the TLIP has continued but been overshadowed by a new tax policy debate concentrating on the case for the introduction of a goods and services tax. It has now been announced (Prime Minister's press conference, Parliament House, Canberra, 13 August 1997) that a new Taxation Task Force has been established with instructions to prepare options for tax reform. The Australian government's remit covered five areas but not one of these was directly concerned with tax simplification. One of the purposes of the TLIP was simplifying taxation in order to promote informed discussion on tax policy issues. However, as the Australian tax policy debate has now embarked on a new and important phase before the TLIP has completed its work, it would seem that just simplifying the language is no longer seen as a major contribution to tax policy.

To be successful, a strategy for simplification should incorporate a wider remit. A journal of the Taxation Institute of Australia (1991) featured an editorial article in its Current Topics section which stated that there was an 'increasing acceptance that the entire tax system, not only the law, was so complicated that it was difficult for many tax accountants and lawyers — let alone most taxpayers — to understand it'. After a substantial Australian programme of study into the subject, Eagleson (1985) pointed out that 'the cause of much complicated language is frequently ill-conceived and poorly devised policy. No amount of simplification of language can remove unnecessary complications of content'.

A robust process of reform should be capable of accommodating, if not harnessing, the forces for complexity in an increasingly rapidly changing world. A number of commentators, including Beighton (1995), Williams (1993), Pagan (1993) and Sabine (1966, 1990, 1991 and 1993), have examined a variety of the forces generating complexity and their results. For instance, James (1997) uses management techniques to analyse the likely future tax environment and concludes

that not only are taxpayers' circumstances likely to grow increasingly more complex but taxpayers will become more inclined to manage their tax affairs actively. Then, of course, there is the temptation for government to use the tax system for all sorts of purposes other than raising revenue and the result is the large number of tax concessions referred to as 'tax expenditures' — a term coined by Stanley S. Surrey (1973) while Assistant Secretary for Tax Policy in the US Treasury Department. Complexity is also increased by the apparent lack of consistency in policy. As Sabine (1993, p. 515) put it, 'What policies? One common factor in all the Budgets covered is the *ad hoc* nature of the majority of measures: expediency, it would seem has been elevated to the status of a fiscal programme'.

In the UK, both the TLRC and the Inland Revenue found respondents to their suggestions to be in favour of more than linguistic simplification but did not develop the possibility of incorporating simplification into a wider strategy of tax reform. In its interim report (Tax Law Review Committee, 1995), the TLRC devoted Chapter 3 to a summary of some of the forces that cause complexity but viewed them more as a constraint on putting its recommendations into effect (para. 3.1) than as factors that should be explicitly faced in the tax policymaking process. In its final report (Tax Law Review Committee, 1996, paras 6.9–6.10), the TLRC acknowledged that the respondents to its interim report felt that there should be a policy review running either ahead of or alongside a rewrite of tax legislation. However, it was content to let others argue over whether it was possible to produce 'an objectively simple tax system' and suggested that 'as a practical consideration, there is a grave risk that the rewrite project would achieve nothing if it attracted controversy as a result of trying to make simultaneous changes in both language and policy'.

In its background paper, the Inland Revenue (1995b) devoted a short 12-paragraph chapter to reforming tax policy and pointed out that 'it is rare for simplification to be the sole policy objective' and that economic objectives 'may generally be expected to take priority' (para. 2.2). It also recognised that the need for fairness for taxpayers may generate longer and more complex legislation. It was argued that rewriting the legislation could make more general improvements in simplification either by making the underlying policy 'easier to grasp' (para. 4.7) or by 'minor policy rationalisation and reform which we see as an integral part of legislative simplification itself' (para. 4.8) but the exercise as a whole would be 'policy neutral' (para. 4.8). As mentioned above, the Inland Revenue undertook consultations, and a senior official (Munro, 1996, p. 101) stated that 'without exception all the major representative bodies have said we will not get very far unless we can simplify the underlying policy' but that 'We have ... made it clear in our discussions with the main representative bodies that we see their point and in general we [the Inland Revenue] accept it. But policy reform is not on offer now or in the foreseeable future'. Of course, the role of the Inland Revenue is to implement rather than decide tax policy, but the TLRC might have explored

more thoroughly the possibilities of more radical simplification of the tax system. The outcome would seem to indicate that the government does not give simplification a high enough priority in tax policymaking to incorporate it more explicitly in this process. This would seem to leave a different approach to tax legislation as the only major way forward, but here as well little progress has been made.

Prebble's view (1994) is that the complexity arises from trying to fit the law around the 'natural facts of economic life'. The law therefore attempts to solve insoluble problems and ends up as incomprehensible. The use of the law to handle such complexities is exacerbated by the continual battle against tax avoidance. The result is that there has been a steady flow of amendments and additions designed to plug specific loopholes. The increasing amount of legislation has generated yet further loopholes and further revisions. In Australia, in particular, it has been argued that the literal approach taken by the courts has further contributed to the growth of complexity. It is alleged that their reluctance to allow taxation to be levied unless there is a clear mandate has forced legislative drafters to spell out in great detail what is intended. The result is an attempt to produce rules to cover a whole range of possibilities rather than a simple statement of policy. The Australian debate in this context has revolved around the use of the terms 'black letter law' versus 'fuzzy law'. 'Black letter law' is intended to cover as many conceivable eventualities as possible and to be interpreted literally. In contrast, 'fuzzy law' tends to state general principles rather than attempt to deal with every possibility explicitly (see, for example, Cowdroy (1995)).

In the UK, the issue has been discussed in terms of 'purposive legislation' — that is, the drafting of general principles rather than much more comprehensive legislation designed to deal with every likely possibility. The Renton Committee (1975, para. 10.3) on the preparation of legislation recommended that the use of statements of principle should be encouraged in statutes and made a specific recommendation in this respect for fiscal legislation (para. 17.11). Since this article was first drafted, Avery Jones (1996) has argued forcibly for a move in this direction, concluding that what 'we need is less detailed legislation construed in accordance with principles, not a continuation of the plague of tax rule madness' (p. 89). This view has been supported by others. For example, as Beighton (1996, p. 603) put it, 'Principles can be broad and will apply in all situations: by contrast rules have to be ever more tightly cast as more and more situations arise — or are contrived — going far beyond the minds of draftsmen, Ministers or Parliament'.

In its interim report, the TLRC doubted whether a move to purposive legislation would be an improvement. For instance, it cited Bennion (1990), who argued that 'The truth is that the pragmatic British are chary of statements of principle. They distrust them because they almost invariably have to be qualified by exceptions and conditions to fit them for real life. What is the use of a principle that cannot stand on its own?' (p. 25). Also, the Hansard Society (1993, p. 61) considered that a statement of purpose might sometimes usefully be included in an

Act but believed ‘that the inclusion of statements of principle or purpose in Acts should not be adopted as a general practice’. Nevertheless, in its final report, the TLRC revised its view and concluded that it would be possible to draft primary fiscal legislation in terms of general principles, but ‘in view of the need to change Parliamentary procedures first’, left this simply as a ‘longer term aim’. A strategy for simplification should include both reform of the tax policymaking process and a move to purposive legislation.

The question is therefore ‘What is the likely outcome of the UK programme for rewriting tax legislation without a more radical attempt at tax simplification?’. The experience of the Australian Tax Law Improvement Project would seem to have some lessons for the UK.

### **III. THE AUSTRALIAN TAX LAW IMPROVEMENT PROJECT (TLIP)**

In Australia, the TLIP is a government initiative and there is considerable commitment to its success. This is indicated not only by the significant resources allocated to it, but also by the fact that it was headed by Brian Nolan, then a Second Commissioner of Taxation — a position roughly equivalent to a Deputy Chairman of the Board of Inland Revenue. This was reinforced by representation from outside the Australian Tax Office. In addition to the project team of around 40 full-time staff, two private sector representatives were engaged part-time. One was an academic specialising in taxation from the Australian Taxation Studies Program (ATAX) at the University of New South Wales and the other a partner in charge of the tax practice of the Brisbane office of Coopers and Lybrand. Furthermore, a Consultation Committee was set up to represent further interests and there were various subcommittees to assist with different parts of the rewriting programme.

The stated aim of the TLIP was to ‘improve the understanding of the law, its expression and readability’. It was pointed out that excessive costs of compliance are ‘generated by law which is complex in design and obscure in its articulation’. The hope was that the project would save private sector taxpayers millions of dollars in the costs of complying with the tax system. It was also expected that compliance with the tax system would improve and this would lead to far greater savings.

In Australia, considerable thought was given to the best way to proceed. It was recognised that there were two levels at which the task could be dealt with. At one level were issues such as whether to introduce the entire package at the end of the project (later referred to as the ‘big bang’ approach) or in stages as the project progressed (Tax Law Improvement Team, 1994, pp. 9–10). At this level, there were considerations such as establishing guidelines to help decide when brevity was appropriate and when more detailed provisions were suitable. At the operational level, the project had to be divided into manageable parts of the tax system, such as income and deductions and particular types of taxpayer — for

example, companies, trusts and partnerships. Like the UK initiative, it was decided that the brief of the Australian TLIP should be to rewrite existing laws rather than examine wider issues that contribute to complexity. Although the process was not intended to influence tax policy, there is little doubt that it does and this aspect will be dealt with further below.

The TLIP began by dealing with the Australian 'substantiation' provisions. In Australia, employees have been entitled to claim for a wide range of work-related expenses. Prior to the introduction of the substantiation provisions in 1986, all Australian taxpayers had to do was to incur the expenses and show a sufficient nexus between the expense and their employment. However, as a result of the substantiation rules, employees have had to keep receipts or other evidence to prove the expenses were incurred. The substantiation provisions were chosen to be the subject of the first work on simplification because they affected about 70 per cent of Australian taxpayers and had attracted particular criticism that they were too complicated to understand and too onerous to operate. Work progressed steadily and a draft Bill was produced. Following a period in which the Bill was open for public comment, it was introduced in the Australian Parliament as the Tax Law Improvement (Substantiation) Bill on 8 December 1994. It became law on 7 April 1995 and applied to the Australian tax year commencing 1 July 1994. As this was the first area of law to be rewritten, it did not quite fit into the existing legislative framework. To insert it into the old legislation (the Income Tax Assessment Act 1936 as amended) would have been to compound the problems the TLIP was intended to remedy. Instead, it was appended to the old Act until the new Act (the Income Tax Assessment Act 1997) was introduced and an appropriate place was made for it.

The changes made to the substantiation provisions have been quite dramatic. The amount of repetition has been drastically reduced and the number of words reduced from about 19,000 to 11,000. Clearer shorter sentences have been used and the average number of words per sentence has been reduced from 241 to 37. There is also a dictionary of terms and concepts. The legislation appears to become considerably more understandable and this aspect is also discussed further below. The arrangement of the new legislation was based on the principle of moving from the general to the particular. It is described in the legislation as being rather like a pyramid and an illustrative diagram is provided in the Income Tax Assessment Act 1997. The pyramid diagram depicts income tax law starting with the central or core provisions at the top, then moving to general rules of wide application and finally to more specialised topics. It is worth noting that the pyramid and the guide to the Act in which it appears forms Section 2-5 of the Income Tax Assessment Act 1997 and such guides are specifically defined as being part of the legislation itself (see Income Tax Assessment Act 1997, Section 950-100), while other parts of the Act, such as certain tables, are defined as not being part of the legislation (Section 950-105).

The first major instalment of the Australian legislation consisted primarily of the Income Tax Assessment Act 1997. This is the shell of the new Act and contains provisions for dealing with the core provisions, deductions for prior years, losses and special provisions dealing with mining. This Act was accompanied by two other Acts which dealt with consequential amendments and transitional provisions, namely the Income Tax (Consequential Amendments) Act 1997 and the Income Tax (Transitional Provisions) Act 1997.

The second major instalment of the rewritten law comprising provisions dealing with exempt income, trading stock, depreciation, capital expenditure, entertainment expenses, gifts and recoupment of deductible expenses applies from 1 July 1997. These also became part of the Income Tax Assessment Act 1997.

One important change in drafting style has been a move to a narrative approach. Traditionally, there has been a considerable amount of repetition in the legislation so that each proposition is self-contained. This approach has now been rejected and it is considered safe to rely on the sense of the reader to use early parts of a provision to interpret later parts. One example is a section that empowers the Commissioner of Taxation to issue a notice. The following section proceeds to refer to this notice simply as 'the notice'. Under the old approach, it would have stated that it was a notice issued under a particular section to distinguish it from all the other notices that could be issued under the legislation. With the new approach, this does not happen. It is thought by the TLIP drafters that the notice referred to in a section on any reasonable interpretation could only be the one in the previous section. The effect is to treat the law as a continuous narrative which can then be much shorter and less tedious to read.

### *1. Tax Simplification and Tax Policy*

Although the Australian TLIP set out to rewrite tax legislation without changing tax policy, some aspects were changed. This is hardly surprising. Tax simplification is itself part of tax policy and to suppose that one part of tax policy can proceed without influencing any other must seem rather odd. If it continues in complete isolation rather than as part of a wider strategy, it is, as pointed out above, unlikely to be successful in the long term.

As part of the process, the new Australian legislation simplifies some of the rules without appearing to change their meaning, brings inconsistent rules into line and has even gone so far as to change the meaning of some of the rules that were thought to be inconsistent with commercial reality. For instance, previously, wage- and salary-earners were required to keep their receipts for three years and six months, a business person for seven years and a business for five years. This has been rationalised so that the rule is now five years in all cases. This may be a relatively minor example and was done in the interests of simplicity, but it cannot be claimed that it is a change that is totally independent of tax policy. Furthermore, with the rewrite of the substantiation provisions alone, there were 18

such policy changes. None of them was fundamental but they suffice to demonstrate that tax simplification cannot be an isolated exercise.

## *2. Simplification as a Controversial Issue*

It might be thought that there would be universal agreement in support of simple and easily understood tax legislation, particularly with a move to self-assessment. If ignorance of the law is no excuse, then it would seem to follow that taxpayers should be able to understand the relevant legal provisions and to act on them without undue difficulty. In fact, and perhaps surprisingly, in Australia, there has been some quite fierce debate about the desirability of simplifying tax law. In one particularly colourful attack, Lehmann (1995) refers to some of the rewritten law as 'kindergarten babble'. He cited Section 6.30 of the draft legislation as one of the worst examples. In fact, Section 6.30, which, in effect, became Section 6-5 of the Income Tax Assessment Act 1997, was designed to rewrite the single most important provision dealing with income. The provision finally enacted as Section 6-5 stated, in almost the same babble, that 'Your assessable income includes income according to ordinary concepts, which is called ordinary income'. Warming to his theme, Lehmann (1995) suggested that 'the rewrite of the core provisions has not resulted in simple legislation, but a loquacious, patronising and confused babble of educationalese. Reading it is like trying to wade through styrofoam mixed with treacle'.

More generally, the main criticism seems to stem from two propositions. The first is that rewriting the law may inadvertently change its meaning in places. It has been pointed out that, over many years, the courts have gone to considerable lengths to establish the precise meaning of particular words and phrases. As a result, they have built up a considerable and valuable body of interpretation and this may be jeopardised by simplification. The second proposition is that taxpayers themselves do not normally read primary tax legislation and therefore there is no need to direct it at them. According to Sir Harry Gibbs, former Chief Justice of the High Court of Australia and Chairman of the Australian Tax Research Foundation, 'The law of income tax cannot, unfortunately, be limited to concepts that could be understood by a lay person without explanation, and the aim of those drafting income tax legislation should be to make the law clear to the professional reader whose task it will be to explain the effect of the law to the lay person concerned' (Gibbs, 1995). This has also been the focus of the criticism of addressing the reader of primary legislation as 'you'. If the taxpayers themselves do not normally refer to the law, then, so it is claimed, it is inappropriate to address the reader as 'you' since the legislation will be mainly read by tax professionals rather than taxpayers.

These two propositions have their limitations. The first proposition, in its extreme form, would rule out any change for ever. Even at a more reasonable level, it might be expected that the benefits arising from simplification should

outweigh some minor changes in the meaning of legislation. It is also possible that simplified language might reduce the scope for different interpretations of particular words and phrases. To deal with the point that benefit of a large body of judicial precedent that had evolved over 60 years since the Act was introduced should not be lost, the principle was established that the courts and others should not assume from the mere fact that the words of the legislation have changed that a change of meaning was intended. This was incorporated as Section 1-3 of the Australian Income Tax Assessment Act 1997. This states:

- (1) This Act contains provisions of the Income Tax Assessment Act 1936 in a rewritten form.
- (2) If:
  - (a) that Act expressed an idea in a particular form of words; and
  - (b) this Act appears to have expressed the same idea in a different form of words in order to use a clearer or simpler style; the ideas are not to be taken to be different just because different forms of words were used.

One of the unfortunate consequences of provisions such as Section 1-3 is that, instead of simplifying the law, it can make it more complicated. This arises because, in some circumstances, it requires a comparison of the old and the new law. Those reading the new legislation may not be sure if the new words represent a new idea or only simplification. The only way of deciding whether a new idea was meant would be to compare the old and the new legislation carefully.

The second proposition is also arguable. There is no doubt that taxpayers benefit from the skilled and experienced assistance of tax practitioners. This will normally be true, no matter how simplified primary tax legislation is made. The gains from a division of labour mean that taxpayers will usually be too involved with other activities to become expert in matters that may affect them only occasionally and will find it worth while to engage professional assistance. However, it is highly questionable that legislation should be formulated on the basis that it is directed only to a professional audience or that taxpayers can expect to understand the law only by engaging paid advisers. Although it has been suggested that tax practitioners have a vested interest in tax law being sufficiently complex to ensure a large number of clients, it is not easy to find practitioners who acknowledge such a position, even in private. Instead, a more common view is that an obscure and poorly understood body of primary legislation that is difficult to access is likely to bring the whole tax system into disrepute to the detriment of all concerned. It can also increase the risk of tax practitioners making mistakes which can prove to be very expensive. It would seem better for parliamentary drafters to ensure that legislation is sufficiently clear to be understood by ordinary taxpayers wherever this is possible. Also, if the law is expressed simply, tax guides that

taxpayers do use might be expressed more simply as well — not only because tax policy is clearer but because the guides would follow clearer modes of expression.

The debate about addressing the legislation to the taxpayer and the use of the term ‘you’ is not a fundamental point. Indeed, it seems to be based on the pessimistic assumption that simplification will not increase the accessibility of legislation for taxpayers themselves and their willingness to refer to it. Furthermore, if the use of the term ‘you’ actually contributes to the simplification of tax language, and this can be tested, it does not follow that it necessarily becomes less comprehensible only because the provisions do not apply to a particular reader at a particular time. Indeed, as Turnbull (1995) has pointed out, the use of the term ‘you’ is not only less formal but is briefer than the term ‘the taxpayer’ and might be useful in producing ‘gender-free’ language without the use of clumsy alternatives — such as ‘his, hers or its’ or the use of ‘they’, ‘their’ and ‘themselves’ when referring to a single person. Although this issue has been the subject of some heated controversy, it is only one aspect of simplification and one that would appear worth testing.

### *3. Evaluation of the Work of the TLIP*

Particularly given such controversy, it is important to evaluate the work of the TLIP. An early study was undertaken by Wallschutzky (1995). This surveyed various categories of relevant participants — namely, individuals, tax practitioners, small businesses and large businesses. The sample was selected by the Australian Tax Office on the basis of instructions from the researchers, but otherwise the work proceeded independently of the revenue authorities. Although tentative, the results are interesting and will provide a useful bench-mark for measuring the effects of later work by the TLIP.

Wallschutzky also used Cloze analysis which showed that both the old and the new legislation relating to the substantiation provisions were easy to understand. It might be that familiarity with the old legislation caused this result but that could not be true of the new legislation. It might also indicate that the problem with complexity is not the form of language of existing legislation. If it is true that it is relatively easy to understand, problems must lie elsewhere. Perhaps the sheer bulk or the format or some pre-existing attitudes cause negative reactions in taxpayers.

## **IV. CONCLUSION**

Such preliminary evidence from the Australian TLIP reinforces the earlier suggestion that rewriting tax law alone is insufficient to achieve significant simplification of the tax system. Complicated, inconsistent and frequently changing tax policy will be reflected in complex legislation, however it is written or however frequently it is rewritten. To achieve a lasting simplification of tax law

requires the simplification of tax policy. As Sir John Donaldson stated in the Court of Appeal after criticising a particularly complex statute,

... I do not criticise the draftsman. His instructions may well have left him no option ... When formulating policy, Ministers, of whatever political persuasion, should at all times be asking themselves and asking parliamentary counsel: 'Is this concept too refined to be capable of expression in basic English? If so, is there some way in which we can modify the policy so that it can be expressed ...

*(Mercur Island Shipping Corp. v. Laughton* [1983] 1 All ER 334 at 351)

This view, incidentally, was unanimously approved in the House of Lords on further appeal ([1983] 2 All ER 189 at 198).

One way forward might be associated with the debate referred to in Australia as 'fuzzy law' versus 'black letter law'. In the UK, this issue has been cast in terms of 'purposive law' in which primary legislation would state the general principles and be supported by further material elsewhere. The Tax Law Review Committee was doubtful about this approach in its interim report (1995) but became more favourably inclined towards it by the time the final report was reached (Tax Law Review Committee, 1996). It was still, however, very much seen as a longer-term aim. The Inland Revenue (1996a) took the view that it would not be suitable for a blanket approach but that it might have a role where it was clear it would not increase the uncertainty for users. It would seem that, although the present proposals of both bodies involve only a rewrite, there may be significant scope for more improvement in this area, and helpful views on this issue have been offered by Beighton (1995) and Avery Jones (1996). A move towards the purposive approach would be a useful aspect of an overall strategy of tax simplification.

More generally, the way forward seems to be to incorporate simplification into tax policy itself in a rather more determined way than appears to have been done in the past. It would, of course, be only one of a range of goals of tax policy and there are perhaps some rather more important ones, such as equity. However, the Inland Revenue has a list of considerations in evaluating proposals for tax reform (see, for example, HM Treasury (1986, vol. 2, p. 314)). They include the effect of a proposal on increasing or reducing the complexity of the tax system, and perhaps this criterion should be given considerably more weight. One place to start is the meaning of simplification as outlined in Section II. From there, it would clearly be possible to derive a set of guidelines for simplicity in tax policy. It would not, of course, be the case that these would necessarily override other objectives, but their adoption might ensure that simplification became a routine part of the development of tax policy. The Inland Revenue (1995b, para. 2.11) refers encouragingly to the creation of a 'simplification "culture" within the

Revenue which it is important to maintain and encourage' and it would seem desirable for such a 'culture' to be promoted throughout the tax policymaking process. A further aspect of a successful strategy is to be able to measure progress. There are different approaches to such measurement (see, for instance, Wallschutzky (1995)), but it would be an important means of ensuring that progress was maintained and that reversals could be identified and perhaps remedied as appropriate.

Finally, as stated at the beginning of the article, the initiatives of both the UK Tax Law Review Committee and the Inland Revenue are very much to be welcomed. However, they should be reinforced by a more fundamental strategy for simplification which is incorporated into the tax policy process itself.

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