Defining Legislative Complexity
A Case Study: The Tax Law Improvement Project

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Since 1990, both Commonwealth and State governments have responded to complaints concerning the complexity of statute law by embarking upon substantial law simplification projects. At the State level, a Stamp Duty Harmonisation Rewrite Project is underway.[1] At the Commonwealth level, law simplification projects have already been completed in respect of the social security law[2] and the sales tax laws.[3] Currently, there is an ongoing rewrite of the Corporations Law and a rewrite of the income tax laws. All of these projects seek improvements in efficiency arising from simple, easy-to-understand legislation.

Given the significant resources committed to these projects by governments and the community it is important that the projects have clearly stated objectives and that they achieve these objectives. Yet in recent times there has been increasing criticism of the revenue law projects on the basis that they will not achieve any substantial simplification of the law.[4] In this paper we will undertake a case study of the rewrite of the income tax laws (the Tax Law Improvement Project: 'the Project') to demonstrate that this concern

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1 This project involves the States of New South Wales, South Australia, Tasmania and Victoria and the Australian Capital Territory. The stamp duty Acts and the administrative Acts are the primary focus of the project team, with draft legislation being released on 31 July 1995. Similar projects are planned for payroll taxes and financial institutions duty - see 'Stamp duty slug feared in rewrite', *Australian* (Aug 2, 1995) p 35.

2 *Social Security Act* 1991 and *Veterans' Entitlements Amendment Act* 1991.

3 *Sales Tax Assessment Act* 1992 *and Sales Tax (Exemptions and Classifications) Act* 1992.

4 For example, in respect of the Stamp Duty Harmonisation Rewrite Project: 'Draft stamp duty rewrite on track but needs work' *Australian Financial Review* (Aug 8, 1995) p 35 and in respect of the Tax Law Improvement Project: G Lehmann 'The reform that does not reform and the simplification that does not simplify - the Tax Law Improvement Project fiasco' [1995] 33 *Butterworths Weekly Tax Bulletin* at para 675.

reflects the prevailing uncertainty as to the nature of legislative complexity. We argue that the Project's first task should have been to define clearly the legislative complexity which it attempts to address. The generally accepted view is that income tax legislation is intrinsically complex, and therefore the focus of the project should be upon defining 'excessive complexity'. The article considers the difficulties in defining excessive complexity, and suggests that the definition of excessive complexity entails key policy decisions concerning the purpose for which the legislation is written.

Genesis of the Project

Since the *Income Tax Assessment Act 1936* (the Act) was introduced in 1936, it has grown from 126 pages to over 5,000 pages. Furthermore, the body of relevant income tax case law has, at least according to anecdotal evidence, increased, and of course there is the relatively recent innovation of the Commissioner's rulings (which, for many taxpayers unwilling or financially unable to challenge them, amount to a further body of law). Whilst the bulk of these sources of 'law' are not the sole or even the primary source of tax complexity, the growth of the Act reflects the scale of the problem confronting those seeking to identify and minimise tax complexity.[5]

Each day tax administrators, tax practitioners and taxpayers must delve into this wealth of material in search of the rules, whether specific or general, dealing with their particular problems. Hopefully the relevant rules are found, at which point they must be interpreted and applied in light of the particular facts being considered. The difficulty of this process has given rise to protests that the tax legislation is complex, although these protests are not new.

Over the last five years the professional accounting and law bodies have been outspoken in their criticism of the complexity of the Act and have called for its simplification.[6] The impetus for this concerted

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5 As an example of this growth rate, in 1994 alone over 6000 pages of bills, explanatory memoranda, court case reports and tax rulings and determinations were issued: see 'Tax laws a feast of Xmas reading', *Australian Financial Review* (Dec 16, 1994) p 3. This consisted of 14 tax-related bills, 32 tax rulings, 42 draft tax rulings, 98 tax determinations, 116 draft tax determinations, 13 superannuation guarantee rulings and determinations, 5 draft superannuation guarantee rulings and determinations, 86 Administrative Appeals Tribunal decisions and 116 court decisions, plus press releases from the Government, Australian Taxation Office (ATO), Insurance and Superannuation Commission and minutes of ATO tax liaison groups: see '1994 - a busy tax year' [1994] *CCH Tax Week* 905.

6 For example: 'Enough to give you a complex' (1991) 26 *Taxation in Australia* 244; 'A recalcitrant child' (1991) 26 *Taxation in Australia* 247;

effort can be traced back to statements made on 15 February 1990 by the then Treasurer Paul Keating advocating a simplification of the Act.[7]

At that time perceptions of the complexity of income tax laws had reached the point that even members of the High Court expressed concern at the difficulty of applying the legislation to relatively simple transactions.[8] Justice Hill noted that one section had been drafted:

> with such obscurity that even those used to interpreting the utterances of the Delphic oracle might falter in seeking to elicit a sensible meaning from its terms.[9]

The Project

The Tax Law Improvement Project arose out of this public criticism of the complexity of the Act, delays in reform[10] and the recommendation by the Commonwealth Parliament's Joint Committee of Public Accounts[11] that a priority redraft of the Act be undertaken.[12] The project team was established in mid-December 1993 to redraft the Act.[13] The time limit for the redraft is three years, commencing from 1 July 1994.[14]

Scope of the Project

The scope of the project is identified as being merely the rewording, renumbering and restructuring of the existing legislation. *Information*

'Experts step up pressure to simplify the tax laws' *Australian Financial Review* (Nov 12, 1993) p 7.

7 Statement by Treasurer, the Hon Paul Keating MP, 'Tax Simplification' (1990) 24 *Taxation in Australia* 602.

8 *Hepples v FCT* 91 ATC 4808, per Mason CJ at 4810 and Deane J at 4818-19.

9 *FCT v Cooling* 90 ATC 4472, 4488.

10 In a press release on 13 December 1990, the Treasurer made his first response: see 'Income Tax simplification: The first instalment' (1990-91) 25 *Taxation in Australia* 557. This response was criticised as lacklustre and the pressure for reform continued: see 'Simplicity Marathon: Hares and Tortoises' (1991) 26 *Taxation in Australia* 248.

11 Joint Committee of Public Accounts, *Report No 326: An Assessment of Tax - A Report on an Inquiry into the Australian Taxation Office* (AGPS, 1993). A discussion of this report may be found in A Towler, 'Tax Law Improvement - An Overview' (1994) 6(5) *The CCH Journal of Australian Taxation* 14.

12 Id, recommendation 22; also paras 5.22-5.38.

13 Treasurer's Press Release No 172/1993 of 15 December 1993.

14 Treasurer's Press Release No 17/1994 of 20 February 1994.

Paper No 1, released by the project in August 1994, clearly states that the rewrite will not entail a consideration of taxation policy.[15] One major reason for not engaging in discussion regarding Australian income tax policy is to prevent the project becoming 'bogged down in policy debate'.[16]

The project team was instructed to concentrate initially on the core provisions of the income tax law (concepts of income, deductions and rebates), with discussion papers and exposure drafts of legislation being released progressively.[17] In August 1994 the Joint Committee of Public Accounts released draft legislation[18] on the substantiation provisions. In May 1995 it released *Information Paper No 2*[19] and three legislative drafts covering the key provisions of the income tax law,[20] the mining, quarrying and petroleum mining industries provisions[21] and the loss deduction provisions.[22] On 27 July 1995 the Assistant Treasurer released further exposure drafts in respect of trading stock[23] and building write-offs.[24]

Evaluation of the Project

The Taxation Laws Improvement Project appears to suffer from a mission statement which is imprecise in a number of respects. Conflicting statements in *Information Paper No 1*,[25] *Information Paper No*

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15 Tax Law Improvement Project, *Information Paper No 1: The Broad Framework* (AGPS, 1994) reprinted in *Australian Federal Tax Reporter* (CCH) p 100,001.

16 Id at Appendix 1.

17 Assistant Treasurer's Press Release No 87/1994 of 12 July 1994.

18 Tax Law Improvement Project, *Exposure Draft No 1: Substantiation* (AGPS, 1994); Granted Royal assent on 7 April 1995 as *Tax Law Improvement (Substantiation) Act* 1995 (No 30 of 1995).

19 Tax Law Improvement Project, *Information Paper No 2: Building the New Law* (AGPS, 1995).

20 Tax Law Improvement Project, *Exposure Draft No 2: Income Tax Assessment Bill 1995* (AGPS, 1995).

21 Tax Law Improvement Project, *Exposure Draft No 3: The Mining, Quarrying and Petroleum Mining Industries* (AGPS, 1995).

22 Tax Law Improvement Project, *Exposure Draft No 4: Deductions for Losses* (AGPS, 1995).

23 Tax Law Improvement Project, *Exposure Draft No 5: Assessable Income - Trading Stock* (AGPS, 1995).

24 Tax Law Improvement Project, *Exposure Draft No 6: Deductions: Particular Items - Building Write-offs* (AGPS, 1995).

25 Tax Law Improvement Project, *Information Paper No 1: The Broad Framework* (AGPS, 1994).

2,[26] and the seminar paper 'The Tax Pyramid'[27] (the Seminar Paper), demonstrate that there is uncertainty about what sort of complexity is being addressed and for what audience the legislation is being drafted. Without these two items being established clearly from the outset, the language and the structure of the Draft becomes inconsistent.

What is Complexity?

In an ideal world, perhaps, all things would be simple. Many commentators recognise that the income tax is intrinsically complex. It would therefore appear to be generally accepted that an income tax necessarily brings with it a certain amount of complexity.[28]

However, while the literature dealing with tax complexity proceeds upon the view that the existing income tax legislation is complex, no valid attempt has been made to identify how complex (or simple) it ought to be. [29] Furthermore, with few exceptions, no article seeks to identify just where the income tax is on the complexity spectrum other than apparently accepting the proposition that the income tax is simply 'too complex'.

This failure to identify the extent of complexity in the modern income tax and to identify a point of optimal complexity is attributable to the

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26 Tax Law Improvement Project, *Information Paper No 2: Building the New Law* (AGPS, 1995).

27 B Nolan, R Allerdice and S Gaylard, 'The Tax Pyramid' (1995) a Tax Law Improvement Project seminar paper presented in Perth, Sydney, Melbourne and Brisbane in June/July.

28 See, for example, B Bittker, 'Tax Reform and Tax Simplification' (1974) 29 *Uni of Miami Law Rev* 1; S Surrey, 'Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail' (1969) 34 *Law and Contemporary Problems* 673.

29 See, for example, ES Cohen, 'A New Decade for Taxes and the Search for Simplification' (1970-71) 4 *Indiana Legal Forum* 19; GSA Wheatcroft, 'The Present State of the Tax Statute Law' (1968) *British Tax Rev* 377; R Couzin, 'The Process of Simplification' (1984) 32 *Canadian Tax Journal* 487; HH Monroe, 'Fiscal Statutes: A Drafting Disaster' (1979) *British Tax Rev* 265; J Clark, 'Statutory Drafting' (1980) *British Tax Rev* 326; GSA Wheatcroft, 'A Six-Finger Exercise in Statutory Construction' (1965) *British Tax Rev* 359; S James and A Lewis, 'Fiscal Fog' (1977) *British Tax Rev* 371; C McLure, 'The Budget Process and Tax Simplification/Complication' (1989) 45 *Tax Law Rev* 25; 'The Uncertain Potential of Tax Simplification - A Roundtable discussion of the CCH Tax Advisory Board', (1992) *Taxes* 635. This minimum level of complexity *might* be removed, or at least lowered, if society was prepared to forsake its tax equity ambitions for a modified income tax base or another tax base altogether, such as expenditure.

difficulty of developing a valid means of measuring complexity. If there is no generally accepted means of measuring complexity, it is difficult to validate a claim that a particular tax reform measure will produce a simpler income tax.[30] It is therefore very difficult for tax reformers to chart the path from the perceived complexity of the present system to an optimum level of complexity (or simplicity).

Whilst the objective of the project is apparently to reduce the complexity of the Act, nowhere in the Joint Committee of Public Accounts Report or the various publications associated with the project is there a definition of complexity. Furthermore, commentators have generally accepted that some degree of complexity (which once again is generally left undefined) goes hand in hand with the income tax.

Before turning to a consideration of various attempts to define tax complexity, the reasons for seeking tax simplification should be canvassed, as these reasons may condition the approach required to defining what is 'tax complexity'.

Justification for a Simpler Income Tax System[31]

(a) Cost of tax compliance

Those who do consider why a simpler taxation system is desirable focus upon the economic benefits from tax simplification.[32] Uncertainty is said to flow from excessive complexity and such

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30 Furthermore, assuming that the tax simplification proposal is only to be adopted if tax equity remains constant, it may be difficult to develop an accurate means of measuring tax equity: for a discussion of this see V Thuronyi, 'The Concept of Income' (1990) 46 *Tax Law Rev* 45.

31 There are also some arguments against a tax system which is too simple. Some commentators argue that it is impossible specifically to provide for all circumstances in the complex modern world (if it ever was possible to provide for all circumstances in the perhaps mythical golden era of the past). These commentators suggest that an element of discretion is therefore essential to the operation of the taxation system. One advantage of such discretion, it is said, is that taxpayers are more likely to shun the cost of obtaining tax avoidance advice and implementing tax avoidance arrangements if the outcome is too uncertain because of discretionary powers vested in the Commissioner or the courts. Discretion is therefore seen as an important tool in protecting the revenue base. Another advantage is that discretion may allow the relevant authority to relieve a taxpayer of a tax liability in circumstances where 'fairness' considerations indicate that there should be no tax liability.

32 See, for example, Y Grbich, *Operational Strategies for Improving Australian Tax Legislation* (Monash University Law School, 1984).

uncertainty, it is generally maintained, is counterproductive to the economic development of the country for a number of reasons.[33] As taxpayers are unable to ascertain the taxation liability arising from a proposed venture, they are compelled to seek expensive legal advice or legal representation in consulting with the tax administration. If entrepreneurs are unable to determine with some degree of certainty the profit potential, the argument suggests, entrepreneurs will favour activities where the profit outcome is more predictable. Economic neutrality is therefore jeopardised by tax complexity.

(b) Cost of tax administration

Furthermore, from the tax administration perspective, the complexity experienced by taxpayers is also experienced by the tax administrators, often compelling them also to seek legal advice and litigate provisions of the legislation which have an indefinite meaning. The cost of raising revenue is therefore increased.

The income tax would be cheaper to administer both from the government's perspective[34] and also, in an age of taxpayer self-assessment, from the perspective of the taxpayer. Furthermore, a portion of the nation's limited resources are devoted to determining the liability of taxpayers to income tax, when clearer, more certain and simpler laws would enable such resources to be directed elsewhere in the economy. As such, uncertainty in taxation is counterproductive to the national good.

(c) Interaction of tax complexity and the self-assessment system

A further reason for certainty is that uncertainty of taxation law might actually reduce the revenue raised under a self-assessment tax system. At present taxpayers face considerable penalties if they do not, at the least, exercise reasonable care or, in certain circumstances, adopt a reasonably arguable position.[35] Of course, where there is uncertainty there is the option available to the taxpayer of seeking a private ruling from the Commissioner of Taxation.

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33 See, for example, Law Reform Commission of Victoria, *Report No 9: Plain English and the Law* (1987) p 59; 'Counting the Costs' (1991) 26 *Taxation in Australia* 248; and B Nolan and T Reid, 'Re-Writing the Tax Act' (1994) 22 *Federal Law Rev* 448 at 450.

34 Id, Law Reform Commission of Victoria, at p 62.

35 A taxpayer need only adopt the more stringent test of a reasonably arguable position in certain as to why circumstances: see *Income Tax Assessment Act* 1936, s 226K. All taxpayers, however, must exercise reasonable care (s 226G) or face penalties if their lack of care produces a lower tax liability than would have applied otherwise.

However, there are a number of reasons why taxpayers may not wish to seek such a ruling. One key reason is that if the law is uncertain it would only be reasonable to expect the Commissioner to issue a ruling which maximises the revenue. If the taxpayer disregards such a ruling penalty, tax may be imposed. In cases where there is uncertainty as to the proper scope of the law there is therefore little advantage to the taxpayer in notifying the Commissioner of the facts and being told that tax is payable.

Taxpayers in such circumstances can reasonably be expected to engage professional assistance in establishing a reasonably arguable position to their own advantage and not notifying the Commissioner of the specific facts of their circumstances. If the taxpayer is subsequently audited and the Commissioner disagrees with the taxpayer's self assessment, no penalty tax will be payable.[36] The taxpayer is therefore encouraged to play a game of chance: chance that the Commissioner won't audit the taxpayer; if audited, chance that the auditor will not discover the particular circumstances of concern to the taxpayer; if discovered chance that the auditor will not take a contrary view to that of the taxpayer; if the auditor does take a contrary view chance that the taxpayer's 'reasonably arguable position' is indeed considered by the Commissioner or the courts to be reasonable and upheld.

(d) Tax complexity and the rule of law

An uncertain tax also runs the risk of generating disrespect for the rule of law.[37] If taxpayers perceive that their responsibilities under the income tax are a game of chance, the widely held perception of the law as a body of rules to be followed may break down. Voluntary compliance will suffer and greater cost will be incurred by the tax administration in adopting measures which protect the revenue.

It has also been argued that complex income-tax law will merely encourage inept tax advisers and discourage thorough tax advisers. The argument is founded upon the view that if the tax law is so uncertain as to preclude the provision of reasonably certain advice, tax advisers who thoroughly research the relevant law will not be able to justify the fees that they charge for such thorough research if the advice that they give is merely that there is no reasonably certain view as to the client's tax liability. In such circumstances, tax advisers who do not thoroughly research the law will predominate as they will be

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36 Although the proper amount of tax and interest thereon will be payable.

37 For example see R Parsons, 'Income tax - An Institution in Decay?' (1986) 12 *Monash Uni Law Rev* 77.

able to charge less for their equally uncertain advice. This phenomenon is known as Gresham's Law.[38]

(e) Tax complexity and the political process

Another argument for tax certainty is that it allows for a widespread and informed debate upon taxation policy issues. On this view, it is essential to the functioning of democracy that the public understand the rationale for tax reform choices, and that the forerunner to this understanding is an understanding of the legislation as it presently stands.[39]

This discussion of the objections to tax complexity suggests that tax complexity is not necessarily the same thing to all people. A tax adviser might emphasise the costs of tax compliance. Such a tax adviser might embrace an income tax which was expressed so that a tax expert could understand it with minimum effort. On the other hand, others might decry the writing of tax legislation for an elite, and instead demand tax legislation which was readily accessible to the average member of the public.

Criteria for Evaluating Complexity

On the basis that complexity is in the eye of the beholder, it is difficult to conceive of a generally acceptable measure of complexity. However, there have been some limited attempts to establish a complexity calculus.

(a) Piecemeal approaches to defining and treating complexity

(i) Plain English

One example of a test of complexity was posited by the Victorian Law Reform Commission, which focussed upon the readability of the tax legislation as the basis for determining whether or not it was excessively complex.[40] The Commission redrafted a portion of the Act in simple English,[41] and suggested that complexity could be substantially reduced if the legislation was rendered more readable.[42]

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38 Committee on Tax Policy of the New York State Bar Association's Tax Section, 'A Report on Complexity and the Income Tax' (1972) 27 *Tax Law Rev* 325.

39 See, for example, C Havighurst and R Hobbet, 'Foreword' (1969) 34 *Law and Contemporary Problems* 671.

40 See generally Law Reform Commission of Victoria, note 33 above, at Chapter 3 and Appendix 1.

41 The Law Reform Commission of Victoria rewrote Division 16E of Part III at the request of the Law Council of Australia and submitted a draft to the Australian Taxation Office for comment: see Law Reform

But this suggestion confuses the issue of certainty - a provision may be easily read and understood, but may nevertheless fail to produce a result which is certain. An administrative discretion couched in general terms is a good example of apparent simplicity masking seething complexity. Furthermore, the simple-English approach fails clearly to outline what level of understanding is required before excessive complexity is considered. 'Income' as it appears in s 25 of the Act may be read and understood at some level by most people, but can anybody really claim to understand the income concept such that they can safely predict the outcome of the most contentious cases? There are therefore substantial criticisms of the simple-English approach to determining the existence of legislative complexity.

(ii) Length of the legislation

Other commentators refer to the length of the Act and its related legislation as evidencing its complexity, but they do not explain why length, of itself, produces complexity.[43] Detailed provisions which run to great length may produce optimal simplicity if those reading the legislation can readily find what they need and be assured that they will thereby obtain a reasonably certain answer. Furthermore, in the computer age, length of legislation is arguably becoming less significant.[44]

From the foregoing discussion, it may be seen that there is little point in singling out one aspect of the income tax legislation for the purpose of measuring the complexity of the income tax overall. The simple-English and length-of-legislation approaches suffer from crippling shortcomings if taken as general tests of tax complexity. However,

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Commission of Victoria, *Annual Report 1990-1991*, p 7. It was touted as a great advance (see 'Snappy language: The Dingo Division' (1991) 26 *Taxation in Australia* 246), but also met with criticism (see I Turnbill, 'Simplification: Dingos Revisited' (1992) 27 *Taxation in Australia* 79; and AH Slater, 'Principle or prescription? Simplified tax legislation involves much more than "plain English" redrafting' (1993) 1 *Taxation in Australia* (red edn) 119). Also see response: DStL Kelly, 'Simplification: Dingos Revitalised' (1992) 27 *Taxation in Australia* 270.

42 See also James and Lewis, note 29 above.

43 See, for example, T Boucher, 'Tax Simplification - Some Different Dimensions' (an address by the Commissioner of Taxation to the Monash University Law School Foundation in Melbourne on 3 September 1991) p 2; 'The simplification debate: Too simplistic' (1991) 26 *Taxation in Australia* 277.

44 Note the insight of H Stone, who suggests that the ever-increasing length of legislation would put pressure on some new technology to facilitate the speedy location of relevant law: H Stone, 'Some Aspects of the Problem of Law Simplification' (1923) 23 *Columbia Law Rev* 319.

they may have a subsidiary role to play in a more wide- ranging measurement of complexity.

(b) General tests of complexity

Cost of compliance

One definition of income tax complexity was suggested by the Committee on Tax Policy of the New York State Bar Association's Tax Section. In its report, the Committee stated that complexity existed where:

> (1) A reasonably certain conclusion cannot in some instances be determined despite diligent and expert research.
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> (2) A reasonably certain conclusion can be determined in other instances only after an expenditure that is excessive in time and dollars.[45]

This definition links complexity with certainty, in that the test of complexity becomes a question of how readily a reasonably certain answer to a particular tax problem may be ascertained. There is good reason, on the basis that interpretive simplicity is achieved with certainty of tax rule application, to collapse the issues of interpretive complexity and tax certainty into the one question of *certainty*.

One key shortcoming of the definition noted above is that it does not specify from whose perspective the test is to be applied. The reference to 'expert research' suggests that tax complexity is to be measured from the professional tax adviser's viewpoint. This therefore leaves no room for the non-elitist approach to tax complexity noted above.

A further observation is that this definition of complexity is itself complex (applying the definition to itself) in that it is difficult, if not impossible, to apply the definition to particular factual cases and reach a definitive result. This is largely attributable to the subjectivity of such terms as 'reasonably certain' and 'excessive expenditure'. These shortcomings suggest that it is not possible to objectively define tax complexity.

(c) Conclusion on defining complexity

The limitations of both piecemeal and general tests of complexity have produced an environment where commentators focus upon one provision or part of the tax legislation rather than attempt some more general measure of complexity. The rationale adopted by these commentators appears to be that if they can't measure complexity

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45 See note 38 above, at 327.

overall, they can nevertheless isolate particular instances of complexity and deal with them individually.

This approach therefore proceeds upon the implicit assumption that the extent of complexity is merely the sum of all instances of individual complexity - curing all such instances of complexity which can be cured will therefore lead to an optimally simplified income tax. The problem with this approach is that it assumes that instances of complexity can be treated in isolation - there is no scope for a holistic approach to the problem. Turgid expression, length of legislation, uncertainty and the bewildering array of sources of the law are just some examples of more general facets of the income tax legislation which may contribute to complexity. Isolating Div 6AA of the Act and suggesting how its technical features might be simplified moves us little nearer to that elusive general conception of complexity which is needed if a general project such as the tax law improvement project is to identify its goals and achieve them.

Furthermore, the choice of a measure of complexity is inherently value laden and the differing users of the tax system will have different perspectives on the complexity of that system. In the absence of some workable utilitarian calculus for minimising complexity (which itself would be applied according to political preferences in choosing between aggregate complexity or minimising complexity for the greatest number), we must face the fact that the nature of complexity will depend upon the perspective from which the legislation is viewed. As such, the project must choose the group of users for whom the legislation ought to be simplified. As already noted, this is a choice with practical consequences for the role of the income tax law in our society.

Specific Problems with the Project

(a) No definition of excessive complexity

At present, the publications associated with the project offer only a fragmentary view of what the rewritten legislation ought to achieve. At differing places in the papers there appear differing criteria of complexity. Length is cited as one criterion of complexity. However, in other places in the Information Papers it has been suggested that length is ultimately irrelevant, and that it is the structure and other aspects of the legislation which determine the degree of complexity. Cost of compliance is another criterion alluded to in the documentation,[46] yet there is no indication as to what compliance

46 See the foreword of the Assistant Treasurer to *Information Paper No 1*, note 15 above.

costs will be acceptable such that the success of the project can be measured.

On the basis of the foregoing consideration of the problem it might be suggested that complexity is in the eye of the beholder, and ultimately the criteria which must be applied in determining the optimum level of complexity will depend upon the readership targeted by the revised legislation.

(b) The target audience

The Information Papers and other publications associated with the project adopt an erratic approach to the identification of the reader for whom the revised legislation ought to be written. The target audience of the simplified legislation was initially identified in *Information Paper No 1* as the individual taxpayer. The Paper endorses the proposition that the Act ought to constitute a comprehensible and comprehensive statement of taxpayer obligations. It concludes that the Act:

> has long since ceased to be a document that can be used by people to understand their rights and obligations under the tax law.

Information Paper No 2 reiterated this objective in stating:[47]

> We want to restructure and rewrite the tax law so that a reader can:
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> - open up the new law;
> - follow a path that takes him or her to exactly those provisions that apply to him or her (or his or her client);
> - be certain that he or she has found all the relevant provisions; and
> - understand and apply those provisions.
>
> If we can achieve that, then we will also have more people understanding their tax rights and obligations. They will be able to work out more easily what tax they have to pay and they will save time and money.

Further, when speaking of the signposting to be adopted in the Draft, the project team stated in *Information Paper No 2*[48] that:

> Eventually, by following these signposts a reader will find all the information they need to tell them exactly what the tax obligations are for a person in their position and circumstances [*sic*].

These statements imply that the legislation is to be redrafted so that the ordinary taxpayer will be able to understand his or her obligations under the legislation. The use of the word 'you' throughout the Draft and the educative nature of various sections of the Draft support this

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47 See note 19 above, at 5.

48 See note 19 above, at 9.

approach. This objective would therefore suggest that the purpose of the project was to open the tax legislation to wider scrutiny and understanding, primarily so that taxpayers with a do-it-yourself bent could more easily complete and lodge their own tax returns. Of course, a further consequence of this approach might have been to open the tax legislation to wider scrutiny and possibly greater understanding within the community, thereby facilitating a more informed tax policy debate.

However, by late 1994 the project team determined that it was impractical to focus on this audience as the rewritten law would have been unsuitable for the reader who could be expected to make the greatest use, the tax professional.[49] Thus, the revised target group was to be the tax professionals. By June 1995 there appears to have been another change in focus. In the Seminar Paper[50] it was stated that the project should target 'the suburban tax agent as a typical audience'.

However, if the project is to rewrite the legislation so that a suburban tax agent regards the legislation as, if not simple, at least not excessively complex, many of the existing provisions need not be rewritten. The new focus of the project would seem to require the identification of those provisions commonly used by suburban tax agents which are perceived as excessively complex. Many of the provisions which might be regarded as complex (the CFC rules contained in Part X are perhaps one example), would only be considered by a suburban tax agent in a small number of cases, and would therefore not be considered as within the scope of the project. Likewise, the provisions dealing with mining expenditure are more likely to be encountered by 'city' rather than suburban tax agents, and there would therefore appear to be little point in rewriting those provisions given the focus of the project.

However, despite this change the language of the Draft does not reflect the new audience. It fails to reflect in the drafting the education and experience of the 'suburban tax agent'. Registration requirements in s 251J and s 251BC of the Act require that an applicant for registration as a tax agent should hold the qualifications prescribed in reg 156 of the *Income Tax Regulations*.[51]

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49 Nolan and Reid, note 33 above, at 457.

50 Nolan, Allerdice and Gaylard, note 27 above, at 3.

51 For example the prescribed qualifications for an applicant accountant under reg 156 are that the applicant must have a degree, diploma or other qualification from a tertiary institution in accountancy or law; have been employed in *relevant employment* at least 12 months out of the last 5 years; and have completed a course of study in Australian tax law by passing a written examination. Reg 156(2) defines 'relevant

Further, the case law in the late 1980s and early 1990s reveals that, given these strict requirements, it is very difficult to be registered, unless the applicant possesses considerable knowledge of the application of the Act across a wide range of taxpayers and has some years experience practising as an employee to a tax agent (see *Re Culmer v Tax Agents' Board*,[52] *Re Civiti v Tax Agents' Board of Victoria*[53] and *Re Chenouda v Tax Agents' Board of NSW*).[54]

Therefore, suburban tax agents should be familiar with basic taxation law concepts like 'income from ordinary concepts' and would not require the educative focus contained in the Draft. They would tend to gloss over the superficial complexities of the Act such as the numbering of the provisions and even the organisation of the provisions. After all, it would also be reasonable to expect such tax agents to have an adequate professional library which would readily direct them to the relevant provisions of the Act.

What is of concern is that despite the clear statement of the 'new' target audience in the Seminar Paper, it is clear that the Draft is not focused to this end. In fact, the Seminar Paper states that sub-division 6B gives readers 'for the first time...some insight into what income from ordinary concepts really means'.[55]

In light of the target audience's qualifications and experience requirements, this sentence indicates that the sub-division was not written for this audience. Therefore, the pitch of the Draft should be changed to recognise the education and experience level of its new target audience.

(c) Exclusion of tax policy

In the context of uncertainty as to the definition of complexity and the user for whom the tax legislation ought to be written, the exclusion of a reconsideration of income tax policy is unfortunate and founded upon a misconception of the relationship of tax policy and tax administration in the widest sense. The premise of this exclusion is that tax simplification can be divorced from issues of tax policy, when this is not the case at all.

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employment' as employment involving substantive tax matters including the preparation of a wide range of returns, the preparation or examination of objections to assessments, and the provision of advice in relation to income tax returns, assessments or objections.

52 90 ATC 2018.

53 90 ATC 2039.

54 91 ATC 2027.

55 Nolan, Allerdice and Gaylard, note 27 above, at 8.

Indeed, this 'method' of tax simplification has been criticised in other jurisdictions. Surrey, writing in 1973, commented that:

> The efforts at tax simplification are rarely preceded by a consideration of what factors make for tax complexity and whether those factors are inherent in an income tax or instead are the result of faulty policies or faulty techniques.[56]

Much of the perceived complexity may be attributed to the absence of a coherent income concept embodied in the legislation. While Surrey saw this absence of coherence as the product of inserting tax expenditures into the Internal Revenue Code which distorted an essentially coherent income concept[57] (an argument which could equally be applied in Australia), Bittker contended that the income concept was inherently fuzzy and argued that any income tax legislation represented no more than an ad hoc identification of taxable events/circumstances.[58] To Surrey, tax simplification should proceed by excising tax expenditure provisions and restoring coherency to the income tax, while to Bittker simplification was more problematic, as the only approach to simplification was to minimise overly technical writing and adopt aids to assist navigation through the maze of tax legislation.

Whichever approach is the better one, it is significant that the Tax Law Improvement Project has failed to identify what steps might be taken towards producing a coherent concept of income for income-tax purposes or, indeed, assessing whether a more coherent income tax is feasible.

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56 S Surrey, *Pathways to Tax Reform* (Harvard University Press, 1973) p 34.

57 Id, at pp 18-22. Note that Surrey recognised that the Haig-Simons definition was impracticable for a contemporary income tax, but he appeared to suggest that an income tax would gradually come to use the 'economic' definition of income as community perceptions of what constitutes income move closer to the economic definition of income postulated particularly in H Simons, *Personal Income Taxation* (University of Chicago, 1938) p 50.

58 B Bittker, 'A Comprehensive Tax Base as a Goal of Income Tax Reform' (1967) 80 *Harvard Law Rev* 925. For a discussion of Bittker's approach, see R Musgrave, 'In Defense of an Income Concept' (1967) 81 *Harvard Law Rev* 44; J Pechman, 'Comprehensive Income Taxation: A Comment' (1967) 81 *Harvard Law Rev* 63; CO Galvin, 'More on Boris Bittker and the Comprehensive Tax Base: The Practicalities of Tax Reform and the ABA's CSTR' (1968) 81 *Harvard Law Rev* 1016; S Surrey and I Hellmuth, 'The Tax Expenditure Budget - Response to Professor Bittker' (1969) 22 *National Tax Journal* 528; B Bittker, 'The Tax Expenditure Budget - A Reply to Professors Surrey and Hellmuth' (1969) 22 *National Tax Journal* 538.

Whilst we are not suggesting that the implementation of the Haig-Simons[59] definition of income should be the primary source of tax simplification, there is certainly good reason to reconsider the income concept as presently understood in the context of the Act.

Other issues of tax policy which might have been addressed with a view to their impact on tax law simplification include the identification of tax entities (for example, should the family unit be taxed? and should the company be treated as a separate entity in all circumstances?) and the role of 'tax expenditures' (although note Bittker's criticism of the term) in the income tax legislation.

The exclusion of a reconsideration of income tax policy therefore represents a missed chance to do 'something fundamental'.[60] The missed chance was to redefine the policy of the Act so that the fundamental concepts were more readily identified. If this re-consideration of tax policy had been undertaken, it just may have been possible that the legislation would have been simpler, at least to the tax practitioner and, to some extent, to the ordinary reader. At present, the suggestion that the project will mean that the Act will be 'more easily understood by a wider range of people, with the result that analysing and debating tax policy will be improved and made more open'[61] does not sit well with a rewritten Act that targets the suburban tax agent. How will legislation which is directed at people with a considerable understanding of income tax facilitate the open discussion of tax policy?

Conclusion

Given that income tax law is intrinsically complex, it is essential that in any tax law simplification project an acceptable level of complexity be determined. What is an acceptable level of complexity will depend upon questions of policy. A law of taxation capable of being understood by the 'ordinary' person is impossible in the context of a legal system which is not widely understood. An accessible and understandable taxation law may be a worthy objective, but it will

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59 See note 57 above.

60 During evidence provided to the Joint Committee of Public Accounts, the ATO stated (at vol 1, p 31) that:

> We must do something fundamental... To use another analogy, the snowball has been rolling down the hill for a long time now, threatening to bury us. It might not be this year or next year but we can see that in time it will happen. I believe that Australia, along with other developed countries which have much the same legislative problem, has to turn its attention to dealing really fundamentally with that issue.

61 See note 15 above.

only be achieved by reform of the legal system overall (if that is possible). The Tax Law Improvement Project must therefore adopt more modest objectives. If the target audience is to be the tax professional at some level, larger-scale testing should be undertaken to determine the appropriate level of tax professional for whom the tax law ought to be rewritten.[62] Once the targetted readership has been identified, the appropriate level of complexity must be defined. Such a process ought not exclude a review of the policy objectives of the income tax law.

62 Rather than testing just 18 individuals: see Nolan and Reid, note 33 above, at 459.