



A U S T R A L A S I A N
TAX TEACHERS ASSOCIATION

JOURNAL
OF THE
AUSTRALASIAN
TAX TEACHERS ASSOCIATION

2013
Vol.8 No.1

Edited by
MARK R KEATING

Postal Address:
JATTA, c/o School of
Taxation and Business Law
University of New South Wales
NSW 2052 Australia

Kathrin Bain
Ph: +61 2 9385 9541
E: kbain@unsw.edu.au

The Journal of the Australasian Tax Teachers Association ('JATTA') is a double blind, peer reviewed journal. The Journal is normally published annually, subsequent to the Association's annual conference.

The Australasian Tax Teachers Association ('ATTA') is a non-profit organisation established in 1987 with the goal of improving the standard of tax teaching in educational institutions across Australasia. Our members include tax academics, writers, and administrators from Australia and New Zealand. For more information about ATTA refer to our website (hosted by ATAX at the University of New South Wales) at <http://www.asb.unsw.edu.au/schools/taxationandbusinesslaw/atta>.

Please direct your enquiries regarding the Journal to the Editor-in-Chief:

Professor Dale Pinto
Professor of Taxation Law
School of Business Law and Taxation
Curtin University
GPO BOX U1987 Perth WA 6845
E: Dale.Pinto@cbs.curtin.edu.au

Editorial Board of the Journal of Australasian Tax Teachers Association:

Professor Dale Pinto, Curtin University, Perth, Australia (Editor-in-Chief)
Professor Neil Brooks, Osgoode Hall Law School, York University, Toronto, Canada
Associate Professor Paul Kenny, Flinders University, Adelaide, Australia
Professor Margaret McKerchar, UNSW, Sydney, Australia
Professor John Prebble, Victoria University of Wellington, NZ
Professor Adrian Sawyer, University of Canterbury, NZ
Professor Natalie Stoianoff, University of Technology Sydney, Australia
Professor Miranda Stewart, University of Melbourne, Australia
Professor Kerrie Sadiq Queensland University of Technology, Australia
Associate Professor Andrew Smith, Victoria University, NZ

ISSN: 1832-911X

Volume 8 Number 1 published December 2013

Copyright © 2013 Australasian Tax Teachers Association

TABLE OF CONTENTS

FOREWORD (Heading 1)

| | |
|--|-----|
| Multinational Business Restructuring: Are Tax Authorities Trying to Hold Back the Tide? JULIE HARRISON, CHRISTINA STRINGER, AND JASNEET SINGH | 4 |
| A History of the Australasian Tax Teachers Association FIONA MARTIN | 31 |
| Using one-on-one Interviews in tax teaching JOHN MINAS, DR SONIA SHIMELD AND SIMONE BINGHAM | 55 |
| Paul Keating, tax alchemist? A study proposing the interpretive tools of Pierre Bourdieu DR DIANE KRAAL | 77 |
| The Australian Capital Territory has adopted measures to abolish stamp duty and impose a land tax on all real property: Will this approach be adopted by other States in Australia? JOHN MCLAREN | 101 |
| Neoliberalism In Australia And The Henry Tax Review JOHN PASSANT | 117 |
| Social Enterprise: Some Tax Policy Considerations JONATHAN BARRETT AND JOHN VEAL | 141 |
| Income tax and environmental provisions – green gold or lead weight? SALLY JOSEPH | 169 |

FOREWORD

The 2013 edition of the Journal of Australasian Tax Teachers Association grew out of the Association's successful annual conference held in January 2013 at the University of Auckland. In recognition of ATTA's 25th year the conference theme was "Tax Alchemy – turning silver into gold". It was a great credit to my colleagues that the Auckland conference was so enjoyable and ran so smoothly.

As detailed in the excellent article by Fiona Martin recording the history of ATTA, the association is in fine health as it passes its silver jubilee. This article tells the interesting story of ATTA's formative years, and its subsequent growth and development. Details of the annual conferences, patrons, and award and medal winners are all recorded. As such, the article ensures the activities and achievements of our association are preserved for posterity.

The ongoing strength of ATTA is also demonstrated in the number and breadth of the other articles contained in this edition. These articles reflect both the trans-Tasman flavour of the membership and the sheer range of research interests being pursued by tax academics in the two jurisdictions.

The wide-ranging economic and tax reforms of the late 1980s and early 1990 are considered from two very different perspectives in articles by Diane Kraal and John Passant. Diane's paper examines the extent of Paul Keating's contribution to tax reform in Australia. It weighs up whether Mr Keating during his time as Australia's Treasurer and Prime Minister simply marketed to the electorate the tax reform ideas of others or whether he transformed existing tax reforms and then built upon them. Applying Pierre Bourdieu's social practice theory to the topic of tax reform, the paper examines the interrelatedness of Mr Keating's persona and his struggles with the tax institutions and various interest groups.

Taking an opposing view is John Passant, whose paper looks at the development of tax reform in Australia in the light of the global rise of neoliberalism and its impact on tax policy. It argues that the fall in profits across the globe and the lack of class struggle in Australia have allowed neoliberal tax policy to dominate the agenda. The paper argues the Henry Tax Review is part of that process by both reducing taxes on capital and increasing tax burdens on labour. It proposes that only a return to class struggle offers the best opportunity to reintroduce equity into the tax debate.

On a less theoretical level, the paper by John McLaren review recent tax reform in the Australian Capital Territory (ACT). The ACT government undertook a review of its tax system in 2012 and one of the major recommendations was to broaden the land tax base. As a result the ACT imposed a land tax on a progressive basis on all commercial and residential property in the ACT, including owner occupied homes. Implementing this reform increased the general rates on owner-occupied homes and reduced land tax on investment properties and commercial properties. As a result of the subsequent increase in revenue, the ACT has substantially reduced stamp duty on real property conveyances with a view to abolishing it over the next 20 years. The paper examines the recommendations contained in the Henry Tax Review and suggests the ACT approach to the abolition of stamp duty and the imposition of a land tax on all property should be adopted by all States and Territories in Australia.

The tax implications, and particularly the transfer pricing aspects, of business restructuring by multinationals is considered by Julie Harrison Christina Stringer, and Jasneet Singh. The authors examine the revenue concerns raised when profit-making

activities are shifted from one jurisdiction to another, and consider the responses of the Australian and New Zealand tax authorities. The paper also reviews the OECD's report on the transfer pricing aspects of business restructuring and recent initiatives aimed at the issue of global profit shifting.

The boundaries between charity and business are examined in the paper by Jonathan Barrett and John Veal. The paper notes that many charities engage in trade and many companies perform some public benefit functions. The emergence of "social enterprises", which employ features of both business and charitable practices, has highlighted the desirability of revisiting old policy and legal distinctions drawn between altruistic and for-profit enterprises. Since charitable organisations enjoy tax advantages over for-profit organisations competing in the same market, the conduct of charities has come under increased scrutiny from revenue authorities. The paper proposes how tax policy might be reformulated in the face of this social enterprise phenomenon.

The ability of tax law to make an environmental impact is examined by Sally Joseph. The income tax provisions pertaining to the mine site rehabilitation and land degradation are two tax expenditures that are able to assist environmental management. While environmental policy may not have necessarily been the impetus for their introduction, it has been a factor in their development over time. The paper reviews the history and policy behind these provisions and analyses their environmental effectiveness. It concludes that Australian tax policy is always subject to the influence of various interest groups, which results in a lack of clear direction and limited appeal.

Lastly, to reflect the role of ATTA in developing and improving the teaching of tax as a pedagogical discipline, no edition of JATTA would be complete without an article examining the teaching and learning of tax. The paper by John Minas, Dr Sonia Shimeld and Simone Bingham documents the implementation of one-on-one interviews as a new assessment initiative in the Master of Professional Accounting (MPA). The authors introduced the interviews in response to the challenges faced by international postgraduate taxation students, particularly English language difficulties, which compound the problems faced mastering a new and complex tax system. The paper suggests these interviews encouraged independent and deeper learning, and they eliminated student plagiarism, thereby improving the quality of student learning overall. I would like to thank all authors who submitted a paper for consideration. Both the scope and depth of tax research presently being undertaken in Australia and New Zealand shows the health not only of ATTA as an organisation but also of the tax community in both jurisdictions. I would also like to thank the many referees who assisted with the time-consuming task of reviewing those papers. Their thoughtful consideration of all submissions and the constructive reports produced were extremely helpful to myself and the authors concerned.

Finally I would like to thank Dale Pinto and the board of JATTA for giving me the opportunity to assume the role as guest editor of the 2013 edition. I am grateful for their patience and practical assistance during what I found to be an interesting but challenging process.

Mark Keating
Senior Lecturer, University of Auckland
December 2013

MULTINATIONAL BUSINESS RESTRUCTURING: ARE TAX AUTHORITIES TRYING TO HOLD BACK THE TIDE?

JULIE HARRISON, CHRISTINA STRINGER, AND JASNEET SINGH*

ABSTRACT

Business restructuring by multinationals has become increasingly prevalent as businesses seek to improve their profits through the location of business activities in countries with cheaper distribution, production, administration, or tax costs. This restructuring activity has been subject to increasing scrutiny from the OECD and tax authorities due to its potential impact on domestic tax bases. In particular, when profit-making activities are shifted from one jurisdiction to another, this can significantly alter the tax paid by multinational subsidiaries. Dominating the debate surrounding the tax issues are the transfer pricing implications of these reorganisations. This paper discusses the motivation behind international business restructures, including a review of some recent high profile examples, and considers why transfer pricing issues arise. Responses by the Australian and New Zealand tax authorities are examined, together with the OECD's report on the transfer pricing aspects of business restructuring and recent initiatives aimed at the issue of global profit shifting.

* Julie Harrison is Senior Lecturer, Department of Accounting and Finance, University of Auckland Business School. Christina Stringer is a Senior Lecturer in the Department of Management International Business, University of Auckland Business School. Jasneet Singh is an MIB graduate from the University of Auckland Business School.

I INTRODUCTION

Business restructuring and transfer pricing have had a high profile in recent media reports with the spotlight focused on how much or how little tax multinational enterprises pay.¹ Multinationals argue these restructures are legitimate, reflect both the spirit and letter of the law, and are pursued to allow businesses to maximise economies of scale, increase operational efficiencies, develop greater specialisation, and optimise supply chains. Restructures involve the transfer of business functions, assets, and risks between subsidiaries of multinationals. Where the transfers take place cross-border, as is often the case, they have the potential to significantly change the tax paid by multinationals and the countries in which those taxes are paid. In response to the threat to domestic tax bases, a growing number of tax authorities and the Organisation for Economic Co-operation and Development (OECD) have increased their scrutiny of these activities and responded in a variety of ways ranging from providing guidance to multinationals on tax issues to introducing new legislation. However, it is questionable whether these measures are able to cope with either the scale of the restructuring activity or the intangible nature of many of the most valuable transfers.

Business restructuring can take a variety of forms, but underpinning these reorganisations is a profit maximisation objective. Increased profits can arise from operational efficiencies or from tax advantages arising from moving from high tax to low tax jurisdictions.² Business restructuring involves multinationals moving single or multiple business functions (e.g., production or distribution facilities) from a subsidiary located in one tax jurisdiction to a subsidiary in a different and often, but not always, lower tax jurisdiction. The transfer of business functions through this restructuring activity can involve the transfer of both tangible and intangible assets, together with associated functions and risks.

¹ See, for example, Charles Duhigg and David Kocieniewski, 'How Apple sidesteps billions in taxes', *The New York Times* (New York), 28 April 2012 and Simon Neville and Shiv Malik, 'Starbucks wakes up and smells the stench of tax avoidance controversy', *The Guardian* (London), 12 November 2012.

² J Dunning and S Lundan, *Multinational Enterprises and the Global Economy* (Edward Elgar, 2008); J Fraedrich and C Bateman, 'Transfer pricing by multinational marketers: risky business', (1996) *Business Horizons* 17-22.

Restructuring can have significant and complex outcomes for international tax planning as restructuring can raise transfer pricing and treaty issues. Transfer pricing issues arise from the transfers of goods, services, or intangibles between multinational subsidiaries, either as part of the restructure itself, or as part of the resulting network of transfer pricing transactions arising from the new structure. Tax authorities are concerned with whether the transfer prices and the resulting reallocation of profits among subsidiaries of the multinational are consistent with the arm's length principle. Treaty issues arise from the determination of whether restructuring arrangements give rise to income sourced in a particular country or to a permanent establishment in one or more jurisdictions.

This paper discusses the transfer pricing issues arising from business restructuring and considers the motivation behind business restructures. Recent media attention on this issue is discussed, together with the responses to this issue by the OECD and the Australian and New Zealand tax authorities. This analysis identifies the current approach taken to manage the inherent risks associated with unfettered business reorganisations and highlights some of the remaining issues. The paper concludes by considering the future for multinational taxation and assessing whether the current tax authority responses are adequate to address the increasing problem of double non-taxation.

II TRANSFER PRICING AND BUSINESS RESTRUCTURING

The OECD defines business restructures as consisting of:

internal reallocation of functions, assets and risks within an MNE [multinational enterprise], although relationships with third parties (e.g. suppliers, sub-contractors, customers) may also be a reason for the restructuring and/or be affected by it...³

These business reorganisations can involve either primary business functions (e.g., manufacturing or distribution) and/or business support functions (e.g., general

³ OECD, *Transfer Pricing guidelines for Multinational Enterprises and Tax Administrations* (2010) [9.1].

management or intangible management). The main types of business restructure that multinationals have pursued include:⁴

1. Conversion of fully-fledged distributors into limited-risk distributors or commissionaires;
2. Conversion of fully-fledged manufacturers into contract-manufacturers or toll-manufacturers;
3. Rationalisation and/or specialization of functions (e.g., creation of single manufacturing or research and development sites); and
4. Transfers of intangible property rights to a single entity within a multinational.

Reorganisations involving the conversion of fully-fledged distributors or manufacturers result in a reduction in the level of business functions performed by those subsidiaries. This may involve reductions in the number of physical assets and employees. However, in some conversions the only major changes may relate to contract terms and relationships with suppliers and customers, and/or the location of certain management or administrative functions. In these cases, risks are transferred between legal entities in the multinational by changing the terms of the contractual relationships. Where a multinational can demonstrate that significant profits relate to those risks, it is possible to reallocate large portions of profit between jurisdictions. In such cases it may appear to an observer that little has changed when considering the externally visible operations of the distributor or manufacturer as products continue to be manufactured or sold from the same location. This can create tension, particularly with the media and general public, when these businesses' profits and tax reduce significantly post-restructure.

Manufacturers and distributors can perform a range of functions and the relative level of profitability should reflect the extent of those functions and the level of assets and risks held by the business. For example, a fully-fledged manufacturer performs all aspects of the manufacturing process, including product and process design, inventory management, production planning and scheduling, supply chain management, and quality control. Such businesses are responsible for inventory and liability costs, plant capacity risks, and warranty risks. As a consequence, fully-fledged manufacturers would be expected to earn a significant portion of the total profits generated from the eventual sale of the manufactured product to the end-customer. In contrast, a contract or toll-manufacturer performs only a restricted range of functions such as scheduling day-to-day production, execution of quality procedures, and the manufacture of standard

⁴ Ibid [9.2] to [9.3].

products. Such businesses may not be responsible for holding or managing the finished products and may be indemnified for most or all business risks associated with the manufacture of the products. Accordingly, a toll-manufacturer would be expected to have a significantly lower level of profitability than a full-fledged manufacturer operating in the same industry.

Similarly, a fully-fledged distributor performs all aspects of the distribution process, including the logistics of purchase and supply of products, creation and management of local marketing strategies, performance of all sales functions, and all related customer relationship management. In contrast, a limited-risk distributor or commissionaire may only perform the sales function with products supplied directly by the manufacturer, or other related company, to the end-customer. As a consequence, the limited-risk distributor may have limited or no credit or inventory risk and few assets.

As a result of the conversion of a fully-fledged distributor or manufacturer to a limited-risk business, tax authorities would expect to see costs associated with the restructure (e.g., asset disposal and staff redundancy costs) to support the argument that the business has changed. Contractual terms would be expected to change to reflect changes in the relationships. The sharing of risks and modifications to the supply chain from the manufacturer to the end-customer would be expected to occur to reflect the shift in functional profile of the restructured business. The key transfer pricing issues in the conversion of distributors or manufacturers to a limited-risk arrangement are whether the reduced functionality reflects the economic reality of the underlying transactions and to what extent changes should lead to a reduction in profitability. In addition, if the business has developed valuable intellectual property, such as locally-developed brands or manufacturing know-how, it is likely that the restructure will involve the transfer of this property and the restructured business would be expected to be compensated for such transfers.

Reorganisations involving the centralisation of primary business activities (e.g., the transfer of all or most manufacturing activities to a single location such as Mexico) result in the removal of all or most local business functions. To an observer this type of reorganisation is, generally, the most compelling as it involves the transfer of all or most

tangible assets and the transfer or dismissal of many local employees. In these reorganisations the range of manufacturing functions can be reduced in scope, a business or product line can be eliminated, or manufacturing capacity can be shifted from one country to a lower-cost country. For example, the establishment of a Chinese manufacturing hub could result in the removal of manufacturing activities in most or all other locations. However, while the reduction in profit may seem more explicable to the general public these reorganisations create their own bad press when local jobs are replaced by foreign jobs, particularly in periods of high unemployment.⁵

Centralisation of administration or research functions can involve the establishment of regional offices that provide back-office support and/or regional research and development centres. Tax authorities would expect businesses that had previously performed these functions to reduce their own functions and costs as part of these new structures. For example, if a regional accounting centre was established, in the local subsidiaries served by that centre the number of accounting staff would be expected to reduce as a result of the transfer of accounting functions. Of particular interest to tax authorities is whether any costs that relate to services that are of no value to the subsidiaries are on-charged to local subsidiaries. For example, a regional accounting centre could perform work related to compliance with the legislative requirements applying to the parent company only. Local tax authorities would expect such costs to be charged to the parent and not to the local subsidiary.⁶

Restructuring activities that involve the rationalisation of management, other support activities, and/or the ownership and management of intangible property into a specialised regional or global entity may result in the removal of only a limited scope of activities from the local jurisdiction. Rationalisation may involve only the movement of intangible property and/or the transfer of risks through the modification of contracts between subsidiaries or between the multinational and its suppliers or customers. The centralisation of intellectual property ownership to a newly created subsidiary presents

⁵ The recent US presidential elections provided numerous examples of this type of media scrutiny, see, for example, Ewen MacAskill, 'Obama repeats claim that Romney outsourced jobs to China and India', *The Guardian* (London), 5 July 2012.

⁶ The treatment of these "shareholder activities" is discussed further in the OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (2010), Chapter VII.

particular challenges to tax authorities due to the unique nature of these assets and the difficulty in determining their profit potential. Issues arise in relation to the valuation of the transfer of the intellectual property to the new company and to the subsequent charging of royalties and research and development costs. These types of arrangements can be contentious, particularly where intellectual property is well-known and feted in the local jurisdiction. Parochial considerations can cloud determinations of whether the arrangements are arm's length. Tax authorities, as a result, are concerned both with valuation issues and also the capacity of the newly created intellectual property-company to manage the property i.e., whether the restructure has any economic reality. These arrangements can be complicated where the intellectual property-owning subsidiary does not employ staff and is reliant on other related companies to further develop and manage the intellectual property. The creation of intellectual property owning companies can be particularly troublesome for tax authorities in the digital-age where software and internet businesses can conduct huge volumes of business in countries while maintaining limited or no physical presence that gives rise to a tax liability.⁷

Regardless of the type of reorganisation the resulting structure is designed to be beneficial to the multinational by creating increased profits through increased efficiencies driven by the centralisation of particular functions. In addition, if high-value business activities, such as the ownership of intangible property, are located in low tax jurisdictions then this can result in substantially reduced tax obligations. However, expected benefits, whether tax-related or otherwise, do not always arise and the OECD recognises that the implementation of a restructure could result in increased costs and less efficiency, which may explain changes in the tax paid by the restructured multinational.⁸

The transfer pricing issues for tax authorities in relation to business restructuring are related to, first, whether the restructure and sale of property is arm's length and, second, whether the resulting transfer pricing arrangements (e.g., sale of goods and royalty

⁷ See, for example, Ben Chapman-Smith, 'Facebook NZ's \$14k tax bill a 'rort'- Labour', *New Zealand Herald* (Auckland) 29 November 2012 and Rosamund Urwin, 'Facebook, Amazon, Google, Starbucks: you owe us £900,000,000', *Evening Standard* (London), 13 November 2012.

⁸ OECD, above n 3, [9.58].

payments) are arm's length. A more fundamental problem is whether, if these arrangements are at arm's length and legitimate under current legislation, the current basis for taxation and network of tax agreements provides the best approach for allocating the tax payable between competing tax jurisdictions.⁹

The OECD has identified three core issues¹⁰ arising from business restructures that can potentially threaten the tax base of the country in which restructured multinational subsidiaries are located. The first core issue relates to the impact of any risk transfer that occurs as part of a restructure. These transfers often lead to an effective change in the operational profile of a subsidiary due to the transfer of risks. The Australian Tax Office (ATO) identifies business risks arising in reorganisations as related to either the transfer of assets (either their use or ownership) or the transfer of functions (described in terms of the decision-making related to those functions). The most common types of risks are operational, marketing, credit, inventory, foreign exchange, and risks relating to the management and ownership of intangibles.¹¹ At issue is the degree to which the functionality of a subsidiary has changed and its impact on the profit that should be attributed to it. As part of the restructure, assets, risks or functions could be transferred from subsidiaries in high tax jurisdictions to subsidiaries in low tax jurisdictions with a resulting reduction in the overall tax paid by the multinational and the amount of tax collected in the home countries of the subsidiaries subject to the restructure. Further, the multinational is likely to attribute high levels of profitability to the risks and other assets transferred. Whether this attribution is arm's length may be almost impossible to determine using the existing transfer pricing methods because similar transfers almost never occur between independent entities. In addition, whether the transfer has any economic substance will depend on the ability of the restructured entities to assume the risks transferred. Determining the economic substance of the arrangement is a particular concern for tax authorities given the types of arrangements seen in multinational business reorganisations seldom arise between unrelated parties (e.g., the

⁹ Tim Worstall, 'Facebook, Apple, Google, Amazon: Why cannot France understand that they already do pay taxes?', *(Forbes)* 27 November 2012 <<http://www.forbes.com/sites/timworstall/2012/11/27/facebook-apple-google-amazon-why-cannot-france-understand-that-they-already-do-pay-taxes/>>.

¹⁰ OECD, above n 3.

¹¹ ATO, Taxation Ruling 2011/1 *Income Tax: application of the transfer pricing provisions to business restructuring by multinational enterprise*, [103].

sale and lease-back of valuable intellectual property). The OECD has highlighted the potential problems with determining the economic substance and, in particular, determining whether the legal entity the risk is transferred to has the capacity to manage that risk.¹² Such capacity would include having sufficient financial resources to cover the risks transferred and sufficient appropriately trained staff to manage those risks.

The second core issue identified by the OECD relates to the determination of the appropriate arm's length price for the transactions arising from the restructure itself. Where assets, risks or functions are transferred under a restructure, this can require remuneration to be paid to the transferor. This compensation could include payment related to the termination or substantial renegotiation of existing valuable contracts or payment related to the surrender of profit potential. The arm's length principle requires related parties to behave in a manner consistent with how independent parties would behave in similar circumstances. However, in the case of a multinational business restructure there may be no comparable transactions between independent parties to use as a basis for applying the transfer pricing methods. Accordingly, the valuation of the compensation for such transfers or for the termination or renegotiation of the existing contractual arrangements between parties can be complex. For example, an intangible asset transferred under a restructure may not have an established value at the time of the transfer (e.g., where it relates to newly developed technology). This could result in a significant difference arising between the level of expected future profits used to calculate the transfer value of the technology at the time of the sale transaction and the actual profit subsequently derived by the transferee from that technology. Such discrepancies can call into question the arm's length nature of the transfer value.

The third core issue identified by the OECD is related to the determination of the appropriate treatment for the post-restructuring arrangements. As a general proposition, the application of the transfer pricing rules to the post-restructure transactions should be no different to their application to any transfer pricing arrangement. However, the application may not be straight forward, particularly in

¹² OECD, above n 3, [9.23].

relation to the treatment of location savings arising from the restructure. For example, in the case of the manufacture of branded products, if the location savings occur in a market where there are many alternative third parties who could perform the same function (such as in the relocation of the manufacture of clothing to China), then it is likely that the location savings would be allocated to the owner of the brand. Alternatively, if the location savings occur in a market where there are few competitors (such as the relocation of the manufacture of complex engineering products to Singapore), then it is more likely the location savings would be allocated to the manufacturer.

While the focus of this paper is on transfer pricing issues arising from business restructures, there are also a wide range of other direct and indirect tax consequences arising out of business restructures. These include issues related to identifying the source of income under the restructured arrangements; the creation of permanent establishments; value added tax issues arising from transfers of assets and changes to the supply chain; allocations and deductibility of restructuring expenses; the creation of deemed dividends from the transfers of assets; and the potential exposure to capital gains tax and other property-related taxes.

III RECENT EXAMPLES OF RESTRUCTURING

A number of high profile business restructures have attracted media attention in recent years. Key features of these cases include the transfer of locally developed intellectual property to low tax jurisdictions and the transfer of risks between legal entities to reduce the profit attributable to operations in high tax jurisdictions. Much of the attention has focused on the apparently artificial nature of these transfers, but increasingly the media and public have linked the low effective tax rates of multinationals to the corporate citizenship of these enterprises. This media attention has steadily grown in response to pressures on government spending with many linking the low tax rates of multinationals to decreases in public spending forced on many governments following the global financial crisis. While some of the cases reported in the media relate to general tax avoidance and value added tax, many highlight the tax planning and transfer pricing activities of multinationals. Generally, multinationals do

not comment on their tax affairs publicly and it can be difficult to determine tax positions in relation to particular arrangements from published annual accounts. However, it is noteworthy that in relation to the cases detailed below there has been no tax litigation or similar action reported. This suggests that these arrangements are compliant with the applicable tax legislation and that the media attention reflects either the general public's lack of understanding of current international tax rules or their dissatisfaction with these rules.

The Guardian newspaper ran a series of reports in 2009 that detailed a number of well-known UK companies that reportedly transferred valuable intellectual property overseas. These transactions attracted attention because they involved high profile brands, such as Walker potato crisps and Johnnie Walker scotch, and the reduction in UK taxable income was reported to be material. These brands were developed over a long period of time in the UK and after the reported restructure many of the products continued to be manufactured in the UK. By transferring the intellectual property, and related contractual risks, a portion of the profits of these companies were reported to be transferred to other tax jurisdictions and the local manufacturing operations converted to contract manufacturers.¹³ However, from the perspective of the consumer, it appeared little had changed. The products were still manufactured in the UK, the branding still emphasised the UK-history and location of the manufacture of the products, and there was no mention of the new foreign ownership in the advertising of the brand.

More recent media focus has concentrated on high profile US multinationals and, in particular, technology companies. Starbucks,¹⁴ Apple,¹⁵ Facebook,¹⁶ Google,¹⁷ and Amazon¹⁸ have all been the subject of intense media scrutiny. This attention is likely the

¹³ Tax Gap Reporting Team, 'How to save a packet: The transfer of Walkers crisps to a foreign subsidiary has cost UK millions', *The Guardian* (London), 5 February 2009 and Tax Gap Reporting Team, 'Going Dutch: How drinks giants spirited away Johnnie Walker label from UK tax liabilities by a technique known as outward domestication', *The Guardian* (London), 2 February 2009.

¹⁴ BBC News UK, 'UK Uncut protests over Starbucks 'tax avoidance'', 8 December 2012, <<http://www.bbc.co.uk/news/uk-20650945>>.

¹⁵ Charles Duhigg and David Kocieniewski, 'How Apple sidesteps billions in taxes', *The New York Times* (New York), 28 April 2012.

¹⁶ Chapman-Smith, above n 7.

¹⁷ Louise Armistead, 'Bermuda shelter helps Google duck \$2bn tax bill', *The Age* (Melbourne), 11 December 2012.

¹⁸ Juliette Garside, 'How Amazon finds tax loopholes', *The Guardian* (London), 4 April 2012.

result of their high profile and the large numbers of customers they have outside the US. The general public, and many politicians, struggle to understand how such visible businesses used by so many people can have no or very limited taxable presence in the countries where those people live. In response, some locally-based competitors of these firms have reportedly started using this negative media to encourage customers to shop locally rather than electronically to ensure tax is paid locally.¹⁹ Further, the reports of low tax paid by these companies have spurred protests by politicians and even, in the case of Starbucks, protests in the street.²⁰

Starbucks recently attracted public scrutiny in the UK (and elsewhere) because of its ubiquitous high street presence and the low level of tax reported to be paid by some of its foreign subsidiaries.²¹ The profitability of its overseas subsidiaries that operate coffee shops is reported to be affected by payments of royalties for the use of its marketing intangibles and payments for the purchase of the coffee beans from related foreign subsidiaries. The adverse publicity in the UK was followed by a report that the company is to make a 'voluntary' additional payment of £20 million to HM Revenue & Customs over the next two years; this additional payment is to be generated by Starbucks UK voluntarily not claiming deductions related to royalties, inter-company loans, and coffee purchases.²² However, this raises the question of what treatment will be made by the counter-party to the transactions. If the foreign counter-party returns the income on the basis that it is the arm's length value of the transfers then double taxation will arise.

While the reduction in domestic profits related to transfers of intellectual property for businesses selling physical products or services (such as crisps, scotch, or coffee) are important, a potentially more significant problem is the taxation treatment of digital commerce. Amazon is reported to have transformed local supply operations into low-risk delivery centres that do not create a significant local tax presence, thus, ensuring

¹⁹ Sainsbury and John Lewis are reported to have encouraged customers to shop with them to ensure the resulting income is reported in the UK and UK corporate tax paid, see Ian Griffiths, 'VAT loophole on digital sales 'costs UK more than Olympics'', *The Guardian* (London), 3 December 2012.

²⁰ BBC News, above n 14.

²¹ In the UK the tax paid by Starbucks is reported to be less than one percent of its UK sales over the last 14 years. See Louise Armistead, 'Starbucks' £20m gift 'makes joke' of tax system', *The Telegraph* (London), 6 December 2012.

²² Armistead, above n 21.

that most of the profits related to local sales are attributed to offshore subsidiaries located in lower tax jurisdictions.²³ Google, which generates much of its revenue from services such as the sale of advertising, is reported to have introduced tax structures that allow it to attribute revenue arising from customers located in a variety of high tax jurisdictions to subsidiaries located in countries with favourable tax regimes.²⁴ The intangible nature of the services provided, the electronic transmission of those services, and the electronic nature of the transactions themselves, have allowed technology companies to structure arrangements so that they limit their taxable presence in the countries where customers reside.

Here the issues are more fundamental than simply whether multinationals are complying with existing legislation and/or creating artificial tax structures; instead they represent a rapidly emerging problem of so-called double non-taxation where current source-based taxation systems, designed for the conduct of business through a physical presence with employees using tangible assets, are failing to deal with the new electronic business model. Under this new model billions of dollars of transactions can occur with limited or no local physical presence in any country. These cases do not represent a failure of tax authorities to apply the transfer pricing rules, nor are they a failure of the existing transfer pricing rules in their role of eliminating double taxation, but rather a failure of the system to allocate taxable profits in a way that continues to be acceptable to governments and the general public.

IV TAX AUTHORITY RESPONSES TO BUSINESS RESTRUCTURING

In response to these high profile business restructurings tax authorities, governments, and quasi-governmental bodies are currently addressing a variety of issues related to these activities. These include issues related to tax policy, source rules, the treatment of permanent establishments, tax avoidance, and transfer pricing. The purpose of this paper is to examine some of the responses directly related to the application of the

²³ Ian Griffiths, 'How one word change lets Amazon pay less tax on its UK activities: The word 'fulfilment' introduced in 2006 marked new role for Amazon.co.uk after ownership moved to Luxembourg', *The Guardian* (London), 4 April 2006.

²⁴ Jesse Drucker, 'Google revenues sheltered in no-tax Bermuda soar to \$10 billion', *Bloomberg* (New York), 10 December 2012.

transfer pricing rules. In this respect, the OECD was among the first to respond to this issue.

The OECD established a working party (Working Party No. 6) to examine business restructuring and released a draft discussion document for public consultation in 2008.²⁵ Responses²⁶ to this discussion document were subsequently incorporated into the new chapter on business restructuring contained in the latest update of the OECD's Transfer Pricing Guidelines.²⁷ The underlying philosophy of the discussion document and new chapter is that:

the arm's length principle and these [transfer pricing] Guidelines do not and should not apply differently to restructurings or post-restructuring transactions than to transactions that were structured as such from the beginning...²⁸

Of particular note, the OECD's examination of the transfer pricing issues related to business restructuring specifically do not consider anti-abuse rules. As such, the existence of a tax purpose in a restructure is not sufficient to conclude that an arrangement is not arm's length:

Under Article 9 of the OECD Model Tax Convention, the fact that a business restructuring arrangement is motivated by a purpose of obtaining tax benefits does not of itself warrant a conclusion that it is a non-arm's length arrangement. The presence of a tax motive or purpose does not of itself justify non-recognition of the parties' characterisation or structuring of the arrangement...²⁹

In addition, the scope of the OECD's chapter on business restructuring excludes a consideration of CFC rules, capital gains tax, domestic rules on deductibility of payments, value added taxes and indirect taxes.³⁰ Similarly, issues arising from permanent establishments are specifically excluded.³¹ However, in recognition of these

²⁵ OECD, *Transfer Pricing Aspects of Business Restructurings: Discussion Draft for Public Comment 19 September 2008 to 19 February 2009* (2008).

²⁶ OECD, *Response to the Committee on Fiscal Affairs to the Comments Received on the September 2008 Discussion Draft on the Transfer Pricing Aspects of Business Restructuring* (2010).

²⁷ OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (2010), Chapter IX.

²⁸ *Ibid* [9.9].

²⁹ *Ibid* [9.181].

³⁰ *Ibid* [9.8].

³¹ *Ibid* [9.7]. The OECD's definition of permanent establishment is currently under review with the most recent discussion document released in 2012. See OECD, *Model Tax Convention: Revised Proposals*

wider problems and their potential impact, in 2012 the OECD commenced a new project, *Base Erosion and Profit Shifting* (BEPS), which has been charged with examining the current rules for allocating taxable profits to locations other than where actual business takes place. This project will look wider than just transfer pricing issues, and will also consider aggressive tax planning, the role of tax treaties, tax policy, and compliance. In the briefing paper on the issue the key problem of multinational tax planning was identified as:

a tendency to associate more profit with legal constructs and intangible rights and obligations, thus reducing the share of profits associated with substantive operations involving the interaction of people with one another.³²

The BEPS released its first report in 2013.³³ This identified key issues and principles related to the scope of the problem. The fundamental policy issue identified by the report was that changes in international principles on the tax treatment of economic activity have not 'kept pace with the changing business environment'.³⁴ The report recommends that any action taken should not be unilateral as uncoordinated responses are likely to increase the risk of double taxation. In this regard, the OECD has proposed that an initial comprehensive plan be developed to identify the actions needed, set deadlines to implement actions, and identify the resources and methodology needed to implement changes.

The OECD believes that these wider problems must be addressed by international cooperation and a re-examination of the tax treatment in relation to a number of key areas. These include the international mismatch of the treatment of different corporate entities (particularly hybrid entities); the treatment of the delivery of digital goods and services under double tax treaties; related party financial transactions, such as debt-financing and insurance; shifting of risk and intangibles, and the artificial reorganisation of assets that do not reflect normal business transactions between independent parties; anti-avoidance measures including general anti-avoidance, CFC regimes, and thin

Concerning the Interpretation and Application of Article 5 (Permanent Establishment) 19 October 2012 to 31 January 2013 (2012).

³² OECD (20 November 2012), *The OECD Work on Base Erosion and Profit Shifting*, http://www.oecd.org/ctp/BEPS_Background_Brief.pdf p 2.

³³ OECD, *Addressing Base Erosion and Profit Shifting*, (2013).

³⁴ *Ibid* p 5.

capitalisation rules; and the existence of preferential regimes for certain business activities.

In this regard, the transfer pricing rules related to business restructuring can be regarded as only a partial solution to the wider problem of legitimate tax planning that can result in an increasing level of double non-taxation. The OECD's essential approach to the transfer pricing issues arising from business restructuring is to treat them as no different to the issues related to normal transfer pricing arrangements, but with an additional focus on the terms of risk reallocations under restructures, the determination of the consideration for the restructure itself, and the remuneration for the post-restructuring arrangements.

The OECD's starting point in the Guidelines is the recognition of the actual transactions that have taken place,³⁵ and it considers that only in exceptional circumstances should those arrangements be disregarded.³⁶ Exceptional circumstances can occur either if the economic substance of the arrangements differ from their form or if the arrangements lack 'commercial rationality' (i.e., independent parties in comparable circumstances would not have entered similar arrangements). While the former may be relatively easy to identify based on a comparison of the contractual arrangements to the actions of the related parties, the latter may be difficult to determine. The nature of multinationals is such that many of the arrangements entered into are only possible because of the relationships within the multinational. Accordingly, the likelihood of comparable data existing to support a particular restructure is low. The OECD suggests one approach to this problem is to consider the other options realistically available to the related parties; if more attractive options existed, then this provides evidence that the arrangements were not arm's length and the parties were not acting in a commercially rational way.³⁷ In relation to risk allocation, the OECD has stressed the need to examine the contractual terms of the restructure between the related parties. If comparable data exists that shows similar risk allocations would take place between independent parties, then the

³⁵ OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, above n 27, [9.164].

³⁶ *Ibid* [9.168].

³⁷ *Ibid* [9.175].

allocation is regarded as arm's length. If comparable data does not exist, which is usually the case, then it is necessary to consider who has control over the risk, defined as:

the capacity to make decisions to take on the risk (decision to put capital at risk) and decisions on whether and how to manage the risk, internally or using an external provider...³⁸

In the absence of comparable data to support the arrangement, a multinational needs to be able to demonstrate both that the related party has assumed control over the risk and also that they have the financial capacity to assume that risk. Further, it would be expected that the related party assuming the risk would also assume all the related costs associated with managing and bearing that risk (e.g., in relation to credit risk this would include all costs of credit defaults). If this can be demonstrated, then the transfer of the expected benefit from bearing the risk (i.e., the expected profit) would be considered arm's length. However, for a significant transfer of profit to be associated with the transfer of the risk it is necessary that the risk be economically significant i.e., that the risk is associated with significant expected profit. For example, in relation to credit risk, it would be necessary to demonstrate that there was a history of an economically significant level of default. Conversely, if there was a very low risk of default then no or very little profit would be expected to be associated with the transfer of that risk.

In determining the compensation for transactions occurring as part of the business restructure, the OECD stresses the importance of examining the contractual agreements between the parties. The OECD does not consider that every transaction will require compensation, rather the facts and circumstances at the time of the restructure should be closely examined to determine the value of the assets, risks and/or functions transferred. Further, the determination of any compensation payable for the transfer must consider the position of each related party independently:

The arm's length principle requires an evaluation of the conditions made or imposed between associated enterprises, at the level of each of them. The fact that the cross-border redeployment of functions, assets and/or risks may be motivated by sound commercial reasons at the level of the MNE group, e.g. in order to try to derive

³⁸ Ibid [9.23].

synergies at a group level, does not answer the question whether it is arm's length from the perspectives of each of the restructured entities...³⁹

Compensation may include payment in relation to the loss of future profits, although the OECD considers that future expected profit is not an asset itself but a potential carried by some other rights or assets e.g., the profit potential attached to an intangible asset such as a trademark or patent.⁴⁰ Payment may be required if the transferor has surrendered rights or other assets that carry that profit potential. Similarly, there is no presumption that all restructurings should give rise to an indemnification of the restructured entity for any losses it incurs as part of the restructure. Whether a payment should be made should reflect what independent parties would have negotiated in similar circumstances.⁴¹

In relation to post-restructure transactions, the OECD's view is that it is essential to conduct a detailed functional analysis for both pre-restructuring and post-restructuring arrangements to again ensure that the arm's length principle is applied. However, the application of the transfer pricing rules to the post-restructured arrangements should be the same as if the arrangements had been structured in that way from the beginning of the relationship.

While the OECD's new chapter on business restructuring provides more detailed guidance on aspects of these arrangements, when considering these rules in relation to the real world examples discussed in the previous section, it is unlikely they would have prevented or modified the structures adopted. Assuming that the economic substance of these arrangements is consistent with the form of the relationships and that the prices attached to both the restructure and the post-restructure transactions are determined in accordance with the transfer pricing methods, then each would be considered legitimate from a transfer pricing perspective. Accordingly, the rules do not restrict how multinationals can organise and reorganise their business operations. In particular, the OECD's view expressed in the *Transfer Pricing Guidelines* is that:

³⁹ Ibid [9.63].

⁴⁰ Ibid [9.65]-[9.68].

⁴¹ Ibid [9.103].

MNEs are free to organise their business operations as they see fit. Tax administrations do not have the right to dictate to an MNE how to design its structure or where to locate its business operations. MNE groups cannot be forced to have or maintain any particular level of business presence in a country. They are free to act in their own best commercial and economic interests in this regard. In making this decision, tax considerations may be a factor. Tax administrations, however, have the right to determine the tax consequences of the structure put in place by an MNE, subject to the application of treaties and in particular of Article 9 of the OECD Model Tax Convention. This means that tax administrations may perform where appropriate transfer pricing adjustments in accordance with Article 9 of the OECD Model Tax Convention and/or other types of adjustments allowed by their domestic law (e.g. under general or specific anti-abuse rules), to the extent that such adjustments are compatible with their treaty obligations.⁴²

In Australasia, both the Australian Tax Office (ATO) and the New Zealand Inland Revenue Department (IRD) have also considered the issue of transfer pricing and business restructuring. In 2011 the ATO released a taxation ruling on business restructuring⁴³ that sets out the ATO's position on the transfer pricing aspects of business restructuring. As with the OECD *Guidelines*,⁴⁴ the ATO ruling is restricted in scope to only transfer pricing issues and specifically excludes issues related to anti-avoidance, capital gains tax, permanent establishments, and the CFC rules.⁴⁵ The ATO's approach mirrors the OECD in that it requires taxpayers to apply the standard transfer pricing methods to determine the arm's length price of both the restructure and post-restructure transactions with regard to the 'commercial rationality' of those actions.⁴⁶ In particular, the ATO has developed a set of indicators, that it will consider in determining whether the actions of related parties are arm's length, specifically:

- (a) an arm's length outcome is one that makes business sense in the circumstances of the particular taxpayer;
- (b) an independent party dealing at arm's length would seek to protect its own economic interest;
- (c) an independent party dealing at arm's length would compare the options realistically available and seek to maximise the overall value derived from its economic resources;

⁴² Ibid [9.163].

⁴³ ATO, Taxation Ruling TR 2011/1, *Income Tax: application of the transfer pricing provisions to business restructuring by multinational enterprise*.

⁴⁴ The ATO ruling [21] makes specific mention of the OECD report on business restructuring and states the ATO will have regard to this document in its application of the arm's length standard.

⁴⁵ ATO, above n 43, [4]-[6].

⁴⁶ Ibid [11].

- (d) one option might be not to enter into a transaction because it does not make commercial sense for the particular taxpayer.⁴⁷

The ATO's ruling sets out a three-step process⁴⁸ for analysing business restructures based on its earlier ruling on documenting transfer pricing arrangements.⁴⁹ First, the taxpayer should describe the international dealings with the related parties in the context of their own business. This characterisation of the arrangements should consider the relationships between the related parties both pre- and post-restructure. Second, the taxpayer should select the most appropriate transfer pricing method. Third, the taxpayer should apply the most appropriate method.

Overall, the ATO ruling is relatively limited and does not provide much practical guidance on how multinationals should approach business restructuring. More details on how the ATO is likely to apply the transfer pricing rules are provided in Appendix 2 of the ruling, however, this section is not legally binding on the ATO. This Appendix notes that the arm's length rules will be applied to the entire 'arrangement' and not to isolated transactions and that it is not necessary for there to be a formal agreement in order for an arrangement to exist for the purposes of the transfer pricing legislation. The ATO's focus is on determining whether the arrangement has a commercial basis for all the parties to the business restructure.⁵⁰

The ATO requires that all benefits expected to arise from the business restructuring for all parties to the arrangement be identified. This information should consider the nature and value of the benefits, an explanation of why the restructure is needed to derive the benefits, which related parties contribute to those benefits and how they will be shared among members of the multinational.⁵¹ The ATO approach requires a detailed cost/benefit analysis to be prepared to support the rationale for the business restructure. One of the ATO's goals is to determine exactly what has changed as a result of the restructure and what difference this will make to both the Australian subsidiary's

⁴⁷ Ibid [14].

⁴⁸ Ibid [19].

⁴⁹ ATO Taxation Ruling 98/11, *Income tax: documentation and practical issues associated with setting and reviewing transfer pricing in international dealings*.

⁵⁰ ATO, Taxation Ruling TR 2011/1, above n 43, [54].

⁵¹ Ibid [63].

business and profits and the value chain of the multinational as a whole. However, the existence of a tax benefit from the restructure is not considered conclusive that an arrangement is not arm's length, rather the ATO will examine whether the pricing of the restructuring and post-restructuring transactions is arm's length under the transfer pricing rules.⁵² Similarly, just because an arrangement is not one typically entered into by independent entities, the ATO accepts that this is not sufficient to conclude that the arrangement is not arm's length.⁵³

The ATO acknowledges the risk-reward trade-off and accepts that an entity may accept a lower reward in exchange for lower risk (e.g., when converting to a low-risk distributor).⁵⁴ However, the related party to whom any risk is transferred must have the capacity and capability to bear such risk. For example, if the credit risk functions of a subsidiary are transferred to another subsidiary and that other subsidiary does not have the staff and/or expertise to manage the risk, the rationale and commerciality of the restructure will be viewed as questionable by the ATO.

In relation to compensation for the restructure itself, the ATO's view is that under the arm's length principle there should be a payment in connection with a business restructuring arrangement if a payment would be expected between independent parties in similar circumstances. The ATO stresses the need for detailed analysis of comparable data to determine whether compensation is needed and the value of that compensation. However, it considers compensation will not be required, generally, unless there has been a transfer of property. Specifically, the ATO's view is that no compensation is likely to be required for the loss of profit potential, for the transfer of a function or risk, or for the termination of contractual rights.⁵⁵

The ATO's documentation requirements under the ruling are likely to be onerous for multinationals. It expects such analysis to include, as a minimum, details of the multinationals internal analysis of the restructuring decision, documentation describing the business context of the restructure including detailing the costs and benefits for the

⁵² Ibid [68].

⁵³ Ibid [78].

⁵⁴ Ibid [101].

⁵⁵ Ibid [116].

restructure from the perspective of the multinational as a whole and for each of the participating subsidiaries, all relevant contracts for the restructure and post-restructure transactions, detailed functional analyses for all business activities both pre- and post-restructure, and details of the comparability analyses performed and transfer pricing methods applied to determine the arm's length prices for the arrangement.⁵⁶

In addition to the ATO ruling on business restructuring, in recent developments the Australian government has amended its transfer pricing legislation to address deficiencies in the transfer pricing and general anti-avoidance regimes and further amendments are expected. These amendments were designed, at least in part, to address problems identified with the regulation of multinational structuring. Further, the federal government recently announced the formation of a special taskforce to examine tax minimisation by multinationals.⁵⁷ The assistant treasurer, the Hon. David Bradbury, specifically identified technology companies and the problems they create for the future sustainability of corporate taxation as issues that need to be examined by the task force.⁵⁸

In New Zealand, the IRD generally endorses the approach detailed in the OECD *Transfer Pricing Guidelines*,⁵⁹ including its guidance on the treatment of business restructuring. The IRD has not issued its own taxation ruling on this issue, but it has identified business restructuring as an important tax risk issue⁶⁰ and has developed a set of questions it considers multinationals need to document in relation to their business restructures. The IRD's list of questions has an underlying assumption that the acquirer of the assets, risks and functions will be the overseas entity. This reflects the IRD's primary concern, which is reductions in the profitability of New Zealand taxpayers rather than increases

⁵⁶ Ibid [150].

⁵⁷ Hon. David Bradbury, 'Specialist reference group on ways to address tax minimisation of multinational enterprises', *Office for the Assistant Treasurer Media Release No. 162*, 10 December 2012.

⁵⁸ Adele Ferguson, 'Taxing time for tech giants as war is declared', *Sydney Morning Herald* (Sydney), 23 November 2012.

⁵⁹ The IRD released its own transfer pricing guidelines in October 2000. These do not specifically cover the issue of restructuring. Further, these guidelines have not subsequently been updated and the IRD's website notes that the IRD uses the OECD's 2010 *Transfer Pricing Guidelines* (<<http://www.ird.govt.nz/forms-guides/title/forms-t/guide-transfer-pricing.html>> retrieved 12 December 2012).

⁶⁰ IRD, *Restructuring* (18 January 2011) < <http://www.ird.govt.nz/transfer-pricing/practice/transfer-pricing-practice-restructuring.html>>.

in profitability where the New Zealand related party is the acquirer of assets. This focus is also reflected in the IRD's standard transfer pricing questionnaires used for audits, where information is only required from foreign-owned subsidiaries of multinationals in relation to structural changes made to their business, as follows:

'Have there been any material structural changes in the last five years which have resulted in a reduction of business functions, assets held and risks borne by the New Zealand operations? If so, please provide full details.'⁶¹

The questions detailed on the IRD's website⁶² include information related to whether a functional analysis has been performed at appropriate stages of the restructure; whether there has been any consideration of the value of transferred assets, risks and functions; whether the acquirer has the capability to manage the transferred functions, assets, and risks; whether the post-restructuring transactions are arm's length; whether the acquirer has any taxable presence in New Zealand; whether there are any restructuring costs and who has borne those costs; whether valuations of transferred assets have been prepared; and the extent of the documentation. The IRD considers that preparing and maintaining contemporaneous documentation will support the transfer prices adopted by the New Zealand taxpayer in the restructure and reduces the risk of the IRD re-characterising the nature of the arrangements.

The IRD highlights its three main concerns relating to restructuring as being the economic substance underlying low risk operations such as contract manufacturers, the consistent return of routine profits, and the commercial rational for the restructuring.⁶³ The IRD's view on the economic substance of the arrangement is similar to the OECD's, and emphasises the need for the structural change to be significant and not simply a restructure of the form of the arrangement only. Further, the terms of contracts and the actions of the related parties must be consistent. For example, the IRD notes that the charging of costs associated with a market penetration strategy to a New Zealand low-

⁶¹ IRD, *Transfer Pricing Questionnaire: Foreign-Owned Multinationals*, question 46 (available from <<http://www.ird.govt.nz/resources/d/b/db25cf004bbe4a589cb6dcbc87554a30/tp-questionnaire-foreign-owned.pdf>>).

⁶² IRD, *Restructuring*, above n 60.

⁶³ *Ibid.*

risk distributor would not be appropriate, as such a strategy is inconsistent with a low-risk profile.

The IRD's comments highlight that it will consider wider issues than just transfer pricing when reviewing these types of arrangements. Specifically, the IRD will consider whether the reorganisation creates a permanent establishment for one or more overseas parties to the restructure, and whether the general anti-avoidance rules apply. This is particularly relevant where insufficient commercial rationale exists to explain the reorganisation or where there are 'unnecessary steps in the arrangement, circularity of fund-flows or novel instruments exhibiting artificiality'.⁶⁴ Given the IRD's recent successes in the courts in relation to anti-avoidance,⁶⁵ it is highly likely the IRD would consider any 'artificiality' under both the general anti-avoidance rules and the specific transfer pricing rules when investigating these types of business restructures.

In December 2012 the New Zealand Minister of Revenue requested the IRD examine the tax treatment of foreign companies and foreshadowed possible changes to tax laws to reflect changes in how these businesses are now operated compared to when applicable tax laws were first drafted.⁶⁶ This new focus may have been partly a response to negative media attention focused on the tax paid in New Zealand by a number of internet companies.⁶⁷ The IRD report⁶⁸ addressing this issue identified the core issue as the increasing problem of non-taxation of multinationals, in particular, in relation to technology companies. However, the IRD acknowledged the international nature of this problem and that it required a global response to deal with issues such as deficiencies in the current source rules and permanent establishment definitions. Accordingly, the main recommendations from the report were that the IRD should actively work with

⁶⁴ Ibid.

⁶⁵ See, for example, Mark Keating and Craig Elliffe, 'Tax avoidance – Still waiting for Godot' (2009) 23(3) *New Zealand Universities Law Review*, 368, or Julie Harrison and Mark Keating, 'New Zealand's general anti-avoidance provisions: A domestic transfer pricing regime by proxy?' (2011) 17(4) *New Zealand Journal of Taxation Law and Policy* 419.

⁶⁶ Hon Peter Dunne 'Taxing multinational companies' (Inland Revenue, Policy Advice Division, 4 December 2012) <<http://taxpolicy.ird.govt.nz/news/2012-12-04-taxing-multinational-companies>>.

⁶⁷ See, for example, Chapman-Smith, above n 7.

⁶⁸ IRD, *Taxing multinational companies* (Inland Revenue, Policy Advice Division, 13 December 2012) <<http://taxpolicy.ird.govt.nz/sites/default/files/2012-other-taxation-multinational-companies.pdf>>.

both the OECD's project on base erosion and profit shifting (BEPS) and with the Australian Treasury's taskforce.

V CONCLUSION

Business restructuring has been recognised only recently as a significant issue in transfer pricing. The key transfer pricing issues arising from business restructures relate to the reduced functionality and profits of subsidiaries, the economic substance or commerciality of the arrangements, the valuation of transactions arising from the restructure and post- restructure, the recognition of transactions by tax authorities, and the capacity and capability of acquiring entities to manage risks assumed under the restructure. The tax authority response to these transfer pricing issues has been, typically, to require taxpayers to document and analyse these arrangements in accordance with the general transfer pricing rules. That is, the arm's length nature of these restructures need only be considered using the same approach as if the arrangements had been structured the same way from the beginning. The only caveat to this is that the commercial rationality of the restructure must be demonstrated. Given many structures are only possible for multinational groups, it may not be necessary to evidence this commerciality by comparison to how independent entities conduct their business. As such, if benefits can be shown to accrue to all parties to the arrangement it is likely commerciality can be demonstrated. However, the inability to evidence any commercial basis for a restructure or the insertion of artificial steps is likely to attract greater scrutiny from tax authorities.

This paper has considered the response of the OECD, ATO, and IRD to these transfer pricing issues. Their approaches reflect varying degrees of specificity in how each approaches the issue. The OECD guidelines provide very detailed discussion of what is likely to be acceptable, the ATO's taxation ruling reflects some of this detail, while focusing on the need for comprehensive documentation. The IRD's approach is more practical and highlights areas of greatest risk and emphasises that transfer pricing is only one aspect of the tax law that will be considered by the IRD in investigating these arrangements.

Similarly, other jurisdictions have attempted to address this problem. For example, Canada and the UK have already adopted the OECD approach.⁶⁹ Germany provides an extreme reaction to these restructures with its adoption of an 'exit tax' imposed under laws specifically directed at business restructuring.⁷⁰ This approach represents a significant departure from the OECD's as compensation is required for lost business opportunities and profit potential when functions are transferred to another jurisdiction.⁷¹ Arguably, this is contrary to the arm's length principle, where compensation is usually only required where assets are transferred. However, it demonstrates an approach that might be adopted by other countries as a deterrent to a practice that is rapidly reducing the tax paid by multinationals in higher tax jurisdictions.

The increasing problem of double non-taxation, particularly in relation to electronic commerce, does not appear to be addressed by simply examining the transfer pricing aspects of business restructures. Tax authorities are rapidly recognising this problem. This is reflected by the number of special task forces that have been appointed in recent months to examine tax minimisation by multinationals. Accordingly, transfer pricing must be regarded as only part of a much wider problem. Multinationals have a long history of complying with transfer pricing rules and have developed strategies for structuring their businesses in ways that meet the requirements of the arm's length standard. The problem is not that many of these restructures are in contravention of the transfer pricing rules; rather the problem is that the restructuring activity can be completed in a way that is arm's length, but increasingly leads to double non-taxation. Accordingly, the regulation of business restructuring must address not only tax issues related to transfer pricing, but also issues related to aggressive tax planning, the application of tax treaties, and tax policy.

⁶⁹ K A Bell, 'Canadian, U.K. Tax officials embrace OECD draft on restructurings' (2008) 17(11) *BNA Tax Management*, 460.

⁷⁰ Corporate Tax Reform Act 2008.

⁷¹ M Moses, 'U.S. Practitioners compare German, U.S. provisions on restructuring' (2008) 17(1) *BNA Tax Management* 3.

A HISTORY OF THE AUSTRALASIAN TAX TEACHERS ASSOCIATION

FIONA MARTIN*

ABSTRACT

The Australasian Tax Teachers Association (ATTA) is a not-for-profit association originally aimed at improving the standard of tax teaching in institutions of higher education in Australia and New Zealand.¹ It was established as an informal network of tax academics in 1987² although the first formal conference did not take place until 1989.³

ATTA members organise annual conferences which are hosted by a different institution each year. The members agreed early on that in principle every fourth conference should take place in New Zealand,⁴ although this has not always been achievable often due to budgetary constraints and also other practical reasons. Furthermore, it is often the larger universities that have hosted the conference, also for budgetary and practical reasons.

At the 2013 conference which was held at the University of Auckland it was decided that it was time to draft a new constitution and also investigate formalising the organisation of ATTA as an incorporated association.⁵ It therefore seems timely that a paper is written discussing the history of ATTA. In particular this paper focuses on the development of ATTA, the ATTA annual conferences, the scholarly refereed journal that has been established as a vehicle for ATTA members to publish their research and the role that ATTA and the conferences play in the development of tax teaching and research excellence in Australia and New Zealand.

* Senior Lecturer, The University of New South Wales.

¹ (2005) Vol 1 (1) Journal of the Australasian Tax Teachers Association ii.

² Ibid.

³ Australasian Tax Teachers Association Conference, University of Melbourne, January 2011 <http://www.atta.law.unimelb.edu.au/go/about-the-conference/about-atta>.

⁴ This was agreed at the 1993 ATTA Conference which was held at the University of Canterbury, New Zealand, see email from Adrian Sawyer dated 31 January 2013.

⁵ Eg under the Associations Incorporations Act 2009 (NSW).

I INTRODUCTION

Originally ATTA was a group of likeminded tax academics who came together to discuss issues relating to teaching and researching into tax and tax related areas. As stated above the organisation began in 1987, the inaugural conference was 1989 and was held at the University of New South Wales (UNSW).⁶ Pearl Rosenberg, widow of tax academic Abe Greenbaum recalls that:

On the earliest of days of ATTA, I attended the foundation meeting where they made the decision to create ATTA. It was in Melbourne. Rick Krever and Abe Greenbaum had a large role and tax academics from as many universities as possible attended. Essentially the idea behind ATTA was to give tax academics a network long before networking became a term. Most departments had a lone tax academic, at best two, which meant that there was little opportunity to discuss issues, get support etc. The idea of a regular newsletter, and an annual meeting to allow tax academics to discuss and develop issues was the outcome.⁷

A formal constitution was not however drafted until several years later. It was at the 1993 conference at the University of Canterbury, Christchurch, in New Zealand that it was decided that ATTA should become an organisation⁸ although it appears that a formal resolution to establish ATTA was not passed until the 1994 conference in Sydney.⁹ It was also decided at the Christchurch conference that the conference would be held in New Zealand every four years.¹⁰ The original Constitution of ATTA is dated 20 January 1994. However, it was signed and dated 30 January 2006.¹¹ It has as its objects:

To advance scholarship in Taxation Law and related disciplines by:

- (a) Furthering the development of education in these disciplines in the universities and colleges in Australia and New Zealand;
- (b) Encouraging research;
- (c) Holding conferences and publishing a journal as a means for disseminating ideas and information and for promoting their discussion;

⁶ Australasian Tax Teachers Association Conference, University of Melbourne, January 2011 <http://www.atta.law.unimelb.edu.au/go/about-the-conference/about-atta>.

⁷ Email from Pearl Rozenberg, University of Sydney, 12 March 2013.

⁸ Email from Adrian Sawyer, Canterbury University, Christchurch, New Zealand, 31 January 2013.

⁹ ATTA *Newsletter*, June 1994, 'Association Formed Jan 1994'.

¹⁰ Email from Adrian Sawyer, Canterbury University, Christchurch, New Zealand, 31 January 2013.

¹¹ Constitution of ATTA, 20 January 1994, UNSW, Australian School of Business, School of Taxation and Business Law, ATTA <http://www.asb.unsw.edu.au/schools/taxationandbusinesslaw/atta/Pages/default.aspx>.

- (d) Promoting closer relations between full-time teachers in the relevant disciplines and others who may be interested in their scholarly advancement.¹²

Patrick Gallagher, a senior lecturer at UNSW was the first President of ATTA.¹³ Once the Constitution was developed¹⁴ Patrick Gallagher led a committee of several academics one of whom undertook the role of secretary/treasurer. The ATTA Committee comprised a President, (Patrick Gallagher from 1994 until the late 1990s) three to four Vice-Presidents and a Secretary/Treasurer. At the 1994 annual general meeting, held as part of the conference, the inaugural executive were elected. Apart from Patrick, these were Cynthia Coleman from the University of Sydney, Fiona Martin, Queensland University of Technology, Les Nethercott, Monash University and Helen Hodgson as secretary/ treasurer.¹⁵ A network of local contacts was also nominated from New Zealand and the other Australian states and territories. Adrian Sawyer, University of Canterbury and Andrew Smith, University of Victoria Wellington represented New Zealand and, apart from the executive representing their home states, Gino Dal Pont represented Tasmania, Domenic Carbone, South Australia, Michael Dirkis, the ACT and Ian Burnett, the Northern Territory.¹⁶

The organisation has continued as an unincorporated association. Currently there are discussions aimed at rewriting and updating the constitution and also registering ATTA as an incorporated association.¹⁷

II ATTA CONFERENCES

Early in the history of ATTA the members realised that there was a need for a conference that was aimed at tax academics and which had the initial goal of improving the standard of tax teaching at universities and other institutions of higher education. Tax academics do not come from one discipline. Our members are taken from the discipline fields of law, accounting, economics, psychology and sociology. In this regard,

¹² ATTA Constitution, 20 January 1994, 1.

¹³ Patrick Gallagher, Macquarie University
http://www.businessandconomics.mq.edu.au/contact_the_faculty/all_fbe_staff/patrick_gallagher.

¹⁴ Drafted by Patrick Gallagher and Helen Hodgson, confirmed by email from Helen Hodgson dated 15 February 2013.

¹⁵ ATTA Newsletter, June 1994.

¹⁶ ATTA Newsletter, June 1994.

¹⁷ ATTA, Annual General Meeting, University of Auckland, New Zealand, 25 January 2013; *ATTA News*, February 2012.

there was not one conference held in Australia or New Zealand in the late 1980s that would cover many of the teaching and research interests of ATTA members. Thus, in 1989, an academic at UNSW, Patrick Gallagher reports that he was encouraged to establish a two day conference aimed at the teaching and research needs of tax academics.¹⁸ The initial conferences commenced with a day devoted to issues related to tax teaching. The second day included a range of tax related papers, many of which were on very technical areas of taxation law and policy. This day was regularly open to members of the tax profession outside academia and often well attended by them. As you can see from the table below, UNSW hosted these conferences for the first two years.

The following is a table of all the conferences held by ATTA since inception until 2013. It details the host institution, the organisers of the conference and other important information such as plenary speakers.

III TABLE OF CONFERENCES

| Year | Host institution | Organisers/JATTA Editors | Important Information/ Plenary Speakers |
|--------------------|---|---------------------------------|---|
| 1989 ¹⁹ | Law School, University of New South Wales, Sydney | Patrick Gallagher ²⁰ | No plenary speakers but highlights included the robust debate between Yuri Grbich and Rick Krever. Ted Withers of the Australian Taxation Office (ATO) spoke. ²¹ |
| 1990 | Law School, UNSW, Sydney, NSW | Patrick Gallagher | No plenary speakers but practitioners were encouraged to attend on the 2 nd day. |

¹⁸ *ATTA News*, February 2008. Rick Krever, Monash University notes that the original idea for the conferences came from Yuri Grbich formerly Director of Australian Taxation Studies Program (ATAX), UNSW.

¹⁹ Australasian Tax Teachers Association Conference, 2011 website <http://www.atta.law.unimelb.edu.au/go/about-the-conference/about-atta>.

²⁰ *ATTA News*, February 2008, Speech by Patrick Gallagher accepting the Graham Hill ATTA medal at the ATTA Conference, 23-25 January 2008, University of Tasmania. Patrick advised that the conferences were initially organised by him with the support of the Continuing Legal Education Committee of the Law Faculty at UNSW. Phil Burgess, UNSW academic and ATTA member, was also a member of this Committee.

²¹ Patrick Gallagher acceptance speech on receipt of the Graham Hill ATTA Medal at the 2008 ATTA Conference, *ATTA News* February 2008.

| | | | |
|------|--|--|---|
| 1991 | School of Accounting, University of Southern Queensland, Toowoomba, Queensland | Alexander Bates and Bill Langdon ²² | There were no plenary sessions. This conference was attended by approximately 20 delegates. ²³ |
| 1992 | Law School, Deakin University, Geelong, Victoria | Abe Greenbaum ²⁴ | There were no plenary sessions. However the conference is reported to have been of the highest standard by attendees ²⁵ |
| 1993 | Department of Accountancy, University of Canterbury, Christchurch, NZ | Adrian Sawyer and John Hasseldine ²⁶ | First ATTA conference held in New Zealand Professor John Prebble, Victoria University of Wellington, New Zealand Wyatt Creech, then New Zealand Minister of Revenue ²⁷ Agreed at this conference that ATTA should be formed as an organisation. ²⁸ |
| 1994 | ATAX, UNSW at Coogee, Sydney, NSW | Patrick Gallagher Abe Greenbaum ²⁹ | A large group of attendees from Australia and New Zealand. No plenary speakers but a session dedicated to tax teaching. ³⁰ |
| 1995 | Business School, Curtin University, Perth, Western Australia | Helen Hodgson | Highlights included the mystery bus tour which took delegates to Whitfords Beach (famous as an Australian tax |

²² Both formerly academics at University of Southern Queensland (USQ), Toowoomba.

²³ Many continuing and illustrious members of ATTA did attend including Rick Krever, Helen Hodgson, Graeme Cooper, Gary Payne and Kaye Emmerton. The author wishes to thank Gary Payne, formerly of USQ and UNSW and Kaye Emmerton, formerly of USQ for the information regarding this conference.

²⁴ There is no documentation available regarding this conference but several longstanding members of ATTA remember attending and that Abe Greenbaum was the organiser; see Rick Krever, 'Tribute: Abe Isaac Greenbaum and Australian Tax Teaching' (2000) 10 *Revenue Law Journal* 1, 1; Email from Mark Burton, University of Melbourne, 31 January 2013.

²⁵ Rick Krever, 'Tribute: Abe Isaac Greenbaum and Australian Tax Teaching' (2000) 10 *Revenue Law Journal* 1, 1.

²⁶ Email from Adrian Sawyer, Canterbury University, Christchurch, New Zealand, 31 January 2013. John Hasseldine is now with the University of New Hampshire.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Rick Krever, 'Tribute: Abe Isaac Greenbaum and Australian Tax Teaching' (2000) 10 *Revenue Law Journal* 1, 1

³⁰ This may have been the first conference attended by Michael D'Ascenzo, email from Rick Krever dated 17 February 2013.

| | | | |
|------|---|--|---|
| | | | case) and some delegates riding bicycles around Rottneest Island. |
| 1996 | QUT, Law and Business Schools, Brisbane, Queensland | Fiona Martin and Sandra Rodman | Margaret Hayley, ATO ³¹ Conference papers were made available electronically (on floppy disc for all delegates) for first time ³² |
| 1997 | Department of Commercial Law, University of Auckland, Auckland, NZ | Garth Harris ³³ | Justice Graham Hill was the after dinner speaker his topic 'Reflections on becoming a judge' ³⁴ Wayne Mapp, MP ³⁵ |
| 1998 | Law School, University of Sydney | Abe Greenbaum ³⁶ | Graeme Cooper ³⁷ |
| 1999 | Law School, University of Canberra | Michael Dirkis | Justice Graham Hill Rick Krever Helen Hodgson, MLA gave one of the after dinner speeches ³⁸ |
| 2000 | Department of Business Law and Taxation, Monash University, Clayton, Victoria | Wayne Gumley (convenor) Ken Devos Les Nethercott Grant Richardson ³⁹ | Justice Graham Hill ⁴⁰ John Ralph, Chair, Ralph Review of Business Taxation ⁴¹ Cynthia Coleman chaired a tax teaching forum ⁴² and Abe Greenbaum came from the hospital to be there. ⁴³ This was his last conference. ⁴⁴ |

³¹ The other plenary speaker was to have been Simon Gaylard, Coopers & Lybrand however he was ill at the last minute and could not attend. Conference organisers file note from Sandra Rodman, January 2006.

³² In 2003, Colin Fong arranged for these to be uploaded to the National Library of Australia and Partners, Pandora, Australia's Web Archive, *Australasian Tax Teachers Association (ATTA) Annual Conference - Conference Papers*.

³³ Email from Mark Keating who attended the conference dated 14 February 2013.

³⁴ Cynthia Coleman, 'Recollections of Justice Hill, Patron of ATTA', ATTA Conference, 2006. In her vote of thanks at the 1997 conference Cynthia invited Justice Hill to be the patron of ATTA.

³⁵ Email from Mark Keating who attended the conference dated 14 February 2013.

³⁶ Rick Krever, 'Tribute: Abe Isaac Greenbaum and Australian Tax Teaching' (2000) 10(1) *Revenue Law Journal* 1, 1.

³⁷ Author's recollection as an attendee at the conference.

³⁸ Final Conference Program, ATTA Conference, University of Canberra, 5-7 February 1999, Pandora, Australia's Web Archive.

³⁹ Email from Ken Devos dated 13 February 2013.

⁴⁰ 'Flagging for the Courts the problems of the GST' (Paper presented at the ATTA Conference, 3-5 February 2000), see Pandora, Australia's Web Archive.

⁴¹ *Ralph Review of Business Taxation* (1999); Final Conference Program, ATTA Conference, Monash University, 3-5 February 2000.

⁴² Final Conference Program, ATTA Conference, Monash University, 3-5 February 2000.

⁴³ Email from Pearl Rozenberg, University of Sydney, 12 March 2013.

| | | | |
|------|---|--|---|
| 2001 | Atax, UNSW, NSW | Michael Walpole | Justice Graham Hill Michael Bersten, Deputy Chief Tax Counsel, ATO ⁴⁵ Geoffrey Lehmann was the dinner speaker. ⁴⁶ |
| 2002 | Manukau Institute of Technology, Business School, Auckland, New Zealand | Katherine Ritchie ⁴⁷ | Conference papers placed on Pandora Archive site ⁴⁸ |
| 2003 | Law School, University of Wollongong, NSW | Natalie Stoianoff (ed) Mary Kaidonis (ed) ⁴⁹ | Justice Graham Hill Second Commissioner of Taxation, Michael D'Ascenzo Jim Gordon, Inland Revenue, New Zealand Professor John Prebble, Victoria University of Wellington, New Zealand ⁵⁰ Dinner speaker Dick Warburton. ⁵¹ |
| 2004 | School of Commerce and School of Law, Flinders University, Adelaide | Paul Kenny, organiser and editor of JATTA ⁵² | Justice Graham Hill Michael D'Ascenzo, Second Commissioner of Taxation Professor Alice McCleary, Deputy Chancellor, University of South Australia Associate Professor Owen Covick, Flinders University Jim Gordon, Inland Revenue, New Zealand ⁵³ |
| 2005 | School of Accounting & Commercial Law | Andrew Smith was organiser and also JATTA editor, | Justice Graham Hill ⁵⁵ Commissioner of Inland Revenue, David Butler |

⁴⁴ Recollections of Rick Krever, Monash University.

⁴⁵ *Atax Annual Report* (2001), Attachment B, '13th Annual Australasian Tax Teachers Association Conference 2001', 23.

⁴⁶ Abe Greenbaum had offered to organise but sadly passed away just prior to the conference, recollection of Michael Walpole, UNSW.

⁴⁷ *ATTA News* March 2003.

⁴⁸ *ATTA News* March - December 2002, Colin Fong, 27 March 2002 (also now includes 1996, 1999, 2000 and 2001 papers).

⁴⁹ (2005) Vol 1 (1) *Journal of the Australasian Tax Teachers Association* was edited by Natalie Stoianoff and Mary Kaidonis and is the first volume of the Journal.

⁵⁰ Final Program, 15th Annual Tax Teachers Association Conference, 30 January -1 February 2003, University of Wollongong, New South Wales.

⁵¹ Recollections of Michael Walpole, UNSW.

⁵² Margaret McKerchar, then of University of Sydney was also editor of this issue, see (2005) Vol 1 (2) *Journal of the Australasian Tax Teachers Association* iv, Foreword, Paul Kenny and Margaret McKerchar.

⁵³ (2005) Vol 1 (2) *Journal of the Australasian Tax Teachers Association* iv, Foreword, Paul Kenny and Margaret McKerchar.

| | | | |
|------|---|--|---|
| | Victoria University of Wellington, New Zealand | Adrien Sawyer was co-editor only ⁵⁴ | Dr Kevin H Holmes, IBFD, Amsterdam |
| 2006 | Law School, University of Melbourne | Miranda Stewart (ed) ⁵⁶ Lillian Hong, Michael Kobetsky, Cameron Rider | Justice Richard Edmonds Professor Neil Brooks of Osgoode Hall Law School, Toronto, Canada, Commissioner of Taxation, Michael D'Ascenzo Professor Judith Freedman, Oxford University, UK, Professor Claire Young, UBC, Vancouver Professor Malcolm Gammie QC, CBE, London School of Economics, UK |
| 2007 | University of Queensland, Brisbane | Kerrie Sadiq (ed) ⁵⁷ | Commissioner of Taxation, Michael D'Ascenzo Professor Michael Lang, Vienna University of Economics and Business Administration Justice Richard Edmonds |
| 2008 | University of Tasmania, School of Accounting & Corporate Governance, Hobart | Bernadette Smith (ed) ⁵⁸ Simone Bingham Sonia Shimeld | First ATTA conference in Tasmania Gordon Cooper, AO (Patron) Justice Richard Edmonds Commissioner of Taxation, Michael D'Ascenzo Professor Pasquale Pistone, University of Salerno Professor J Clifton Fleming Jr, J Reuben Clark Law School, Brigham Young University, USA ⁵⁹ |
| 2009 | Department of Accountancy, Finance & Information Systems | Andrew Maples (ed) Adrian Sawyer (ed) ⁶⁰ | Gordon Cooper, AO (Patron) Justice William Young, President, New Zealand Court of Appeal Commissioner of Taxation, |

⁵⁵ Sadly this was the last plenary session given by Justice Hill who passed away on 24 August 2005.

⁵⁴ (2005) Vol 1 (3) Journal of the Australasian Tax Teachers Association i.

⁵⁶ (2006) Vol 2 (1) Journal of the Australasian Tax Teachers Association.

⁵⁷ (2007) Vol 3 (1) Journal of the Australasian Tax Teachers Association i.

⁵⁸ (2008) Vol 3 (2) Journal of the Australasian Tax Teachers Association i.

⁵⁹ Final Program, 20th Annual Tax Teachers Association Conference, 23 January – 25 January 2008, University of Tasmania.

⁶⁰ (2009) Vol 4 (1) Journal of the Australasian Tax Teachers Association i.

| | | | |
|------|--|--|--|
| | University of Canterbury, Christchurch, New Zealand | | Michael D'Ascenzo Commissioner for Inland Revenue, Robert Russell Julia Hoare, Partner PWC Professor Neil Brooks, Osgoode Hall Law School ⁶¹ |
| 2010 | School of Business Law and Taxation and ATAX, UNSW | Bill Butcher Chris Evans Helen Hodgson Fiona Martin (ed) John Taylor (ed) ⁶² Michael Walpole | Secretary of the Australian Treasury, Dr Ken Henry Gordon Cooper, AO (Patron) Professor Catherine Brown, University of Calgary, Canada Professor Neil H Buchanan, George Washington University, Washington, DC Justice Richard Edmonds, Federal Court Commissioner of Taxation, Michael D'Ascenzo |
| 2011 | Law School, University of Melbourne and Business School, Monash University | Mark Burton (ed) ⁶³ Rick Krever Ann O'Connell | Professor Neil H Buchanan, George Washington University, Washington, DC Justice Michelle Gordon Commissioner of Taxation, Michael D'Ascenzo Gordon Cooper, AO (Patron). |
| 2012 | Law School and Business School, University of Sydney | Celeste Black, Brett Bondfield Micah Burch Michael Dirkis ⁶⁴ Rebecca Millar (ed) ⁶⁵ | Professor Richard Vann, University of Sydney, Professor Bertil Wiman, Uppsala University, Sweden Professor Diane M Ring, Boston College of Law Associate Professor Stephen Phua, National University of Singapore Gordon Cooper, AO (Patron) Assistant Commissioner, Jennie Grainger, ATO ⁶⁶ |
| 2013 | Department of Commercial Law, Business School, University of | Peter Vial (Chair) Craig Eliffe Audrey Sharp Pam Kam | Justice Richard Edmonds, Justice Susan Glazebrook, Supreme Court, New Zealand Edwin Vanderbruggen, |

⁶¹ (2009) Vol 4 (1) *Journal of the Australasian Tax Teachers Association* iv, Foreword, Andrew Maples and Adrian Sawyer.

⁶² (2010) Vol 5 (1) *Journal of the Australasian Tax Teachers Association* i.

⁶³ (2011) Vol 6 (1) *Journal of the Australasian Tax Teachers Association* i.

⁶⁴ Minutes of the ATTA Annual General Meeting, January 2012, *ATTA News*, February 2012, 3.

⁶⁵ (2012) Vol 7 (1) *Journal of the Australasian Tax Teachers Association* i.

⁶⁶ Final Program, Australasian Tax Teachers Association Conference, University of Sydney, January 2012.

| | | | |
|--|----------|---|--|
| | Auckland | Barnard Hutchinson Christopher Spells Mark Keating | partner VDB – Loi Gordon Cooper, AO (Patron). |
|--|----------|---|--|

IV ESTABLISHMENT OF JOURNAL OF AUSTRALASIAN TAX TEACHERS ASSOCIATION

A discussion took place at the annual general meetings held at the conferences in 2004 and 2005 regarding the Association's commitment to ensuring that the proceedings from each conference would be published in a refereed publication. All feedback showed that this was a high priority to members,⁶⁷ particularly in view of the Federal Government emphasis on quality, refereed publications by academics. At the 2005 conference ATTA established an editorial board for the journal. The tax academics who volunteered were Margaret McKerchar, Dale Pinto, Adrian Sawyer, Andrew Smith, Miranda Stewart and Natalie Stoianoff. Dale Pinto subsequently took on the role of JATTA's Chairman and the Journal of Australasian Tax Teachers Association (JATTA) was established in 2006.⁶⁸ The editorial board originally took prime responsibility for publishing ATTA proceedings in association with the university that held the annual conference although in subsequent years the responsibility has fallen more on the organising committee of each conference.⁶⁹ The first volume was edited by Natalie Stoianoff and Mary Kaidonis, of the University of Wollongong in 2005 and published papers based on eight conference papers from the 2003 ATTA conference that was held at this University.⁷⁰ An issue of the journal is published electronically each year, edited by certain members of the organising committee or University hosting the conference. Each volume of the journal can be found on the website of the School of Taxation and Business Law at UNSW.⁷¹

⁶⁷ATTA News, January 2006
<http://www.asb.unsw.edu.au/schools/taxationandbusinesslaw/Documents/2006-ATTA-NEWS-FullYear.pdf>.

⁶⁸ ATTA News, January 2006
<http://www.asb.unsw.edu.au/schools/taxationandbusinesslaw/Documents/2006-ATTA-NEWS-FullYear.pdf>.

⁶⁹ Comments at the ATTA Annual General Meeting, University of Auckland, 25 January 2013.

⁷⁰ (2005) Vol 1 (1) *Journal of the Australasian Tax Teachers Association* edited by Natalie Stoianoff and Mary Kaidonis.

⁷¹ Australasian Tax Teachers Association, JATTA
<http://www.asb.unsw.edu.au/schools/taxationandbusinesslaw/atta/Pages/default.aspx> and on AustLII
<http://www.austlii.edu.au/au/journals/JLATaxTA>.

The 2012 conference was hosted by the University of Sydney and the latest journal edited by Professor Rebecca Millar of that University.⁷² The role of editor is a significant academic role as many submissions are made and on average 8-10 articles published in each volume after careful refereeing and editing. The referees are chosen not only from ATTA members but from national and international academics.

JATTA is a double blind, peer review, refereed journal. In the 2006 ATTA newsletter the then President of ATTA, Dr Paul Kenny stated that '[i]n my opinion this [JATTA] has been one the most important developments in the history of ATTA'.⁷³

The current editorial board comprises highly regarded and experienced academics from Australia, New Zealand and Canada. They are:

- Professor Dale Pinto, Curtin University (Editor-in-Chief)
- Professor Neil Brooks, Osgoode Hall Law School, York University, Canada
- Professor Margaret McKerchar, UNSW
- Professor John Prebble, Victoria University of Wellington, NZ
- Professor Kerry Sadiq, Queensland University of Technology
- Professor Adrian Sawyer, University of Canterbury, NZ
- Professor Miranda Stewart, University of Melbourne
- Professor Natalie Stoianoff, University of Technology, Sydney
- Associate Professor Andrew Smith, Victoria University, NZ
- Associate Professor Paul Kenny, Flinders University, South Australia

The journal was ranked B on the Commonwealth of Australia, Excellence for Research in Australia (ERA) 2010 scale,⁷⁴ B on the Australian Business Deans Council ranking of the quality of journal publications in the business field,⁷⁵ and C on the Council of Australian Law Deans list.⁷⁶ It should be noted that A* is the highest rank, then A, B and C on each of

⁷² (2012) 7(1) *Journal of the Australasian Tax Teachers Association* <http://www.asb.unsw.edu.au/SCHOOLS/TAXATIONANDBUSINESSLAW/ATTA/ATTAJOURNAL/Pages/currentissue.aspx>.

⁷³ Australasian Tax Teachers Association Newsletter, January 2006 <http://www.asb.unsw.edu.au/schools/taxationandbusinesslaw/Documents/2006-ATTA-NEWS-FullYear.pdf>.

⁷⁴ Government of Australia, Australian Research Council, Excellence for Research in Australia (ERA), Archived Material from ERA 2010, Ranked Outlets http://www.arc.gov.au/era/era_2010/archive/era_journal_list.htm#1.

⁷⁵ Australian Business Deans Council, The Promotion of Excellence in Business Education and Research, ABDC Journal List <<http://www.abdc.edu.au/3.43.0.0.1.0.htm>>.

⁷⁶ Council of Australian Law Deans, Final Journal Ranking, 2009.

these scales. The Australian Research Council separated the ranking of each journal on the following basis:

- A* = top 5% of journals
- A = next 15% of journals
- B = next 30% of journals
- C = next 50% of journals.⁷⁷

JATTA is therefore recognised amongst academics and senior government officials in the research area as a journal of high standing (as evidenced by it being ranked) that publishes articles of above average to average quality.

V ATTA NEWSLETTERS

In the early years of ATTA various members collated information from the Australian states and New Zealand and prepared newsletters which were initially mailed to members and then, as technology advanced, emailed. Patrick Gallagher as President did this regularly commencing in 1994 together with Fiona Martin as Vice-President.⁷⁸

Following on from the ATTA annual general meeting at Manukau Institute of Technology, Auckland in January 2002, Colin Fong, UNSW Atax librarian and lecturer agreed to prepare and edit an electronic newsletter titled *ATTA News*.⁷⁹ This newsletter is published monthly and emailed to all ATTA members and others. It aims to inform members of tax related news such as calls for conference papers, details of tax and business law conferences and tax related PhDs in progress or completed. The newsletter updates members of the career moves of other tax colleagues, any honours received by them and any potential employment opportunities. The newsletter also fulfils the important role of publishing the minutes of each ATTA annual general meeting which is held at the close of each conference.⁸⁰

VI SUPPORT FROM THE AUSTRALIAN TAXATION OFFICE AND INLAND REVENUE, NEW ZEALAND

Representatives of the ATO have regularly presented and attended ATTA conferences. As can be seen from the table setting out details of significant speakers at ATTA

⁷⁷ Government of Australia, Australian Research Council, Excellence for Research in Australia (ERA).

⁷⁸ ATTA Newsletter, June 1994 was the first edition.

⁷⁹ ATTA News March – December 2002, Colin Fong, 27 March 2002.

⁸⁰ ATTA News March – December 2002, Colin Fong, 27 March 2002.

conferences this began in 1989 when Ted Withers, then a senior executive with the ATO,⁸¹ spoke at the first conference. Brian Nolan as Second Commissioner and Ron Mills, Chief Tax Counsel for the ATO were also regular attendees at the earlier conferences.⁸² Michael D'Ascenzo, initially as Second Commissioner of Taxation and then as Commissioner of Taxation has been a plenary speaker at the majority of conferences since 2003 until his retirement in 2012. He has generously presented his insights into the role, structure and changing responsibilities of the ATO at each of these plenary presentations.⁸³ In fact Michael gave his first speech as the Commissioner of Taxation at the 2006 ATTA Conference in Melbourne.⁸⁴ Jennie Grainger, Second Commissioner of Taxation was a plenary session speaker at the 2012 conference.⁸⁵ Representatives of the Inland Revenue Department, New Zealand, have also spoken, particularly when the conference was in New Zealand. Jim Gordon of the Policy Advice Division, New Zealand Inland Revenue⁸⁶ has been a plenary speaker on two occasions and two different Commissioners of Inland Revenue, David Butler and Robert Russell, have spoken.

VII SUPPORT BY THE JUDICIARY

Not only has ATTA and its annual conferences had support from the revenue authorities it has also been the recipient of significant judicial input, research and time commitment. Many judges have been plenary speakers at the annual conferences. Particularly relevant was the support of Justice Graham Hill of the Federal Court of Australia, who was patron of ATTA and spoke or attended every conference from 1997 until his untimely death in 2005.

Subsequently, Justice Richard Edmonds, Federal Court of Australia has also been a significant presenter at ATTA conferences. His honour has given informative and insightful plenary speeches at the 2006, 2007, 2008, 2010 and 2013 conferences. The

⁸¹ Ted Withers spent 32 years with the ATO occupying a range of senior positions including Deputy Commissioner and Senior Assistant Commissioner, see Tax Institute biography <http://www.taxinstitute.com.au/seminar-papers/improving-compliance-with-state-taxes-paper>.

⁸² Patrick Gallagher speech, *ATTA News*, February 2008.

⁸³ Demonstrating his support through not only presenting but attending and participating at other sessions throughout the conferences, see Patrick Gallagher speech, *ATTA News* February 2008.

⁸⁴ *ATTA News*, January 2006.

⁸⁵ Final Program, Australasian Tax Teachers Association Conference, University of Sydney, January 2012.

⁸⁶ (2005) Vol 1 (2) *Journal of the Australasian Tax Teachers Association* iv, Foreword, Paul Kenny and Margaret McKerchar.

New Zealand judiciary have also been represented. Justice Susan Glazebrook of the Supreme Court was a plenary speaker at the most recent conference hosted by the University of Auckland and spoke about her experiences as a judicial officer presiding over tax cases. Prior to that Justice William Young, President of the New Zealand Court of Appeal (now on the Supreme Court) spoke at the 2009 conference hosted by the University of Canterbury.

Other notable judicial supporters have been Justice Tony Pagone, who gave a brilliant and entertaining after dinner speech at the 2011 conference and also ensured that the welcome function for this conference was held at the Victorian Supreme Court and Justice Michelle Gordon of the Federal Court who also spoke at this conference. Another entertaining after dinner speaker was Paul Gerber of the Administrative Appeals Tribunal who spoke after the 1996 conference dinner.⁸⁷

The high level of research that these members of the judiciary put into their presentations is recognised by the publication of many of their conference papers. Several plenary speeches have been published in *JATTA* including the speech of Justice Hill at the 2004 conference on tax reform.⁸⁸ At the first ATTA conference that he spoke, Justice Edmonds gave a speech in honour of Justice Hill. This was published in the 2006 edition of *JATTA* and titled 'The Contribution of Justice Hill to the Development of Tax Law in Australia'.⁸⁹ Justice Edmond's talk at the 2008 conference was published in the *Australian Tax Review*,⁹⁰ as was his talk at the 2010 conference.⁹¹

VIII MENTORING OF LESS EXPERIENCED ACADEMICS/DOCTORAL STUDENTS

A frequent comment from academics (current and former) that I spoke to was the importance and benefit to them of meeting and being mentored by more senior

⁸⁷ File Note 1996 ATTA Conference organisers.

⁸⁸ Graham Hill, 'Tax Reform: A Tower of Babel; Distinguishing Tax Reform from Tax Change' (2005) vol 1(2) *Journal of the Australasian Tax Teachers Association* 1.

⁸⁹ (2006) vol 2(1) *Journal of the Australasian Tax Teachers Association* 1.

⁹⁰ Justice Richard Edmonds 'Recent tax litigation: a view from the bench' (2008) 37 *Australian Tax Review* 79.

⁹¹ Justice Richard Edmonds, 'A finding that a taxpayer carries on business; What is required, related issues and what are the tax consequences?' (2010) 39 *Australian Tax Review* 71.

academics at the ATTA conferences. Associate Professor Cynthia Coleman, University of Sydney, was mentioned many times as a tremendous supporter of other academics, particularly young women academics who are usually in the minority in their Faculty or Department. Professor Michael Walpole, UNSW was also highlighted as someone that colleagues could turn to for advice both academic and career. These colleagues are not however the only ones. I have attended many ATTA conferences over the years dating back to the early 1990s and have regularly observed the way that the established professors would talk encouragingly to their newer colleagues. This is especially important as many tax academics are the only academic in this discipline in their school or department and may therefore experience strong feelings of isolation which are exacerbated by the competitive academic environment.

Reading past newsletters, shows that this experience is shared by many first time attendees at the ATTA conference. In the January 2007 ATTA Newsletter two first time conference attendees wrote of the benefits of attending this conference. Nicole Wilson-Rogers wrote:

I thought it was encouraging to see some first time presenters. Audience participation in the presentations was fantastic and everyone was forthcoming with ideas about new directions the presenters' research could take or potential avenues for further research...I think the conference provides a good opportunity for students, practitioners and teachers in tax to listen to and meet tax colleagues many who are undertaking research in various areas.⁹²

Clare Hyden stated that 'the ATTA Conference was a fantastic opportunity to wet my feet in the academic pond. Everyone was very friendly and supportive'.⁹³

After the 2006 conference in Melbourne Christine Peacock, new academic at Monash University had this to say:

⁹² *ATTA News*, January 2007, 19th Australasian Tax Teachers Conference 2007: First timer's views, Nicole Wilson-Rogers, Curtin University.

⁹³ *ATTA News*, January 2007, 19th Australasian Tax Teachers Conference 2007: First timer's views, Clare Hyden, University of Canberra.

Many thanks to the organisers and fantastic presenters at the ATTA 2006 Conference held in Melbourne. As a newcomer to academia I found this conference of tremendous benefit. I enjoyed getting to know my fellow colleagues and was very much inspired by the quality and presentation of papers on such a variety of topics. I came away having learnt so much and having enjoyed the friendly, collegial environment.⁹⁴

With the advent of more tax academics and practitioners undertaking doctorates mentoring has become an integral aspect of ATTA and the conferences. At the annual general meeting held at the 2007 conference in Brisbane a discussion arose as to whether there should be a separate doctoral students' presentation session as had occurred at the Victoria University of Wellington, New Zealand conference in 2005.⁹⁵ Four PhD students were financially supported to attend the ATTA Conference in 2007 and the 2007 Newsletter reports that this was received well by the students.⁹⁶ It was agreed at the annual general meeting that doctoral students' presentations should be integrated into the conference program⁹⁷ and in 2008 there was a separate session for these students on the first morning of the conference.⁹⁸ This has been continued at subsequent ATTA conferences.

This doctoral workshop session enables candidates who may be inexperienced in presenting their research to do so in a positive and safe environment and receive encouragement and feedback. Written feedback in several ATTA newsletters attests to the important and worthwhile contribution that the ATTA conference and more particularly the PhD students' workshop, has made to tax research and development. A self admitted mature age PhD student wrote after the 2008 conference:

I bravely put forward a paper to present at the conference not really knowing what to expect – another first for me. I was very pleased to realise that the whole first morning was dedicated to students like myself and it was very interesting to see the different presentations and the wide range of research...I was very nervous and a little surprised when the Commissioner turned up to my presentation. However it went well and I received lots of constructive feedback (even some from the Commissioner).⁹⁹

⁹⁴ *ATTA News*, February 2006.

⁹⁵ *ATTA News*, January 2007.

⁹⁶ *ATTA News*, January 2007.

⁹⁷ *ATTA News*, January 2007.

⁹⁸ *ATTA News*, ATTA Conference 23-25 January 2008 Report, February 2008.

⁹⁹ *ATTA News*, February 2008, ATTA Conference 2008 - First timer's views, Trish O'Keefe.

At the 2011 conference hosted by the University of Melbourne and Monash University there were eighteen postgraduate student presentations on the first day.¹⁰⁰ Mark Burton reported on behalf of the organising committee that '[t]his is a wonderful development as it reflects the strength of postgraduate research in taxation law being undertaken primarily in Australia'.¹⁰¹

Each of the 2012¹⁰² and 2013 conferences have since run successful sessions for PhD students on the morning of the first day of the conference. The 2013 session included a presentation by Professor Stephen Barkoczy who recounted valuable advice to doctoral students based on his experience as an academic and a doctoral candidate.¹⁰³

IX ATTA/CCH DOCTORAL SERIES

A further way of recognising and promoting high level research into taxation law and policy has been through the introduction of the ATTA Doctoral Series. In 2010 ATTA and CCH introduced this series in order to annually publish as a book a completed doctorate on taxation law or policy. The judging panel are Chris Evans, Rick Krever and Dale Pinto. There have been three books published in this series and they are:

2010: Lisa Marriott, *The Politics of Retirement Savings Taxation: A Trans-Tasman Comparison*.

2011: Brett Freudenberg, *Tax Flow-through Companies*.

2012: John Bevacqua, *Taxpayer rights to compensation for Tax Office mistakes*.

X ATTA AS INSPIRATION FOR OTHER ACADEMIC ORGANISATIONS

The need for discipline specific conferences and organisations is common and within academia is no exception. There are many organisations that have been formed as a vehicle for the encouragement of research and teaching in a specific area. ATTA was one of the first however and can claim that it inspired other groups to follow its example. Professor Paul Redmond of the Law Faculty at UNSW used ATTA as a model for the first Corporate Law Teachers Conference.¹⁰⁴

¹⁰⁰ *ATTA News*, February 2011.

¹⁰¹ *ATTA News*, February 2011.

¹⁰² 2012 ATTA Conference, University of Sydney, Final Program

¹⁰³ 2013 ATTA Conference, University of Auckland, Final Program.

¹⁰⁴ *ATTA News*, February 2008, Speech by Patrick Gallagher accepting the Graham Hill ATTA medal at the ATTA Conference, 23-25 January 2008, University of Tasmania.

XI PATRONS OF ATTA

The inaugural patron of ATTA was Justice Graham Hill. As one of the most highly regarded tax judges in Australia as well as being a tax teacher at the University of Sydney, Justice Hill gave his support to ATTA from a very early stage. He was appointed patron in 1997¹⁰⁵ and presented plenary papers at nearly every conference from then until his death in 2005.

Gordon Cooper, AO, was announced as the new patron of ATTA at the 2007 conference¹⁰⁶ which was hosted by the University of Queensland and organised by Kerrie Sadiq. He was and still is a visiting professorial fellow at UNSW¹⁰⁷ and a tax consultant in private practice. He is regarded as a leading tax expert and author, particularly in respect of capital gains.¹⁰⁸ Gordon has had many tax related professional involvements including being Governor of the Australian Tax Research Foundation, President of the Committee of the Australian branch of the International Fiscal Association and President of the Taxation Institute of Australia.¹⁰⁹

A second patron of ATTA was appointed at the 2011 conference, hosted by the University of Sydney.¹¹⁰ The patron is Cynthia Coleman who was recognised for her significant contribution to tax teaching and research as an academic and for her support and commitment to ATTA. In accepting the nomination Cynthia spoke of the need for senior members of ATTA to make contact with new members.¹¹¹

XII RECOGNITION OF CONTRIBUTION TO TAX TEACHING AND RESEARCH – THE HILL MEDAL

A medal was first introduced in 2000 and is awarded in recognition of outstanding contribution to Australasian tax teaching and policy. The inaugural medal, which was called the ATTA Medal,¹¹² was presented to Abe Greenbaum in September 2000 in

¹⁰⁵ Cynthia Coleman, 'Recollections of Justice Hill, Patron of ATTA', ATTA Conference, 2006. In her vote of thanks at the 1997 conference Cynthia invited Justice Hill to be the patron of ATTA.

¹⁰⁶ *ATTA News*, January 2007.

¹⁰⁷ Originally with Atax and now with the School of Taxation and Business Law.

¹⁰⁸ Eg Gordon Cooper and Chris Evans, *Cooper & Evans on CGT* (Thompson Reuters, 3rd ed, 2011).

¹⁰⁹ *ATTA News*, February 2007.

¹¹⁰ *ATTA News*, February 2011.

¹¹¹ *ATTA News*, February 2011.

¹¹² Rick Krever, 'Tribute: Abe Isaac Greenbaum and Australian Tax Teaching' (2000) 10(omit 1) *Revenue Law Journal* 1, 1.

recognition of his many books and articles, presentations at tax conferences and his significant contributions to ATTA both as a co-ordinator of conferences, a presenter and as a participant.¹¹³

No further medals were awarded for several years. The issue of the medal was raised at the annual general meeting of the 2006 ATTA conference and the minutes note that general guidelines were agreed upon at this meeting which reiterated that the award is to be made to an ATTA member in recognition of outstanding contribution to Australasian tax teaching and policy. It was decided at this meeting that several medals should be awarded together in order to recognise the significant contribution of several ATTA members over the previous years.¹¹⁴ Professor John Prebble was at this meeting and recalls that the medal was to be known as the Hill Medal in honour of Justice Graham Hill.¹¹⁵

The following members have been awarded medals:

2007 - Cynthia Coleman, Chris Evans, Rick Krever, John Prebble and the late Graham Hill, former Justice of the Federal Court of Australia and patron of ATTA

2008 - David Smith, Phil Burgess, Patrick Gallagher, Colin Fong and Michael D'Ascenzo

2009 - Margaret McKerchar

2010 - Michael Dirkis and Les Nethercott

2011 - Michael Walpole and Yuri Grbich

2012 - Kerrie Sadiq¹¹⁶

2013 - Dale Pinto.¹¹⁷

XIII GRAHAM HILL IFA RESEARCH PRIZE

Justice Graham Hill, who was the patron of ATTA, president of the 2003 International Fiscal Association (IFA) Congress in Sydney and a leading figure in tax in Australia for more than 30 years, died in August 2005. In 2006 the Australian IFA branch in association with ATTA established a prize in his memory known as the Graham Hill IFA

¹¹³ Rick Krever, 'Tribute: Abe Isaac Greenbaum and Australian Tax Teaching' (2000) 10(omit 1) *Revenue Law Journal* 1, 1.

¹¹⁴ *ATTA News*, February 2006.

¹¹⁵ Email from John Prebble, Victoria University of Wellington, 14 March 2013.

¹¹⁶ ATTA Home, ATTA medal, <http://www.asb.unsw.edu.au/schools/taxationandbusinesslaw/atta/Pages/medal.aspx><http://www.asb.unsw.edu.au/schools/taxationandbusinesslaw/atta/Pages/medal.aspx>.

¹¹⁷ ATTA Annual Conference, University of Auckland, 23-25 January 2013.

Research Prize.¹¹⁸ The prize is awarded every two years to a current doctoral student working in international or comparative taxation in Australia. It is a highly competitive and sought after prize. The successful candidate has their expenses paid to attend an IFA international congress as part of the Poster program. This involves preparing a poster, explaining the subject of their thesis and discussing the thesis with interested participants in the Congress. The prize is worth approximately \$7000.00

The inaugural prize winner for this award was Kathryn James in 2007. The title of her thesis is 'Explaining the Rise of the Value-Added Tax - A Challenge to the Conventional Approach' and explains how the value-added tax has risen to become one of the world's most dominant revenue instruments. The judging panel was Chris Evans, Rick Krever and Dale Pinto.¹¹⁹ Kathryn was awarded her doctorate in 2012. The subsequent winners were Fiona Martin in 2009,¹²⁰ Antony Ting in 2011¹²¹ and Celeste Black in 2013.¹²²

XIV RECOGNITION OF RESEARCH THROUGH PRIZES FOR PAPERS ON TAX AND TAX TEACHING

ATTA and the annual conferences has also become a forum for the recognition of high quality research and publications around tax and tax teaching. Several prizes have been established over the years with various name changes for these prizes and also changes in categories. The 2006 prizes for the best 'senior' paper¹²³ and 'junior paper'¹²⁴ have had a name change to 'Best paper' possibly recognising that many of us are coming to the senior stage of our careers. Originally there was a prize for best paper on empirical

¹¹⁸ *ATTA News*, February 2006.

¹¹⁹ *ATTA News*, January 2007.

¹²⁰ The title is 'An analysis of the income tax implications of mining payments to Native Title Groups under the Native Title Act and Traditional Land Owners under the Aboriginal Land Rights Act and an Evaluation of five proposals for legal reform'. Fiona is enrolled at UNSW.

¹²¹ The title is 'The taxation of corporate groups under the enterprise doctrine: a comparative study of eight consolidation regimes'. The doctorate was awarded in 2011 from the University of Sydney. It is to be published by Cambridge University Press as a book, *The Taxation of Corporate Groups under Consolidation: An International Comparison* in 2013.

¹²² The thesis analyses issues relating to carbon tax and is entitled 'Carbon Pricing and Taxation: An International Comparison'. Celeste is enrolled at the University of Sydney.

¹²³ Awarded to John Taylor, UNSW in 2006, *ATTA News*, February 2006

¹²⁴ Awarded to Lisa Marriott, then PhD candidate Victoria University of Wellington in 2006, *ATTA News*, February 2006

research work,¹²⁵ but this prize was discontinued probably due to the fact that much research is now focussed on tax policy. The giving of prizes commenced at the 2005 conference hosted by the Victoria University of Wellington and the categories were best paper, the most original paper and for the most promising new scholar.¹²⁶ At the 2012 conference there were awards for best paper (Lisa Marriott), best paper upon the subject of tax teaching (Brett Freudenberg) and best paper presented by a postgraduate student (Sandra Fernandes). At the previous conference held at the University of Melbourne Law School the best paper award went to John Bevacqua, best teaching paper to Richard Simmons and there were two prizes for the best PhD presentations, Martha Smart for the best presentation on a PhD on tax administration and Caroline Dick for one on a general tax area. Gordon Cooper, as Patron has also presented Patron's prizes at several conferences and at the 2011 conference Victoria Roberts was the winner of the Patron's prize for a PhD presenter.¹²⁷ A list of prize winners is attached as Appendix A.

XV SPONSORSHIP OF CONFERENCES

ATTA's close links with the tax, legal and accounting professions is recognised through the presence at and sponsorship of conferences by various professional and publishing organisations. Each conference has had numerous sponsors. CCH Australia, Thomson Reuters and Lexis Nexis have been regular sponsors. Professional associations have also contributed such as the Tax Institute, CPA Australia, Tax Matrix and the National Institute of Accountants.¹²⁸

XVI CONCLUSION

This paper has aimed to provide a detailed, but concise history of ATTA, the annual conferences and other developments that have made this organisation an important contributor to tax research and teaching. When viewed across the spectrum of over 20 years it can be seen that the organisation has developed and changed in many ways. The initial conference presentations were much more focussed on tax technical issues and

¹²⁵ Awarded to Ern Chen Loo, then a PhD Candidate at the University of Sydney, *ATTA News*, February 2006.

¹²⁶ *ATTA News*, September 2004.

¹²⁷ *ATTA News*, February 2011.

¹²⁸ *ATTA News*, December 2007.

more practitioners were involved. The involvement of the ATO has gradually deepened and represents significant support for the continuation of ATTA as a contributor to tax research, policy and teaching. Other important developments include the production of the annual journal which publishes scholarly papers and which is recognised as an important contributor to tax research and debate and the involvement of new academics and doctoral students as a way of fostering the future growth of tax research and teaching.

XVII APPENDIX A

| Year | Name of Prize | Recipient |
|-------------|---|---|
| 2005 | Best Conference Paper | Miranda Stewart, University of Melbourne |
| | Runner up | John Prebble and Geraldine Hikaka, Victoria University of Wellington |
| | Most original Conference Paper | Bernadette Smith and Sonia Shimeld, University of Tasmania |
| 2006 | Best Junior Paper | Lisa Marriott, PhD candidate, Victoria University of Wellington |
| | Best Senior Paper | John Taylor, UNSW |
| | Best Empirical Paper | Ern Chen Loo, PhD candidate, University of Sydney |
| 2007 | Best Junior Paper | Lisa Marriott, Victoria University of Wellington |
| | Best Senior Paper | Mark Burton, University of Canberra |
| | Most Innovative Paper | Rebecca Prebble and John Prebble, Victoria University of Wellington |
| 2008 | Best Conference Paper | Justin Dabner, James Cook University |
| | Best Teaching Paper | Margaret McKerchar, UNSW |
| | Most original conference paper | Premasiri Yapa, Diane Krall and Dianne Harvey |
| | Patron's award for best student's paper | Trish O'Keefe |
| | Best paper on Personal tax | Giok-Faa Sia, Arah Salleh, Murali Sambasivan and Jeyapalan Kasipillai |
| | Best paper on Business tax | Julie Cassidy, Deakin University |

| | | |
|------|---|--|
| | Best paper on International Tax | Richard Cullen, University of Hong Kong and Richard Simmons, Lingnan University Hong Kong |
| | Best themed paper | Andrew Maples, Canterbury University |
| 2009 | ATTA Cynthia Coleman Prize for the Best Teaching Paper/Presentation, sponsored by Tax Matrix Pty Ltd. | Julie Cassidy, Deakin University |
| | Thomson Reuters New Zealand Prize for the Best Themed Paper. | John Taylor, UNSW |
| | Patron's award for the Best PhD Workshop Paper/Presentation | Najeeb Memon |
| 2010 | Best Paper | Lisa Marriott, Canterbury University |
| | Best Paper by an Early Career Researcher | Chloe Burnett, University of Sydney |
| | Best Empirical paper | Robert McGee, Fayetteville State University and Ranjana Gupta, Auckland University of Technology |
| | Best Teaching Paper Prize | Brett Freudenberg and Lisa Samarkovski, Griffith University |
| 2011 | Best Paper | John Bevacqua, La Trobe University |
| | Best Teaching Paper | Richard Simmons, Lingnan University Hong Kong |
| | PhD presentation (tax administration stream) | Martha Smart |
| | PhD presentation (general tax stream) | Caroline Dick |
| | Patron's prize for a PhD presenter | Victoria Roberts |
| 2012 | Best Paper | Lisa Marriott, Victoria University of Wellington |
| | Best Teaching Paper | Brett Freudenberg, Griffith University |
| | Best paper presented by a postgraduate student | Sandra Fernandes, K.U. Leuven, Belgium |
| 2013 | Best Paper | John Bevacqua, La Trobe University |
| | Best Teaching Paper | John Minas, Sonia Shimeld and Simone Bingham, University of Tasmania |
| | Best PhD Presentation | Raihana Mohdali |
| | Patron's Prize | Sally Joseph |

USING ONE-ON-ONE INTERVIEWS IN TAX TEACHING

JOHN MINAS, DR SONIA SHIMELD AND SIMONE BINGHAM*

ABSTRACT

This paper documents the implementation of one-on-one interviews as a new assessment initiative in the Master of Professional Accounting (MPA) unit Australian Tax Law. We introduced the interviews in response to the challenges faced by international postgraduate taxation students. Language difficulties compound the problems international students face in coping with mastering a new and complex tax system.

We designed and implemented one-on-one interviews with the objective of improving the quality of student learning. The interviews encouraged independent and deeper learning and they eliminated plagiarism. Students reported that having to explain the application of tax concepts to their lecturer encouraged them to understand the underlying sources of law and discouraged rote learning. This paper examines the interviews in the context of student approaches to learning.

* John Minas BBus, MInt Tax is an Associate Lecturer at the School of Accounting & Corporate Governance, University of Tasmania and PhD candidate at Atax, University of New South Wales.

Dr Sonia Shimeld PhD, MCom, BCom (Hons), Grad Cert ULT, CPA, FIPA is a Lecturer at the School of Accounting & Corporate Governance, University of Tasmania. Simone Bingham GradCertLegPrac, BEc, LLB, BCom(Hons) is a Lecturer at the School of Accounting & Corporate Governance and PhD candidate at the Faculty of Law, University of Tasmania.

I INTRODUCTION

This paper explores the introduction of an oral assessment task in Australian Taxation Law.¹ The oral assessment task (a one-on-one interview) was a significant change to the written assessment it replaced, and it was unlike any other assessment experience in the Master of Professional Accounting (MPA) program. Student feedback on the interview assessment (hereafter the interviews) was collected over the first two semesters of its use. The research considers the interviews in the specific context of student approaches to learning (SAL).

Australian Taxation Law is widely regarded by students to be one of the more challenging units in the MPA as reflected by its high failure rate. The MPA student cohort is approximately 90 per cent international and the majority of students are from China. The high level of communication skills required in the unit compounds the difficulties some international students face in learning and understanding a foreign tax system. However, from an assessment perspective, effective communication skills are critical in order for students to demonstrate their ability to understand and apply primary sources of tax law to complex 'real life' taxation problems, which are often ambiguous.

One of the broad aims of the interviews was to improve student learning by influencing student attitudes to learning. We designed and conducted a survey to gain a better overall understanding of the student cohort. Our hypothesis was that the way the students perceived assessment and feedback generally, would provide a basis for how to design and implement a specific assessment to support and improve their learning. Our research was also concerned with the question of whether assessment and teaching style can influence learning style and student performance.

In order to address our concerns, we implemented an action research design. This involved identifying the problem, creating a solution and evaluating the impact of the solution. We defined the problem by reference to the experience of the academics who taught the unit and feedback from previous students. This problem related to the need to improve the oral communication skills of students and improve the quality of their

¹ Australian Taxation Law is a compulsory unit in the Master of Professional Accounting (MPA) at <name of our university>.

learning. The development of the solution was informed by discussions with other accounting and non-accounting academics, reviewing the literature, and designing and applying the new assessment tool. We evaluated the success, or failure, of the interviews through student surveys,² overall student results, voluntary discussions with some students at the end of each semester and our reflections on the assessment task.

II BACKGROUND

The teaching of Australian Taxation Law is delivered by way of a two-hour lecture and one-hour tutorial; the tutorials are limited to a maximum of 20 students. The scope of the material covered in the unit is very broad, as it is the only taxation unit offered in the MPA. Topics covered include assessable income and allowable deductions, capital gains tax, GST, FBT, taxation of entities and international tax. Although the final examination was not open-book, students were permitted to use an unannotated volume of concise tax legislation. The importance of the correct application of the legislation was emphasised throughout the unit, and students were made aware that this provided assessors with evidence of their understanding.

Failure rates in the unit typically range from 14 to 20 per cent and these have consistently been the highest in the MPA. In recognition of this level of difficulty, the teaching materials in Australian Tax Law have been carefully developed and aligned over many years³ so that each assessment, whether formative or summative, scaffolds the next one. The focus of every change in assessment is to encourage students to actively engage in their learning. In the semester that interviews were introduced, there were 98 students enrolled in the unit; in the second semester that the interviews were used there were 78 students enrolled.

III IDENTIFYING THE PROBLEM

Our research is partly informed by the view in the literature that research on SAL needs to be developed in certain areas and cultural contexts.⁴ There have been a number of

² We conducted the surveys at the beginning and end of each semester.

³ By the same unit coordinator

⁴ Angus Duff and Sam McKinstry, 'Students' Approaches to Learning' (2007) 22 (2) *Issues in Accounting Education* 183, 205.

qualitative studies undertaken in accounting research on SAL. Our research focuses on using assessment to develop the oral communication skills of students from a non-English speaking background and examining the results in the context of SAL. The assessment can also be seen as a way of developing a better understanding of the unit material as a whole.

A central issue identified with student learning in Australian Tax Law was that, despite continual refining of the assessment tasks, several students experienced difficulty in correctly applying sources of tax law to ambiguous situations. The problem we identified was an inadequate approach to learning used by some students. Specifically, this appeared to be a surface approach to learning, characterised by rote learning and evidenced—in some cases— by incorrect application of memorised material. This surface approach to learning would not suffice given that students were expected to independently locate relevant tax law information and apply this to complex 'real life' cases. It was considered that an assessment could be designed to specifically address this problem.

The concepts of the surface and deep approach to learning can be useful in conceiving ways of improving teaching.⁵ The surface approach arises from the need to complete assessment with a minimum of effort, whereas the deep approach arises from a need to engage with assessment appropriately and meaningfully.⁶ If this apparently simple distinction between the two learning styles is accepted, it is evident that the deep approach to learning is preferable, especially in the context of a postgraduate taxation law subject.

The literature on SAL considers that the distinction between approaches to learning extends further than merely surface or deep; importantly, it also characterises approaches to learning as malleable and dynamic.⁷ SAL researchers are motivated to understand the interaction between learners and the learning environment, rather than

⁵John Biggs and Catherine Tang, *Teaching for Quality Learning at University* (Open University Press, 3rd ed, 2007) 22.

⁶ Ibid.

⁷ Duff and McKinstry, above n 4, 186.

focussing on learning preferences or styles of learning.⁸ It is asserted that educators who apply SAL do so in an attempt to orchestrate the learning environment, and the learner's perceptions of it, in order to achieve learning objectives that reflect deep, meaningful and conceptual understanding of the unit.⁹ Curriculum design, and the way a unit is taught, can influence the learning approach adopted by students.¹⁰

Although surface and deep are two distinct approaches to learning, it would be an oversimplification to characterise a learner as either a deep learner or surface learner. This is because the same learner can use both approaches and there can be a degree of overlap between aspects of deep and surface approaches to learning. Under a 'narrow orientation' approach to learning, students systematically review material, attempting to first understand and then memorise what they have learnt.¹¹

The literature identifies an apparent paradox, about student learning, applying to some Asian students. Notwithstanding that these students are high achievers generally; there is a perception that they may appear to be using a surface approach to learning.¹² This paradox may be explained by the notion that these students seek understanding consistent with deep learning, which requires committing pertinent information to memory. For example, there is evidence from research on a group of students from Hong Kong that this learning approach was characterised by an intention to both understand and memorise.¹³ However, memorising prior to understanding does not necessarily constitute surface learning, as this study method may be a means of coping with the pressures that students face.¹⁴ It is possible for a student, with an initial intention to engage in deep learning ultimately to adopt a memorisation approach as a strategic means of completing a particular assessment.¹⁵ More specifically, there is a distinction

⁸ Ibid 184.

⁹ Ibid.

¹⁰ David Kember, 'Misconceptions about the learning approaches, motivation and study practices of Asian students' (2000) 40 *Higher Education* 99, 107.

¹¹ David Kember and Lyn Gow, 60 'Cultural specificity of approaches to study' (1990) *British Journal of Educational Psychology* 356,361.

¹² David Kember, 'The intention to both memorise and understand: Another approach to learning?' (1996) 31 *Higher Education* 341, 343-344.

¹³ Kember, above n 12, 350.

¹⁴ Kala Saravanamuthu, 'Reflecting on the Biggs-Watkins theory of the Chinese Learner', (2008) 19 *Critical Perspectives on Accounting* 138, 162.

¹⁵ Kember, above n 12, 352.

between learning whereby a student attempts to memorise and understand, and rote learning per se, as the latter constitutes a surface approach given that there is an absence of an intention to understand the material.¹⁶ This implies that the student's intention may provide a better indicator of their learning approach rather than the specific study technique used.

Although surface approaches to learning can be associated with rote learning, memorising by repetition can be used to develop and deepen understanding and assist students in attaining a good level of academic performance.¹⁷ Memorising and understanding components of learning are interrelated rather than mutually exclusive.¹⁸ Thus, memorisation does not necessarily constitute a surface approach to learning, as it can be used as part of a deep approach to learning, whereby memorisation enhances understanding. Another view in the literature is that students using a deep learning approach seek the inherent meaning of an area of study and that although information may be remembered as a result of this approach, it is almost an unintentional by-product of the learning style.¹⁹

Under the surface approach to learning, students have the intention to acquire no more than the knowledge sufficient to complete an assessment task or to pass a unit.²⁰ The literature identifies as a critical issue in SAL, whether approaches to learning are an inherent and static characteristic of individuals, or whether these approaches can be influenced by the learning context; that is, influenced by teaching methods, curriculum and assessment.²¹ It was considered that in completing the previous written assignment some students adopted a surface approach to learning. Prior to the use of the interviews there were several cases of plagiarism detected and several suspected cases. This

¹⁶ David Kember, Anthony Wong and Doris Y.P. Leung, 'Reconsidering the dimensions of approaches to learning' (1999) 69 *British Journal of Educational Psychology* 323, 333-334.

¹⁷ Barry Cooper, 'The enigma of the Chinese Learner' (2004) 13(3) *Accounting Education* 289, 294.

¹⁸ Ference Marton, Gloria Dall'Alba and Tse Lai Kun, 'Memorizing and understanding; the keys to the paradox?' in David Watkins and John Biggs (eds) *The Chinese learner: cultural, psychological and contextual influences* (Comparative Education Research Centre/Australian Council for Educational research, 1996) 69, 74.

¹⁹ Kember, above n 12, 343.

²⁰ Matthew Hall, Alan Ramsay and John Raven, 'Changing the learning environment to promote deep learning approaches in first-year accounting students' (2004) 13(4) *Accounting Education* 489, 490.

²¹ *Ibid*, 492.

implies that some students used a surface learning approach and that they lacked the required understanding to complete the assignment themselves.

There is a relationship between cultural factors and learning style preferences identified in the literature.²² In a comparative study across Japan, Australia and Belgium, it was found that the Australian students preferred individual 'learning by doing' to achieve competencies, rather than waiting for appropriate answers from their instructors.²³ The same study found that oral activities such as open discussion and seminars are a preferential learning method for Australian students, partly because there is a high probability that they will receive positive reinforcement from their instructors.²⁴ Although the ideology of teachers as authority has a strong impact on the learning behaviour of Chinese students, these students can ultimately be more active than their Western peers in academic learning, once they overcome their intimidation to express themselves.²⁵

In introducing the interviews, we were conscious of the view in the accounting education literature that effective communication skills are essential for graduates and that these accounting students must acquire these skills before graduation if they are not to be disadvantaged.²⁶ As well as the need for accounting graduates to possess effective communication skills in general, MPA graduates are expected to specifically possess communication skills at a level where they can justify and interpret professional decisions to specialist and non-specialist audiences.²⁷ Prior to their implementation, the interviews were considered an effective assessment type, which would allow for a more complete evaluation of these specific oral communication skills.

²² Gregory Boland, Satoshi Sugahara, Evelien Opdecam, and Patricia Everaert, 'The impact of cultural factors on students' learning style preferences – a global comparison between Japan, Australia and Belgium', (2011) 19(3) *Asian Review of Accounting* 243, 260.

²³ Ibid 258.

²⁴ Ibid.

²⁵ Man-ping Chu and Tomoko Nakamura, 'A Study of Chinese and Japanese College Students' L2 Learning Styles', (2010) 2(2) *Asian Culture and History* 30, 31.

²⁶ Ram Sriram and Richard Coppage, 'A Comparison of Educators and CPA Practitioners Views on Communication Training in the Accounting Curriculum' (1992) 8(3) *Journal of Applied Business Research* 1.

²⁷ Australian Qualifications Council, *Australian Qualifications Framework* (2013) 60. According to the AQF definition, communication skills in this context include oral communication. Australian Qualifications Council, *Australian Qualifications Framework* (2013) 93.

IV DESIGNING A SOLUTION

According to the literature, tertiary institutions should place more emphasis on developing thinking people who are encouraged to engage with emerging knowledge in a reflective manner post-graduation.²⁸ More specifically, the learning process should promote critical reflection of accumulated knowledge by way of assessment and it should develop inquiring minds.²⁹ This view is consistent with the notion that a learning environment can facilitate deep learning. We were not persuaded by the view in the literature that student approaches to learning are static and unchangeable. The design of the interviews was therefore informed by the education literature that characterises student approaches to learning as dynamic, changeable and influenced by teaching style. Furthermore, teaching style should be targeted to suit the preferences of the learner as a way of enhancing students' retention of information, improving the efficiency of teaching and promoting a positive attitude to the unit amongst students. Where teaching styles are compatible with learning styles, students have a more positive attitude towards their unit.³⁰

The teaching and learning approach in accounting—which can be considered to include the more specific discipline of taxation —has focussed on passive teaching techniques and transferring discrete procedural knowledge, including technical content.³¹ It is also recognised that, traditionally, assessment in accounting has tended to have a narrow focus. Despite this, the oral communication skills of accountants are required to be at a high level and the development of these skills may be neglected where the assessment focus is too narrow. One of the motivations for implementing the interviews was our view that many MPA graduates do not possess oral communication skills at the level required for employment in the taxation field. Given the expectation amongst employers for MPA graduates with high-level oral communication skills, we identified a gap in the assessment for the unit.

²⁸ Saravanamuthu, above n 14, 175.

²⁹ Ibid.

³⁰ Richard Felder and Linda Silverman, 'Learning and Teaching Styles in Engineering Education' (1988) 78(7) *Engineering Education* 674.

³¹ Gordon Boyce, 'Critical accounting education: teaching and learning outside the circle' (2004) 15 *Critical Perspectives on Accounting* 565, 569.

The literature on learning and culture portrays learning style as a dynamic state that results from transactions between the person and the environment, rather than a psychological trait.³² The same literature considers culture to be a pervasive influence on the environment in which the self-creation of learning style takes place.³³ This literature was an influence on the design of the interviews. It was also considered that because the interviews would be a significant change to the previous written assignment, students would benefit from a supportive learning environment that would assist them in preparing for, and participating in the interviews.

Literature on learning styles refers to typologies of cultural differences, distinguishing between high-context and low-context cultures.³⁴ In high-context cultures, external physical environments and non-verbal behaviours are considered important for determining meaning and, in this setting, a communication pattern is established whereby covert clues provided are used to search for real meaning beyond verbal messages.³⁵ A high-context culture requires its members to be sensitive to the immediate environment through feelings, with interpersonal relationships considered crucial.³⁶ Chinese, Japanese, French and Arabic countries are considered to belong to high-context cultures.³⁷ The literature explains the relationship between culture and learning in terms of high-context cultures being associated with a 'concrete experience' or 'feeling' learning ability, and low-context cultures being associated with an 'abstract conceptualisation' or 'thinking' learning ability.³⁸

In low-context cultures, external physical environments and non-verbal behaviours are considered to be less critical in generating and interpreting meaning, with interpersonal relationships lasting for a relatively shorter period.³⁹ Low-context cultures represented

³² Simy Joy and David Kolb, 'Are there cultural differences in learning style?' (2009) 33 *International Journal of Intercultural Relations* 69,71.

³³ Ibid.

³⁴ Yoshitaka Yamazaki, 'Learning styles and typologies of cultural differences: A theoretical and empirical comparison', (2005) 29 *International Journal of Intercultural Relations* 521, 525.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid 532.

³⁹ Ibid 525.

by a number of Western countries value explicit communicative styles in logical forms and rationally detached analysis.

By applying the literature's conclusions on typologies of cultural differences by ethnicity,⁴⁰ the majority of Australian Taxation Law students are seen as belonging to a high-context culture. We observed that these students placed a high value on interpersonal relationships, consistent with the characterisation in the literature of high-context cultures. According to our observation, there appeared to be strong links established with students who had completed the unit in previous semesters and this was a method that some students used to obtain information about the unit and assessment.

In designing and implementing the solution, we sought the advice of other academics. Some of the accounting academics, however, were very critical of the additional workload that they perceived the interviews would impose and were concerned about practical issues in implementing the interviews. Because of this feedback, advice on the implementation of the interviews was sought from different disciplines within the University. Academics from Pharmacy and Asian Studies provided support and specific advice about the operational side of the assessment including how to provide scaffolding for the students.

V THE SOLUTION

An integral part of the solution was in the provision of scaffolding for student learning in a new assessment method. Within the tutorials, students were placed in groups of five to engage them in their learning and to develop skills that would prepare them for the interview assessment. For example, each week the tutorial groups were given a sight unseen problem, and each group was then required to present their answers to these. Assessment for tutorial participation was 15 per cent of the overall mark in the unit. A rubric was provided to students at the beginning of semester explaining how the tutorial participation marks would be determined. At the end of the semester, students self-assessed themselves using the rubric and the academics audited their marks.

⁴⁰ Ibid.

We used an initial survey at the beginning of the first lecture of each semester to question the students on whether they thought Australian Tax Law would be a difficult unit to pass. In the first semester that the interviews were used, 52 per cent of students agreed that it would and in the second semester 64 per cent agreed. The increase in the perceived level of difficulty in the second semester might have been influenced by the first semester's students' overall experience with the new assessment and how this was conveyed to the second semester students. Evidence of this was provided in both semesters where the majority of students stated that the reason for their response was that they had 'heard' from past students. The first semester students may have been less prepared for the interviews since they could not obtain any specific information about them from past students. Perceptions about the level of difficulty increasing may be seen as altering the learning environment and influencing the learner's response to it. It could lead to students adopting a surface approach at the outset, or encourage students to work harder from the outset. Another possibility is that it might lead to students deciding to incorporate memorisation into their study routine as a way of—ultimately—attaining a deeper level of understanding.

The interviews were an assessment method that constituted a major change to the previous tax return assignment. Although students had previously been assessed on their written assignment submission, under the new assessment method, they would still be required to complete and submit this written component, but would be assessed on their individual interview only. The written component involved preparing a tax return and justifying the inclusion or non-inclusion of several income and deduction items for a hypothetical individual taxpayer. A few students—especially in the first semester—objected to the fact that the written component was not assessed. One academic individually interviewed each student⁴¹ and the interviews were approximately ten minutes each. Students were asked several interview questions about their previously prepared tax return and written explanation, and were assessed according to a rubric that detailed the assessment criteria. The rubric was distributed to students at the start of semester and was explained in detail prior to the interviews. Five minutes time was allowed at the conclusion of each interview for immediate feedback.

⁴¹ Students were required to register online for an interview time and they had a choice of an interview with one of the two academics who taught in the unit, subject to their availability.

Students also gained a direct insight into how marks were determined by being involved in the feedback process. The interviews were considered to be a practical and rigorous assessment tool that assessed oral communication skills and student understanding of the unit content, whilst encouraging deeper student learning.

VI EVALUATING THE IMPACT

During the first lecture of each semester that the interviews were in use, we requested students complete surveys on their views about assessment. The surveys included questions on their most, and least, preferred methods of assessment and their perceptions on the difficulty of the unit. In the first semester that the interviews were in use, part of the purpose of collecting the first survey responses was to inform the development of the new assessment. We distributed a similar survey to students, during the last week of each semester, to ascertain if their perceptions had changed and how they perceived the difficulty of the unit on having completed the semester. We used the second survey to evaluate how successful the interviews had been from the students' perspective.⁴²

Part of the purpose of the surveys, conducted in the first and last weeks of each semester, was to ascertain if there were any discernible changes in student attitudes to learning. We also used the surveys from the end of each semester to evaluate the impact in terms of feedback from students. The survey data allowed for a comparison of changes in student attitudes to learning between the two surveys in individual semesters and between the two semesters. The surveys required students to nominate their two most preferred assessment methods—from a choice of ten—with the opportunity to provide additional explanatory comments. We considered changes in preferences for particular types of assessment to be indicative of changes in student attitudes to learning, although not necessarily determinative of this. Voluntary formal

⁴² Out of the 98 students enrolled in the first semester 57 (58%) responded to the first survey and 59 (60%) responded to the second survey. In the second semester, 78 students were enrolled, 55 students (71%) responded to the first survey and 34 students (44%) responded to the second survey.

discussions were held with a few students at the end of semester, with the objective of further understanding the impact of the interviews.⁴³

We observed significant changes in the preferred assessment types nominated in the first and second surveys taken in the second semester of the interviews. Specifically, there was a decrease in the percentage of students nominating multiple-choice questions as a preferred assessment method—from 29 to 17 per cent—and the popularity of group written assignments also declined. At the time of the second survey in the second semester, interviews had become a more preferred assessment method,⁴⁴ compared to when we conducted the first survey. It was encouraging to see that interviews were more preferred at the end of the second semester. Some of the survey responses revealed that the unpopularity of group assignments related to a more common objection of higher performing students about ‘free riders’—that other group members could obtain a high mark, with little or no contribution.

We also considered the success of the interviews by reference to the University’s Student Evaluation of Teaching and Learning (SETL) surveys.⁴⁵ SETLs were distributed to students during the last lecture of each semester. The SETL responses⁴⁶ revealed an increase in student agreement to the question on whether the unit developed skills needed by professionals in the field. In the second semester, the mean of the responses to this question was 4.5, with a standard deviation of 0.6, compared to a mean of 4.1, with a standard deviation of 0.9 in the first semester. This increase in the perception of skill development may reflect the decrease in preference for multiple-choice questions as per the surveys. Several students taking a deeper learning approach to the interviews underpinned this skill development. The following quotes—taken from SETL responses—suggest individual instances where this may have occurred:

⁴³ The one-on-one discussions were voluntary and an academic who was not involved in teaching the unit conducted them. In the first semester, eight students volunteered for these discussions. Only one student volunteered in the second semester. The late timing of the voluntary discussions for the second semester may partially explain the lower response rate, given that many international students may have returned home during this period.

⁴⁴ Interviews were the third most popular assessment method in the second semester survey.

⁴⁵ SETLs use a five-point scale for responses: 5 – Strongly Agree, 4 – Agree, 3 – Neutral, 2- Disagree and 1 – Strongly Disagree.

⁴⁶ In Semester 1, there were 74 SETL responses from 98 enrolled students (a 76% response rate) and in Semester 2 there were 54 SETL responses from 78 students (a 69% response rate).

The interview assignment is the best part of this unit. It does provide great opportunities to enhance what we've learnt and go further.

Interview and assignment was a clever way to make us study.

This deeper learning approach may also be a reflection of the practical and 'real life' nature of the interviews and the following SETL feedback also appears to confirm this:

[The interview was] useful for real life.

It trained us how to talk like a professional tax accountant and it also told us what we would be expected to do in real world.

It is more real than any other kind of way to test what we learned.

Not only were you required to thoroughly prepare the tax return, but you were also given the chance to prove/explain your approach. The dialogue with a teacher was extremely useful, I believe, as it was similar to real life.

The interactive nature of the assessment and the immediate feedback, provided after each interview, proved to be very useful and popular with students and it may have assisted with the apparent improvement in student attitudes to learning:

The fact that you can actually explain exactly why you think this way and if your thinking is not on the right track the lecturer points you to the right direction and you can correct your mistakes yourself.

Working in informal groups to address the increased level of difficulty and the personal satisfaction from the challenge was also evident:

It pushed us to work hard and work as a team to prepare for the assignment. During the whole preparation time, we learnt a lot from each other and one more important thing is it does trigger our interest in tax law.

If I get high score from interview, it makes me feel more satisfaction than usual.

Students also acknowledged that cheating would be reduced and communication skills improved:

It really shows your individual knowledge, cuts back on cheating and helps with communication skills.

Good that it is impossible to plagiarise – this would be easy to do if submitting a tax return without the interview.

Great fun! Work environment simulation! Good for building up confidence and having chance to communicate.

Some students perceived that the emphasis on oral communication skills was unfair as this masked their level of understanding of the unit:

It would be unfair for non-English speakers. Cannot expressing clearly does not mean no efforts or endeavour.

Some students perceived that having the choice of two different assessors was unfair:

I don't like the interview as the two tutors have different standards to evaluate students' performance. It is not fair to students.

One of quotes from the end-of-semester voluntary discussions considered the impact of culture:

The education system in China does not focus on opening [the] mind, we can see some of the Chinese students do not really like to communicate, they do not like to communicate with anyone, they just do their work and go away, they do not realise the importance of socialising, so but they will change, we come here to learn...it might be a cultural difference, but students can change.... I think that it might be a different way but I agree that an interview method is a fantastic method.

Although in the first semester some students stated that the interviews caused stress, this was not reported in second semester. The perception of stress may have reflected a reaction to what was a new and unknown learning environment, primarily caused by the interviews or to perceptions of insufficient interview time. A few students in each semester stated that they were nervous. There were more negative comments about limited time in the first semester than in the second semester.

The survey responses provide some evidence of students being highly reliant on information from past students. For example, in the first semester survey, some students complained about the written assignment not being marked. This suggests an overreliance on information about the unit from previous students, as the assessment of the interviews was explained in detail in the Unit Outline; furthermore, the rubric provided and discussed in the lectures and tutorials did not refer to marks being awarded for the written component. In the second semester surveys, the fact that the written component was not marked did not appear to be a common complaint, as students better understood what was required. The second semester students may have had a slight advantage compared to the first semester students, since the formers' reliance on information from the previous semester students, could have been useful for them.

The pass rate in the exam, for the two semesters that the interview assessment was in use, was five per cent higher than the pass rate for the semester in which the written assignment assessment was last used. There was an increase in the number of high distinctions for both semesters that the interview assessment was in use. The average overall internal assessment mark in the unit was the same as in the previous semester.⁴⁷

⁴⁷ That is, the average internal mark for the first and second semesters the interviews were in use were the same and these internal marks corresponded with those from the last semester that the previous

Overall student marks in the unit increased. However, we cannot conclude, from this information alone, that the improvement in student performance was a direct result of the interviews.

Although the reasons for developing and introducing the interviews were primarily student-focussed, one of the benefits for the academics was a reduction in marking time, in comparison with the previous written assignments. Although the time allocated for marking the written assignments was 30 minutes each, in practice these could take longer to mark. The interviews, by contrast, could be marked efficiently upon completion, with meaningful feedback provided directly to students immediately.

VII IMPLICATIONS

The interviews appear to have had a positive impact on SAL. Overall, we consider that they are an example of how the learning environment can positively influence students. The interviews appear to be a type of assessment best suited to students who 'learn by doing' given their practical focus. However, there are some indications that the interviews are suited a variety of learning styles. One of the explicit objectives of the interviews was discouraging surface approaches to learning and we consider them relatively successful in having achieved this.

Some of the student survey responses were critical of the time allowed for the interview, arguing that ten minutes per student was inadequate. This perception of insufficient interview time may have contributed to broader perceptions about unfairness and it may have arisen from a belief that, if more time was allowed, a better mark might have been obtained. However, from the assessors' perspective, ten minutes per interview—and the additional time for feedback—was considered an appropriate amount of time to assess students and there would be no discernible advantage of increasing the duration of the interviews. The interviews were a completely new type of assessment for these students in the MPA course and this might have influenced broader comments about the unfair assessment of the interviews. There were some comments to the effect that marks

written assignment was in use. The internal assessment comprises 40 per cent of the student's overall mark in the unit. This consists of 15 per cent for the interviews (previously a written assignment), 15 per cent for tutorial participation mark for the entire semester and 10 per cent for a peer-reviewed test.

awarded to other students were higher than what they should have been. However, such claims would be difficult for students to substantiate, given that they do not reflect a review of the actual interview of the other student(s).

Before the commencement of each interview, students were advised that they would be recorded. The recordings were retained for the purpose of students appealing their interview mark. The perception of unfairness in assessment may reflect an inadequate understanding of the assessment rubric, by some students. This may be addressed in future, by more detailed explanations of the rubric—before the interviews are conducted—referring to specific examples of answers to individual questions at various standards, in order to increase student understanding.

We consider that, where possible, perceptions of unfairness from students should be addressed. Although such perceptions may be flawed, they may also detract from the overall success of the interviews for as long as they persist. Addressing these perceptions might be achieved by changing the individual interviews to a group interview format. In this alternative format, the time for each interview could be extended and students would have the opportunity to gain an improved understanding of their marks relative to those awarded to other students. If this approach was used it would require the written component to be completed in the same groups, as this would form the basis for questions asked in the interviews. The group interview approach, if it were successfully implemented, would reinforce that it is the interview, rather than the written component, that is being assessed.

However, we consider that changing the intervention format to group interviews is not suited to the objectives and outcomes of this unit. The small proportion of negative student comments on the fairness of marks appear to be more grounded in an incomplete understanding of the assessment criteria, rather than transparency. Furthermore, we consider that immediate feedback may not be appropriate for the group interview format, given that there may be instances where the assessors do not agree or students perceive that the difficulty of questions is unfair compared to their colleagues. The group interviews are likely to require additional time for the interviewers to discuss and moderate their marks and if this were the case, it would

negate the benefits of students receiving immediate feedback following their interview, as well as the decreased marking time for the academics.

VIII CONCLUSIONS

We consider the interviews an improved form of assessment compared to the previous written assignment. This is the conclusion from the perspective of the two assessors after taking into consideration the aggregate student feedback over the last two semesters. After the first semester of using the assessment, the two academics teaching the unit considered the issue of the cultural context as it applied to the assessment. Culture is a broad term, which can be construed as more than simply the learning styles of students from a particular background.

We found that the interviews operated more successfully in the second semester than in the first semester of use and that their overall success may relate to the students' approaches to learning. The survey results provide an indication that, in this instance, student approaches to learning were malleable and dynamic rather than static. Furthermore, we are of the view that the interviews were an effective way of promoting deeper approaches to learning. Some students reported that the interview increased their understanding of the material in the written component.

The learning environment can be construed as including the interactions between past and previous students in the unit and these are a source of information as well as misinformation. Some students in the unit may have been overly reliant on obtaining information and guidance from other students who had completed the unit in a previous semester. This was clearly evident during the first semester, when several students appeared to disregard information about the assessment from the academics where it was inconsistent with information from past students. This approach to learning was particularly unhelpful given that past students had no experience with the interviews. Although it is possible that this learning approach originates from students belonging to a high-context culture, we do not suggest that this point can be proven empirically in our research.

There was significantly more positive than negative feedback, on the interviews, from students in both semesters. One of the more common items of negative feedback was to do with perceived unfairness. Although there may be a degree of subjectivity in interviews per se, this is not considered to detract from the rigour of the interview as an assessment method. We find that, based on two semesters of use, one-on-one interviews are a more rigorous and complete method of assessment than a written alternative. An incomplete understanding, by some students, of what was being assessed may partly explain some of the negative feedback on the interview assessment. Overall, we conclude that most students demonstrated that their oral communication skills were at the required level in the interviews. The interview assessment will continue to be used in the unit. We envisage future research opportunities for quantitative research on the effectiveness of the interviews as a form of assessment using comparative assessment data over several semesters.

IX APPENDICES

Appendix 1: Selected questions and responses from the student surveys

Is this your first semester at this university?

Only two students in first semester responded yes to this question, in the second semester, there were no students who were in their first semester.

What is your nationality?

First semester: 83% of respondents were Chinese, 8% Australian, 7% Indian and 2% Pakistani.

Second semester: 88.8% of respondents were Chinese, 3.7% Malaysian and 1.8% each were Australian, Polish, American and Russian.

Please indicate your age group:

First semester: 57% of respondents were 25 or under; 41% were 26-35 and 2% were over 35.

Second semester: 56% of respondents were 25 or under, 44% were 26-35 and no respondent were over 35.

Please indicate your gender:

First semester, survey one: 53% of respondents were Female

First semester, survey two: 59% of respondents were Female

Second semester, survey one: 73% of respondents were Female
 Second semester, survey two: 74% of respondents were Female

Appendix 2: Other selected questions from the student surveys referred to in the paper

Which two types of assessment do you most prefer? (Circle 2)

- a. Multiple choice test
- b. Short answer test
- c. Exam
- d. Group written assignment
- e. Individual written assignment
- f. Group class presentation
- g. Individual class presentation
- h. Assessed logbooks
- i. Assessed tutorial work
- j. Individual interview

Explain why you prefer those two types of assessment.

Explain which type of assessment you like the least and why.

Appendix 3: Responses to selected SETL questions

| Questions | Mean Semester 1 | Standard Deviation | Mean Semester 2 | Standard Deviation |
|--|-----------------|--------------------|-----------------|--------------------|
| I have developed skills needed by professionals in this field | 4.1 | 0.9 | 4.5 | 0.6 |
| In this unit I was encouraged to think | 4.4 | 0.8 | 4.6 | 0.7 |
| The grading system was explained clearly | 4.2 | 1.0 | 4.4 | 0.9 |
| The use of interviews encouraged me to learn the material in greater depth | 4.2 | 1.0 | 4.2 | 1.1 |
| Interviews should be longer | 3.8 | 1.2 | 3.5 | 1.2 |
| Interviews do not test understanding | 3.0 | 1.4 | 2.4 | 1.2 |
| Receiving verbal interview feedback assisted my learning | 4.1 | 1.0 | 4.1 | 0.9 |
| The unit addressed the learning outcomes stated in the Unit Outline | 4.4 | 0.6 | 4.4 | 0.7 |
| The criteria for each assessment component were clearly identified | 4.4 | 0.7 | 4.3 | 0.8 |
| I was given useful feedback on my assessed work | 4.3 | 0.7 | 4.2 | 0.9 |
| The unit stimulated my interest in the subject area | 4.2 | 0.8 | 4.2 | 0.8 |
| I gained a good understanding of the subject matter | 4.4 | 0.8 | 4.2 | 0.7 |
| I enhanced my skills in this unit | 4.2 | 0.8 | 4.4 | 0.6 |
| The unit was well taught | 4.5 | 0.6 | 4.6 | 0.6 |

Appendix 4: Procedure for inviting students to participate in voluntary discussions

An academic who did not teach Australian Tax Law sent an email to all students enrolled in the unit inviting them to take part in a voluntary discussion. The timing of this email was after the students received their final marks (six weeks after the final lecture). The same academic conducted and transcribed the individual voluntary discussions. The transcriptions included a unique letter code, with individual students not identifiable.

PAUL KEATING, TAX ALCHEMIST?

A study proposing the interpretive tools of

Pierre Bourdieu

DR DIANE KRAAL*

ABSTRACT

What is the extent of Paul Keating's contribution to tax reform during his time as Australia's Treasurer (1983-1991) and Prime Minister (1991-1996)? Even today he is an active commentator on government policy.

Some would claim that Keating simply marketed the tax reform ideas of others to the electorate. Alternatively, using the metaphor of a tax alchemist, he transformed existing tax reform ideals and built upon them.

This study, while acknowledging more common theoretical approaches to understanding tax reform, argues for an alternative: Pierre Bourdieu's social practice theory. Thus an interpretive approach is proposed to analyse the relational processes between tax reform actors, but with a focus in Paul Keating. The Bourdieusian concepts of 'field', 'habitus' and 'capital' were developed to help explain contextualised social and relational encounters; and have been previously applied to legal issues. My investigation finds that these tools are appropriate to explain tax reform, given the scenario of the interrelatedness of Keating's persona and struggles with the tax institutions and its elite political, civil sector, business, academic and trade union actors. Keating's early tax reforms are now 'doxa': normative elements of the tax structure.

* Senior Lecturer, Department of Business Law and Taxation, Monash University

Acknowledgements

The author is grateful for comments from delegates at the 25th Annual Conference of the Australasian Tax Teachers Association, 'Tax Alchemy: Turning Silver into Gold', University of Auckland Business School, Auckland, New Zealand, 23-25 January 2013, and for the travel funding provided by my department at Monash University, Australia. Acknowledgement is also extended to Professor Kerry Jacobs (National University of Australia) for his comments on aspects of the paper.

I INTRODUCTION

What is the extent of Paul Keating's contribution to tax reform while a parliamentary member of Australia's House of Representatives (1969-1996) that includes his time as Federal Treasurer (1983-1991) and Prime Minister (1991-1996)? Even sixteen years after leaving politics, Paul Keating still has a presence in the discourse on contemporary Australian policy. Witness his book of recent speeches and sell-out formal public lectures.¹ It is now timely to examine the extent of Keating's contribution to tax reform.



Figure 1. Paul Keating, c 1985



Figure 2. Paul Keating, c.2012

Some believe Keating simply marketed the tax reform ideas of others to the electorate; or alternatively, using the metaphor of a tax alchemist, he transformed existing tax reform ideals and built upon them. Major tax initiatives during Keating's public life include dividend credits, the Capital Gains Tax, Fringe Benefits Tax and the Petroleum Resource Rent Tax. The introduction of compulsory contributions to superannuation (retirement pension funds) might also be added.² There were also failures; such as his proposal to introduce a consumption tax, in the form of a retail sales tax. Given Keating has actively proffered opinions on government policy since leaving parliament, his public work provides a framework to compare societal aspects of past tax reform to current tax reform initiatives.

Briefly, in 1969 Paul Keating was elected to the House of Representatives; and in October 1975 became the (then) youngest federal Labor minister (Minister for the Northern Territory). In Labor's shadow cabinet of 1976 he was promoted to spokesman

¹ Paul Keating, *After Words: The Post-Prime Ministerial Speeches* (Allen and Unwin 2011). Paul Keating, *On Asia and the new order* (14 November 2012) Keith Murdoch Oration, State Library of Victoria <<http://news.blogs.slv.vic.gov.au/2012/11/15/the-2012-keith-murdoch-oration-delivered-by-the-honourable-paul-keating-former-prime-minister/>>; Glenda Korporaal, 'Keating's Call to Raise Levy Hits Right Note on Retirement Debate,' *The Australian*, 29 November 2012.

² The superannuation [pension] system is currently being criticised for its high fees and tax concessions. 'Dividend credits' is a lay term for Australia's unique dividend imputation system.

on minerals and energy; in January 1983 he was appointed shadow treasurer; and from March 1983 to May 1991 was Treasurer in the government of Bob Hawke, and then Prime Minister from December 1991 to March 1996.³

In reflecting on Keating's contribution specifically to taxation, and more broadly to changes in community access to the tax debate over time, my overall research objectives are:

1. To consider the social practices of the tax field, across both its institutions and elite actors, in the context of Australian tax reform over two periods of Labor Government tax reform: from 1983 to 1994 and from 2007 to 2012.
2. To closely focus on the tax reforms in which Paul Keating has been involved, as either an instigator, or more latterly as a commentator.
3. To analyse Paul Keating's interrelated 'struggles' to enter the institutional structures of the tax field, and acceptance by the elite or dominant tax field agents. Keating's heterodoxy of tax reform requires consideration of his social practice (or practical knowledge), a combination of his habitus, capital and field position.

But first, this study, which is part one of a larger research project, argues for the appropriateness of using the interpretive approach of Pierre Bourdieu's social practice theory in the methodological framework to analyse the relational processes in tax reform between the institutions and agents in the tax field. The context is commentator Keating today contrasted with Keating the MP; and the Australian Labor Government tax reform agenda now versus its tax reforms of the past. The study findings are that Bourdieusian theory has the range tools to analyse the tax field, given the scenario of the interrelatedness of Keating's past and present struggles with the tax institutions and its elite political, civil sector, business, academic and trade union actors.

The next sections of this study cover the case for Bourdieu's theory to help explain tax reform; an overview of the influences on Bourdieu and his practice theory concepts; and the situating of Bourdieu's theory in the methodological framework. Finally, the conclusions are presented in support of the progression of this study to stage two of the larger research project. This study is significant for its contribution to the application of Bourdieu's social practice theory to tax reform and thus of interest to those in the law discipline. More generally it contributes to the literature on the use of Bourdieusian concepts in the legal field of taxation.

³ Paul Keating - A Chronology (c. 1990) <<http://australianpolitics.com/executive/prime-minister/keating/paul-keating-chronology>>

II THE CASE FOR BOURDIEU'S THEORY TO EXPLAIN TAX REFORM

In a 2010 analysis of preferences and reasons for tax reform shifts, James claimed that such outcomes are often the product of a range of political-economic factors.⁴ James adapted the analytical approach of Canadian political scientist, Simeon, whose framework attributes policy reform outcomes to the socio-economic environment, relative power of participants, community cultural traits and institutions that progress reforms.⁵ Simeon's framework, published in 1976, is neither theoretically nor empirically based;⁶ in fact it pre-dates North American acceptance of Bourdieu's vast corpus of work, which has had a profound effect on approaches to sociological disciplines, including legal studies.⁷ Nonetheless, Simeon raised the problem of the gap between subjective and objective approaches,⁸ which Bourdieu's theory of practice tries to address. In shaping her conclusions James also acknowledged the importance of the Weberian idea of culture [religious belief],⁹ but as will be explained later, Bourdieu expanded considerably on Weber's, perhaps one-dimensional, interpretation of culture. James has a later (2012 but as yet unpublished) more comprehensive analysis of dominant approaches to explain tax policy and reform, and focuses on *public choice theory*, which builds deductive models of individual and collective behaviour;¹⁰ and *historical institutionalism*, which explains the present by the institutional practices of the past, through case studies and supporting quantitative data.¹¹ She uses the latter approach.

⁴ Kathryn James, 'An Examination of Convergence and Resistance in Global Tax Trends' (2010) 11 *Theoretical Inquiries in Law*, 496.

⁵ Ibid., 486. James cites, Richard Simeon, 'Studying Public Policy' (1976) 9, no. 4 *Canadian Journal of Political Science*.

⁶ Richard Simeon, "Studying Public Policy," 556.

⁷ In 2010 a cross-Atlantic conference "Trente Ans Après *La Distinction*" marked Bourdieu's work "Distinction". Lamont acknowledged the impact of French sociologists, including Bourdieu, on many disciplines in North America for 30 years from around 1979. Michèle Lamont, 'How Has Bourdieu Been Good to Think With? The Case of the United States' (2012) 27, no. 1 *Sociological Forum*, 229.

⁸ Richard Simeon, "Studying Public Policy."

⁹ Kathryn James, "An Examination of Convergence and Resistance in Global Tax Trends," 486, footnote 60.

¹⁰ Buchanan writes in support of public choice theory, claiming its essential wisdom of insights into the workings of human nature, follows the thinking of Adam Smith, see James M Buchanan, 'Public Choice: Politics without Romance' (2003) 19, no. 3. *Policy*.

¹¹ Kathryn James, *Explaining the Rise of the Value Added Tax: A Challenge to the Conventional Approach* (PhD Thesis, Monash University, Australia, 2012), 153-92. James also considered the approach of 'new fiscal sociology', which is arguably a derivative of 'historical institutionalism'- to explain tax policy and reform. See Isaac William Martin, Ajay K Mehrotra, and Monica Prasad, eds., *The New Fiscal Sociology : Taxation in Comparative and Historical Perspective* (New York: Cambridge University Press, 2009).

For my study, to take either an objectivist approach (analysing institutional structures that reproduce social relations), or a subjectivist approach (interviewing to gain data about the thoughts and decisions of individual agents) will leave a gap; a perpetuation of epistemological shortcomings, as identified by previous scholars.¹² It is a reasonable ontological view that state institutions (that make and enforce tax laws) and personal experience (of tax law cultures and external social forces) are interrelated, and warrant utilising a theory that might bridge this divide. Bourdieu is widely used, (e.g. in legal studies in the UK and the US) and, according to Lamont, is generative, creating strong sociological perspectives.¹³

III BOURDIEUSIAN THEORY

This study claims that the theory of social practice derived by French sociologist, Pierre Bourdieu (1930-2002) will be useful to analyse the data collected on the social process of tax reform between multiple actors and institutional settings. Bourdieu developed his theory to address the traditional bifurcation between objectivist and subjectivist approaches. Thus the theory takes into account objective methods that claim to analyse institutional structures that reproduce social relations and subjective personal experience—and attempts to bridge the gap. Bourdieu's theoretical perspective looks into the practical knowledge of every day action as well as to the objective structures within which such action takes place.¹⁴ His practice theory, or praxeology, explains outcomes that are contended as neither solely objective nor subjective in source.¹⁵ Bourdieu developed power concepts (such as *field*, *habitus* and *capital*) for application to contextualised social and relational encounters in everyday life; tax reform fits this type of context.

Bourdieu's work was particularly influenced by Karl Marx and Max Weber. Marx (1818-1883) developed theories about society, economics and politics—collectively known as Marxism—that hold that all societies progress through the dialectic of class struggle: a conflict between an ownership class, which controls production; and a lower class,

¹² E.g. Rogers Brubaker, 'Rethinking Classical Theory: The Sociological Vision of Pierre Bourdieu' (1985) 14, no. 6, Nov. *Theory and Society*, 750.

¹³ Michèle Lamont, "How Has Bourdieu Been Good to Think With? The Case of the United States."

¹⁴ Objectivism is based on the premise that actions and attitudes, freedoms and wills, are the result of external structures of mechanical determinism, see Pierre Bourdieu, *The Logic of Practice* (Stanford University Press, 1980), 46.

¹⁵ Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, 1977).

which produces the labour for goods. Bourdieu extended Marx's general framework to comprehend social reproduction processes and extend the concept of capital beyond economic capital. Bourdieu accepted the primacy of class conflicts and material interests as the motivator for class inequalities.¹⁶ The use of the Bourdieusian extended concept of 'capital' is seen as more appropriate for my study than, say, Marxist theory, which only privileges economic capital as a path to power.

According to Brubaker, Bourdieu's corpus of work focused on social class and the capital required to reproduce class-based power and privilege over time.¹⁷ Bourdieu used the term *class* to metaphorically describe 'social structure; class struggles are assimilated to sexual, generational, regional, ethnic; and occupational struggle; and class theory merges with sociological theory in general.'¹⁸

Max Weber (1864-1920) wrote, *The Protestant Work Ethic and Spirit of Capitalism*, and called attention to the influence of cultural values, and in particular religious belief, and their impact on economic activity.¹⁹ Weber contended that sociology orientated exclusively to economic and political interests, social structures, classes, power, organisations, or institutions, 'was theoretically inadequate.'²⁰ Expanding on Weber, Bourdieu coined the term symbolic capital, 'to include religion, language, education, art and ideology; in short, culture.'²¹ Bourdieu contributed to reflexivity in research, being influenced by Weber's concept of field to explain social patterns.²² Weber's view of the importance of domination²³ and symbolic systems in social life, as well as the idea of social orders,²⁴ was ultimately transformed by Bourdieu into his concept of 'fields'. Three main assumptions provide the basis for Bourdieu's practice theory. That mental

¹⁶ D L Swartz, *Culture and Power: The Sociology of Pierre Bourdieu* (University of Chicago Press, 1997).

¹⁷ Rogers Brubaker, "Rethinking Classical Theory: The Sociological Vision of Pierre Bourdieu," 746.

¹⁸ Ibid., 770.

¹⁹ Max Weber, *The Protestant Work Ethic and the Spirit of Capitalism* (Roxbury Publishing Company, 2002), 1.

²⁰ Ibid., 1(i).

²¹ Rogers Brubaker, "Rethinking Classical Theory: The Sociological Vision of Pierre Bourdieu," 748. Brubaker refers to the well-known book by Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Harvard University Press, 1979). The book concerns an ethnographic portrait of the contemporary 1970s French class structure. Bourdieu's two-dimensional concept of capital having volume and structure was used to indicate class. For instance, consumption habits and lifestyles are indicators of internalised dispositions of class.

²² Richard Jenkins, *Pierre Bourdieu*, Revised ed. (Routledge, 2002).

²³ E.g. Domination of laymen in the church, see Max Weber, *The Protestant Work Ethic and the Spirit of Capitalism*, 142.

²⁴ E.g. Weber referred to the importance of an American's membership of a recognised association, whether Freemason, Christian Scientist, Quaker etc. as the 'typical vehicles of social ascent into the circle of the entrepreneurial middle class', *ibid.*, 133.

schemata and social division are linked; second, that symbolic systems are instruments of domination; and third, there are constant struggles between individual and groups in fields.²⁵

While Bourdieu is one of the most frequently cited authors in the United States,²⁶ which includes being cited reasonably often in interpretive accounting literature,²⁷ his theoretical work is relatively underutilised in taxation law.²⁸ Nonetheless, it has been claimed that Bourdieusian concepts can 'improve our understanding of tax as a social and institutional practice'.²⁹

My intention is to use Bourdieu's three step process with the aim of understanding the practice of tax reform. First, the tax field of practices will be considered in relation to the broader field of power, in this case the state (a site of power). Second, the tax actors' volume and the structure of the 'capital' will be mapped, which is required for establishing the various positions of power to invoke taxation change. The mapping will identify the dominant and the dominated of actors in the tax field for tax reform. The actors can be individuals or institutions that compete for the dominance and legitimacy in tax reform ideas. For the third step, selected elite tax reform actors from each time frame will be interviewed, to garner their insights on Keating's habitus and his social trajectory for the pursuit of tax reform.³⁰ In justifying my approach in selecting two time frames for comparison (1983 to 1994 and 2007 to 2012), I follow Bourdieu's advice:

I have strongly advised researchers to study at least two objects...for example, in the case of historians, besides their principle [historical] object, to add the contemporary equivalent of this object. The study of the present has at least the virtue of forcing historians to objectivize and to control the prenotions that they are likely to project into the past...³¹

²⁵ Pierre Bourdieu and Loic JD Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press, 1992), 12-14. See also J Everett, 'Organizational Research and Praxeology of Pierre Bourdieu' (2002) 15, no. 1 *Organizational Research Methods*, 58.

²⁶ D L Swartz, *Culture and Power: The Sociology of Pierre Bourdieu*. Quoted in Bertrand Malsch, Yves Gendron, and Frederique Grazzini, 'Investigating Interdisciplinary Translations: The Influence of Pierre Bourdieu on Accounting Literature' (2011) 24, no. 2 *Accounting, Auditing and Accountability Journal*, 195.

²⁷ Bertrand Malsch, Yves Gendron, and Frederique Grazzini, "Investigating Interdisciplinary Translations: The Influence of Pierre Bourdieu on Accounting Literature."

²⁸ Louise Gracia and Lynne Oates, 'Boundary Work and Tax Regulation: A Bourdieusian View' (2012) 37 *Accounting, Organizations and Society*, 304.

²⁹ Lynne Oats, ed. *Taxation: A Field Research Handbook* (London and New York: Routledge, 2012), 119.

³⁰ The three step process is adapted from Pierre Bourdieu and Loic JD Wacquant, *An Invitation to Reflexive Sociology*, 104-5. See also D L Swartz, *Culture and Power: The Sociology of Pierre Bourdieu*, 142; *ibid*; Pierre Bourdieu and Loic JD Wacquant, *An Invitation to Reflexive Sociology*, 104-5.

³¹ Pierre Bourdieu and Loic JD Wacquant, *An Invitation to Reflexive Sociology*, 234.

In my proposed methodological framework for this study (covered later) particular terms are used that recur in the Bourdieusian praxis. These require further explanation and are given below, with other key concepts, taken either directly from Bourdieu's works or from interpretations by exponents of the theory, as found in the literature. The definitions may seem prescriptive because many are directly quoted, rather than paraphrased. In attempting to justify the use of Bourdieu's empirically derived theory, it is useful to lay out the concepts beforehand. The following sections also give some examples of the theory's applicability to the case of Paul Keating, and in some instances, to the Australian resource taxes. Later, in the overall project, Bourdieu's concepts will be applied to aid the interpretation of research data.

- **Field**

Generally, a 'field' may be defined as a 'network, or a configuration, of objective relations between positions. These positions are objectively defined in their existence and in determinations they impose upon their occupants, agents or institutions, by their present and potential situation in the structure of the distribution of capital.' We can compare the 'field to a game...it follows the rules...the product of competition between players.'³² The game metaphor was much favoured by Bourdieu and a similar analogy will be used for this study. This current century's game of partisan, polarised politics has been imported from the US to Australia and elsewhere. In Australia, when Julia Gillard ascended to Prime Ministership in 2010 she quipped, 'game on' as a challenge to the just as competitive opposition leader, Tony Abbott.³³

Insights into the bureaucratic mechanisms of government emerge in Bourdieu's works; such as *Language and Symbolic Power* (1991), which posits that a site of power can emerge from the state, a dominant field including 'ministries, departments, parliament, officers, legislation and policy...'³⁴ The term field describes 'the space in which we can identify institutions, agents, discourses, practices, values...; and the government [state]

³² Ibid., 97-98.

³³ Maxine McKew, *Tales from the Political Trenches* (Melbourne University Press, 2012), 169.

³⁴ Jen Webb, Tony Schirato, and Geoff Danaher, "Understanding Bourdieu," (Crows Nest: Allen and Unwin, 2002), 85-86. See Pierre Bourdieu, *Language and Symbolic Power* (Harvard University Press, 1991), Part III.

has the responsibility to regulate, manage and police the national community; and power is the mechanism it applies to fulfil this responsibility.³⁵

Government is not the field of power, but one of the sites in which power operates. In the two comparative periods for this study, a Labor government is a site of power. Bourdieusian fields are 'networks of social relations, structured systems of social positions within which struggles or manoeuvres take place over resources, stakes and access; and they are hierarchically distributed depending on the kinds of capital, the number and types of positions.'³⁶ Social positions are always in flux. 'Fields are characterised by forces and struggles; a form of life, social microcosms.'³⁷ 'It is in those fields that professional practitioners of representation...clash with one another' and it is those fields that have to be analysed.³⁸

To understand how power constitutes and institutes an authorised spokesman, party leader or trade-union leader in a field, 'one must analyse the logic...described as a process of delegation, in which the mandated representative receives from the group the power to make the group.'³⁹ 'The spokesperson is endowed to speak for group through the magic of the slogan "the password"...the substitute for the group that exists only through this surrogacy.'⁴⁰ The dominance and success of the Bob Hawke and Paul Keating mandate for tax reform from 1985 is an example that will be explored later.⁴¹

Often a group breaks down and leaders are deposed, or choose to depart for ideological reasons. 'Political alienation arises from the fact that isolated agents—the more so, the less strong they are symbolically. The isolated cannot constitute themselves as a group...except by a site *par excellence* of symbolic efficacy.'⁴² Arguably, Paul Keating's political alienation from the mainstream political game is evident today.

³⁵ Jen Webb, Tony Schirato, and Geoff Danaher, "Understanding Bourdieu," 86.

³⁶ Leslie Oakes, Barbara Townley, and David J Cooper, 'Business Planning as a Pedagogy: Language and Control in a Changing Institutional Field' (1998) 43, no. 2 *Administrative Science Quarterly*, 260. See also Pierre Bourdieu, *The Field of Cultural Production* (Columbia University Press, 1993).

³⁷ Pierre Bourdieu, *Practical Reason* (Polity Press, 1998), 132,38.

³⁸ Pierre Bourdieu, 'The Social Space and the Genesis of Groups' (1985) 14, no. 723-744 *Theory and Society*, 735.

³⁹ *Ibid.*, 739.

⁴⁰ *Ibid.*, 740.

⁴¹ Bob Hawke was Australian Prime Minister between 1983-1990. See the chapter on the Hawke-Keating tax summit in 1985, Edna Carew, *Keating: A Biography* (Allen and Unwin, 1988), 115-30.

⁴² Pierre Bourdieu, "The Social Space and the Genesis of Groups," 741.

- **Tax Field**

Bourdieu used all his theoretical concepts to explain legal power and the legal profession.⁴³ For instance, Bourdieu applied his concept of 'field' to the juridical field, 'a social field organised around a body of internal protocols, assumptions, characteristic behaviours and self-sustaining values.'⁴⁴ He sought to explain the invisible but forceful influences upon patterns of legal profession behaviour. Others have followed in applying his theory to general law issues.⁴⁵ Madsen and Dezalay, for example, offered unique definition of the legal field for modern European countries: the law faculty and the state.⁴⁶ Early research by Dezalay and Garth directed Bourdieu's concepts to the legal field in the United States. They examined the division of labour between practicing lawyers and professors of Ivy League law schools; and referred to the division as symbolic domination in the legal field. Using their capital of social relations members of elite legal circles establish their own networks of influence in their struggle for domination.⁴⁷ The legal field theme for the US was recently extended by Dezalay and Garth, who argued that legal aspects of international relations display a relative success in 'Americanization' abroad, which reinforces the power of lawyers, and the clients they serve in the United States. The researchers claimed that each of the legal field, human rights field and the state as a site of power, 'is structured around three main pillars: Ivy League campuses, Wall Street, and Washington DC.' They found that although elite influence has changed, the pillars have become more entrenched.⁴⁸

Within the legal field, tax is a distinct field. Generally, Bourdieusian theory has been under-utilised in tax law policy, reform and practice, but recently in the UK some researchers used Bourdieu to examine the relational complexities of the regulation of tax avoidance and the fine boundary of acceptable tax practice.⁴⁹ For Australia, I see the

⁴³ Mikael R Madsen and Yves Dezalay, "The Power of the Legal Field," in *An Introduction to Law and Social Theory*, ed. Reza Banakar and Max Travers (Hart, 2002), 190.

⁴⁴ Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Jurudical Field' (1987) 38 *Hastings Law Journal*, 2.

⁴⁵ E.g. D McBarnet and C Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' (1991) 54, no. 6 *Modern Law Review*.

⁴⁶ Mikael R Madsen and Yves Dezalay, "The Power of the Legal Field: Pierre Bourdieu and the Law," in *An Introduction to Law and Social Theory*, ed. R Banakar and Traver M (Hart Publishing, 2002), 196-97.

⁴⁷ Yves Dezalay and Bryant Garth, 'Law, Lawyers and Social Capital: 'Rule of Law' Versus Relational Capitalism' (1997) 6 *Social and Legal Studies*, 118-32.

⁴⁸ Yves Dezalay and Bryant Garth, "Law, Lawyers, and Empire: From the Foreign Policy Establishment to Technical Legal Hegemony," in *Cambridge History of American Law* (Cambridge University Press, forthcoming), 2,4.

⁴⁹ Louise Gracia and Lynne Oates, "Boundary Work and Tax Regulation: A Bourdieusian View," 304-05.

tax field as comprising the state, which includes the Treasury and Australian Taxation Office bureaucrats. The state is defined as a political entity that has a monopoly on the use of legitimate physical and symbolic violence for a jurisdiction and its population.⁵⁰ Tax field actors include the global accounting and legal profession, elite law faculties, multinational industry, trade unions and community pressure groups.

What is the relevance of trying to define and understand the Australian tax field anyway? Tax reform from the Keating era of the mid-1980s might be as familiar as yesterday to Australian Baby Boomers; an interesting 'piece of history' to their progeny, Generations X and Y; and perhaps inconsequential to those beyond Australian shores.⁵¹ Baby Boomers may be so thoroughly suffused with, for example the petroleum rent tax, that, given the tendency to forget the deals and compromises, they have lost any critical perspective of the 1980s. For these 'Boomers' this analysis, which will use Bourdieusian theory to explain past tax law policy and reform, may show that 'familiarity has bred an ignorance.'⁵² For them, and Generations X and Y, the 1980s era in Australian tax will be a benchmark for the later attempts at tax reform in the 2010s. Those beyond Australian shores might note that Bourdieu insisted on the unity of theory and empirical research;⁵³ thus for them, my study will be another example of the wider applicability of Bourdieu's concepts.

A fiercely contested struggle within the tax field occurred in 2010, where a head of the Australian mining industry lobby, Mitch Hooke,⁵⁴ and three multinational mining companies engaged in a very public battle against the Australian Government about the design of Australia's then proposed minerals rent tax. The struggle to modify the proposed tax resulted in Prime Minister Kevin Rudd being deposed, and 'faceless numbers men' supporting Julia Gillard's ascendance to the national leadership role. She then had to broker peace with the mining lobbyists by agreeing to lighten elements of the tax.⁵⁵

⁵⁰ Pierre Bourdieu and Loic JD Wacquant, *An Invitation to Reflexive Sociology*.

⁵¹ Baby Boomers were born from 1945 to 1960; Generation X from 1961 to 1976; and Generation Y from 1977.

⁵² Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Jurudical Field," 4.

⁵³ Richard Jenkins, *Pierre Bourdieu*, x.

⁵⁴ Chief Executive of the Minerals Council of Australia

⁵⁵ namewithheld, 'Australia's Minerals Resource Rent Tax: The Multi-National Mining Industry Response' (2012) 15, no. 1 *Australasian Journal of Natural Resources Law & Policy*; namewithheld, 'Resource Rent Taxes: The Politics of Legislation' (2012) 27, no. 3 *Australian Tax Forum*.

By contrast, in 1987 during Paul Keating's time as Treasurer, the then new petroleum tax was passed with minimal protest because the replacement of the complex excise tax on oil production was advantageous for industry. In both time frames the community's position in the tax field needs further explanation, for it is the owner of the natural resources via the respective Australian states.

Garcia and Oats have claimed that the UK tax field experiences 'complex compliance boundary negotiations as sites of fierce power struggles where consensus is sought or imposed',⁵⁶ resulting in shifts in the balance of power, authority and control. It is part of the tax compliance game. 'The field of taxation is not immune, nor isolated from the influence of other significant actors within its field,' which includes pressure groups.⁵⁷ When applying Gracia and Oats' findings about complex boundaries, it might be observed that the Australian legal profession was strangely quiet during the 2010s tax reform debate. The Government and mining industry were the main protagonists; even global accounting firms had active input. Input from the academic fraction of the tax law field was muted when compared to robust academic discussions of the 1980s.⁵⁸ A Bourdieusian dissection of the interrelations between the main actors will provide a closer and more critical questioning of the power of agents in the tax field.

- *Habitus*

Bourdieu's notion of 'habitus' has been understood as 'the deeply ingrained aspects of identity; such as gender, race, ethnicity, and class that individuals bring to a field...'⁵⁹ For Brubaker, 'habitus is interpreted as the system of internalized dispositions that mediates between social structures and practical activity...it is a system that mandates...between inert structures and the practices through which social life is maintained.'⁶⁰ Habitus and the extended concept of capital combine through agents and

⁵⁶ Louise Gracia and Lynne Oates, "Boundary Work and Tax Regulation: A Bourdieusian View," 317.

⁵⁷ *Ibid.*, 318.

⁵⁸ In the 1980s the Australian Tax Research Foundation was amply sponsored by professional bodies in the accountancy, law and taxation – the Australian Society of Accountants, the Institute of Chartered Accountants, the Law Council of Australia and The Taxation Institute of Australia - quite a contrast to today's requirement for competitive funding for tax research, which arguably has impeded commentary.

⁵⁹ S Barley, "Technicians in the Workplace: Ethnographic Evidence for Bringing Work into Organizational Studies" (1996), no. 41 *Administrative Science Quarterly*. See also Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," 5.

⁶⁰ Rogers Brubaker, "Rethinking Classical Theory: The Sociological Vision of Pierre Bourdieu," 758. See also Karl Maton, "Habitus," in *Pierre Bourdieu: Key Concepts*, ed. Michael Grenfell (Acumen Publishing, 2008), 49-65.

institutions (in Bourdieusian terminology, a field) to inform practice.⁶¹ This study's interviews will aim to uncover the habitus of the elite players in the tax reform game as a critical element in understanding tax practice. For instance, Keating introduced portability of the compulsory superannuation (retirement pension funds), an important reform particularly for women. Keating's record on social justice issues was arguably the product of his formative years spent in lobbying for improved wages and conditions for workers.

- **Capital**

Bourdieu extended the traditional concept of economic capital to include cultural, social and symbolic capital; they are many types of capitals, but most important are economic and cultural capital.⁶² Brubaker noted:

Capital... represents a power over the field (at a given moment) and like aces in the game of cards, power defines the chances of profit in a particular field. Actors are positioned in fields according to the overall volume and relative combinations of capital available to them.⁶³

While economic capital, represented by cash, is the most tradable for power, the use of Bourdieu's extended concept of 'capital' is seen as more appropriate than Marxist theory, which only privileges economic capital as a path to power.

Bourdieu developed the concept of cultural capital to explain differences in educational performance and cultural practices that remained unexplained by economic inequalities. Cultural capital is accumulated over time as an investment. It returns dividends at school, university, social contacts... job market.⁶⁴

Culturally legitimate tastes can be seen in the overt selection of fine wine or 'highbrow' opera. Paul Keating, for instance, arguably extended his cultural capital by developing a reputation for expertise in Mahler's music and French Empire clocks.⁶⁵ Did his knowledge in these areas enhance his access to those sympathetic to his quest for social

⁶¹ Kerry Jacobs, 'Enlightenment and Emancipation: Reflections for Critical Accounting Research' (2011) 22 *Critical Perspectives on Accounting*, 512.

⁶² Pierre Bourdieu, *Practical Reason* 41. Jane Baxter and Wai Fong Chua, 'Be(Coming) the Chief Financial Officer of an Organisation: Experimenting with Bourdieu's Practice Theory' (2008) 19 *Management Accounting Research*, 215.

⁶³ Pierre Bourdieu, "The Social Space and the Genesis of Groups," 724.

⁶⁴ Rogers Brubaker, "Rethinking Classical Theory: The Sociological Vision of Pierre Bourdieu," 757.

⁶⁵ Paul Keating, *After Words: The Post-Prime Ministerial Speeches*, 181-83.

change? Contrast the effort required by Keating to establish cultural capital with those born into privilege and have inherited such capital.

Social capital is about a parvenu's ability to foster relations with those of influence to bolster their own trajectory through a field. 'Social capital is the sum of the resources, actual or virtual, that accrue to an individual or a group by virtue of possessing a durable network of more or less institutionalised relationships of mutual acquaintance and recognition.'⁶⁶ Were Keating's efforts to raise his social and cultural profile instrumental in gaining access to powerful agents?

There is continuous competition over the form and type of capital. Capital types vary in liquidity, the speed by which one type of capital can be transformed into other forms of capital.⁶⁷ Bourdieu's two-dimensional concept of capital, having volume and structure, depicts generalised outcomes; such as the intelligentsia 'as rich in cultural capital and (relatively) poor in economic capital; while executives and professionals might be seen as rich in economic capital and (relatively) poor in cultural capital.'⁶⁸ 'It is the competence of individual agents that ultimately influences their ability to mobilise the capital that enables their participation in a field...'⁶⁹ Figure 1 below depicts two sub-sets of cultural capital: inherited cultural capital and educational capital; and their volume and structure. It shows possessors of strong educational capital have also inherited strong cultural capital (point B); they assume positions as legitimate members of the dominant class having ease and familiarity with culture. Those with lower educational capital were found to have lower inherited cultural capital, and are situated lower down the axis (point A). Those with the same inherited cultural capital as B, but who obtain lower educational capital, are still closer to B than A (points C and C*). Those who have a similar educational capital, but commenced with lower inherited cultural capital (points D and D*), and for whom culture is the result of schooling, were found to be still lower down the cultural axis than C and C*.⁷⁰

⁶⁶ Pierre Bourdieu and Loic JD Wacquant, *An Invitation to Reflexive Sociology*, 119.

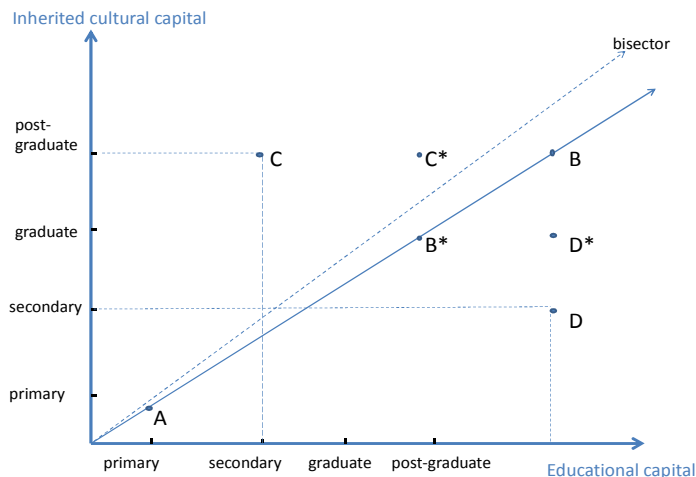
⁶⁷ Leslie Oakes, Barbara Townley, and David J Cooper, "Business Planning as a Pedagogy: Language and Control in a Changing Institutional Field," 260.

⁶⁸ Rogers Brubaker, "Rethinking Classical Theory: The Sociological Vision of Pierre Bourdieu," 766.

⁶⁹ Jane Baxter and Wai Fong Chua, "Be(Coming) the Chief Financial Officer of an Organisation: Experimenting with Bourdieu's Practice Theory," 215.

⁷⁰ Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*, 81.

Figure 1. The relationship between inherited cultural capital and educational capital



Source: Bourdieu, *Distinction*, adapted from Figure 3, p. 81.

The last type of capital to be covered, symbolic capital, may commonly include 'prestige, reputation, renown, religion etc.'⁷¹ Language is symbolic capital, 'which is both a battleground and a weapon' and powerful when used in the struggle to impose on others a particular view of the world.⁷² The dominant agent or institution in a field may legitimise power through specific language. Often control through symbolic capital, such as technical language, is accepted without question. For, it is not clear where those who occupy dominated positions in both social space and the 'field of symbolic production' obtain 'the instruments of symbolic production for them to express their viewpoint.'⁷³ In the case of Paul Keating, he was renowned for his innate language skills, and encouraged to tackle the technical jargon of the profession in the tax field.⁷⁴

Allied to symbolic capital is Bourdieu's theory of symbolic violence, which is exercised upon individuals.⁷⁵ 'The term symbolic violence is meant to be provocative' and implies the imposition of principles on recipients who have little choice on acceptance or rejection.⁷⁶ Goods and services might be denied to a minority group for reproduction of the social order and to maintain the interests of the dominant.⁷⁷ Symbolic violence is

⁷¹ Pierre Bourdieu, "The Social Space and the Genesis of Groups," 724.

⁷² Jen Webb, Tony Schirato, and Geoff Danaher, "Understanding Bourdieu," 95.

⁷³ Pierre Bourdieu, "The Social Space and the Genesis of Groups," 735-36.

⁷⁴ Michael Gordon, *Paul Keating: A Question of Leadership* (Queensland University Press, 1993), 69.

⁷⁵ Rogers Brubaker, "Rethinking Classical Theory: The Sociological Vision of Pierre Bourdieu," 755.

⁷⁶ Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Jurudical Field," 5.

⁷⁷ Kerry Jacobs, "Enlightenment and Emancipation: Reflections for Critical Accounting Research," 511.

'exercised upon a social agent with his or her complicity.'⁷⁸ It is a 'gentle, hidden form of violence', and established when overt violence is impossible.⁷⁹ For example, the reassuring language skills of Paul Keating often morphed into a sharp-tongued weapon to silence political opponents.⁸⁰ One might also suggest the Australian Government's closed negotiations in 2010 with multinational mining companies over the minerals tax, is an example of symbolic violence against the community, as it had little say in the final shaping of the tax.

In summary, the three conceptual tools of field, habitus and capital can be brought together and represented by the following equation: $[(habitus)(capital)]+field = social\ practice$.⁸¹ Thus social practice is the result of the interrelationship between one's disposition or habitus to the volume and structure of capital one possesses, together with one's position in the field. Bourdieu encouraged the examination of social practice, or practical knowledge, which he distinguished from knowledge acquired from phenomenology (individual experience in the wider world) and objectivism.⁸² For instance, emphasis on practical knowledge can be constituted through various practical functions, such as the calculation of tax contained in legislation. The aim is to characterise the 'particular practices of competent actors as they master various situations.'⁸³ Social actors develop repertoires for perception, appreciation and action.⁸⁴ 'The logic of practice is internalised as second nature and then forgotten as history';⁸⁵ it enacts with habitus. Part of this study's overall aim is to consider how Paul Keating negotiated the heterodoxy of tax reform through the tax field by considering his social practice (or practical knowledge), a combination of his habitus, capital and field position.

- *Doxa and Illusio*

The final two Bourdieusian concepts to be covered are doxa and illusio. Agents naturalise certain dominant practices, making them appear as self-evident, fundamental

⁷⁸ Pierre Bourdieu and Loic JD Wacquant, *An Invitation to Reflexive Sociology*, 167.

⁷⁹ Pierre Bourdieu, *Outline of a Theory of Practice*, 196.

⁸⁰ See e.g. Michael Gordon, *Paul Keating: A Question of Leadership*, 195-96.

⁸¹ Karl Maton, "Habitus," 51.

⁸² Jane Baxter and Wai Fong Chua, "Be(Coming) the Chief Financial Officer of an Organisation: Experimenting with Bourdieu's Practice Theory," 213. See Pierre Bourdieu, *Outline of a Theory of Practice*.

⁸³ Pierre Bourdieu, *Outline of a Theory of Practice*, 36-37.

⁸⁴ Jane Baxter and Wai Fong Chua, "Be(Coming) the Chief Financial Officer of an Organisation: Experimenting with Bourdieu's Practice Theory," 214.

⁸⁵ Ibid.

and a universal way of organising personal and professional lives;⁸⁶ this is what Bourdieu referred to as 'doxa'. For example, the 1987 introduction of the petroleum rent tax in Australia meant the removal of the requirement for excise case law precedents and tax office determinations that had guided the application of excise on offshore oil production.⁸⁷ In other words, the new petroleum legislation replaced the hitherto requirement for hours of debate. Doxa takes place intuitively: it is pre-reflexive, for practice is misrecognised as being second nature. 'Most people, for most of the time, take their social world for granted',⁸⁸ and never question its many obligations; such as the submission of correct and timely tax return forms. One of the significant mechanisms used by the state to produce doxa is the 'bureaucratic institution, which is perhaps the most powerful institution of government.'⁸⁹ In Australia, the Australian Taxation Office (ATO) is the intermediary between the state and taxpayers, implementing the government's policies. For instance, once a tax reform battle is over and initiatives legislated, legislation is enforced by the ATO as regulator, a bureaucratic arm of the state; a site of power in its own right.

Thus the term doxa, is used to describe the 'apparently surprising practice of accepting things without realising that one is being oppressed.'⁹⁰ 'The ways in which we submit to and are taken in by this normalised, doxic view of practice, is referred to as *illusio*' and likened to being 'caught up in a game' and 'having a feel for the game'. For instance, Paul Keating at the height of his parliamentary career was a leading exponent of the parliamentary 'game' of tax reform. To legitimise reform to the electorate he needed to maintain the *illusio* of a complete understanding of the technical aspects of tax. The next section of the study details the proposed methodological framework for stage two of the project, which addresses how Bourdieu's social practice theory will be situated to analyse the data.

⁸⁶ Pierre Bourdieu, *Outline of a Theory of Practice*, 64. Pierre Bourdieu, *Practical Reason* 55. Jane Baxter and Wai Fong Chua, "Be(Coming) the Chief Financial Officer of an Organisation: Experimenting with Bourdieu's Practice Theory," 214.

⁸⁷ In December 1987 the Australian Government introduced the *Petroleum Resource Rent Tax Assessment Act 1987* (PRRT) - a profit based tax system that replaced the crude oil excise and Federal and state royalties systems for offshore oil projects.

<<http://fueltaxinquiry.treasury.gov.au/content/backgnd/002.asp>>

⁸⁸ Richard Jenkins, *Pierre Bourdieu*, 70. See also Cecile Deer, "Doxa," in *Pierre Bourdieu: Key Concepts*, ed. Michael Grenfell (Acumen Publishing, 2008), 119-30.

⁸⁹ Jen Webb, Tony Schirato, and Geoff Danaher, "Understanding Bourdieu," 97-98.

⁹⁰ *Ibid.*, 95-96. See also Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Jurudical Field," 5.

IV METHODOLOGICAL FRAMEWORK

The methodological design will use a comparative framework over two points in time (1983 to 1994 and 2007 to 2012)—the two periods of Labor Government tax reform. The research will first require the collection of quantitative tax revenue data, and plotting it relative to GDP to depict tax reform outcomes. Document analysis will then be applied to qualitative data drawn from published journals, biographies, speeches and publically available legislative and policy materials authored by a range of stakeholders, such as politicians, civil servants, business people, academics and trade union officials. In addition, a sample of persons described as elite in the tax field, will be contacted for semi-structured interviews to obtain first-hand insights into their experiences and opinions about social and institutional practices in the tax field. The interviews will aim to penetrate the reform process through four themes: factors to establish authority for a reformist Treasurer; personal insights into tax reform; attributes that equip a Treasurer for a tax reform role; and orthodox tax structure versus change to the heterodoxy of tax reform. Thus, archival data will be supplemented by the interview data, which will be uploaded into NVivo software to facilitate textual analysis using Bourdieu's social practice theory.

Bourdieu's practice theory calls for reflexivity by the researcher, particularly where interview is the method of choice. Star and Griesemer claim that, 'achieving consensus and reflective practice involves negotiation, debate, triangulation and simplification...'⁹¹ Garcia and Oates offer a reflexive perspective of the regulatory processes at play across the tax field.⁹² As the primary researcher, continually reading about Keating, to address the inclination that I may eventually 'assume to know' my research subject, the need to scrutinise and reflect upon the findings is an important aspect of the study.⁹³ To keep the project manageable and comparable, questions will be limited to Australia's

⁹¹ Star and Griesemer (1989) quoted in Louise Gracia and Lynne Oates, "Boundary Work and Tax Regulation: A Bourdieusian View," 319.

⁹² Ibid., 304-05. See also Jacobs reference to Bourdieu's call for reflexivity in research, Kerry Jacobs, "Enlightenment and Emancipation: Reflections for Critical Accounting Research," 513.

⁹³ See Pierre Bourdieu and Loic JD Wacquant, *An Invitation to Reflexive Sociology*, 199-212; Cecile Deer, "Reflexivity." My approach builds on a similar Bourdieusian framework and methods used by Leslie Oakes, Barbara Townley, and David J Cooper, "Business Planning as a Pedagogy: Language and Control in a Changing Institutional Field," and; J Everett and T Jamal, "Multistakeholder Collaborations Pedagogic Practice and Symbolic Marketplace" (paper presented at the European Group of Organizational Studies 2001).

resource tax reform, a key reform in the two selected timeframes. See Table 1 for the interview matrix.

Table 1. Interview Matrix

| | Petroleum rent tax, 1987 | Minerals rent tax, 2010-2012 |
|---------------------------|--|--|
| Politicians | Paul Keating Bob Hawke | Paul Keating Kevin Rudd Julia Gillard Wayne Swan Martin Ferguson |
| Bureaucrats | John Stone, Secretary, Treasury to 1984 Bernie Fraser, Secretary, Treasury, 1984-1989 David Morgan, Senior Dep. Sec., Treasury, 1980s Revenue Group, Treasury | Ken Henry (Treasury, secretary to 2011) Revenue Group, Treasury |
| Business | John Schubert, CEO, Esso Australia Peter Wilcox, CEO, BHP Petroleum | Mitchell Hook, CEO, Minerals Council of Australia |
| Academics | Ross Garnaut, ANU John Freebairn, University of Melbourne Rick Krever, Monash University | George Fane, ANU |
| Unions | Bill Kelty, Secretary, Australian Council of Trade Unions, 1983-2000 | Dave Noonan, National Secretary; Construction, Forest, Mining & Energy Union |
| Community Services | Julian Disney, President, Australian Council of Social Service (ACOSS) | Tim Costello, CEO, World Vision Australia |

Source: the author.

The choice of resource rent taxes for the interviews is appropriate due to the propensity of such a tax to elicit a range of opinions. Underlying a resource tax is the prerogative of a sovereign state to seek an appropriate return for allowing private interests to extract the finite natural resources. In Australia the mining royalty is levied by state governments in two ways: on an output-basis (by volume or value) of mineral production; or on an income-basis by project (a tax on net income). For a mining company, the volume approach disregards the profitability of the project: a disincentive, given the industry's typically high capital costs; while the value (*ad valorem*) method of calculation can be complicated. For a state, the volume royalty does not reflect a market of high commodity prices, thus revenue flow can be flat; and an income royalty might generate no revenue if early capital costs of mining are high. Royalties can thus distort investment decisions.

In 1948, Brown attempted to address the shortcomings of output-based and income-based royalties through a variation on income-based royalties, that is, replacing royalties

with a resource rent tax: a tax on 'above normal' profits (ie. economic rent).⁹⁴ His approach, termed the 'cash flow method' has tax levied on the difference between project receipts and expenditure (current and capital); but in cases where the cash flow happens to be negative, the government provides a tax refund. Much later, in 1975, Garnaut and Clunies Ross posited their variation on the Brown tax, whereby a resource rent tax was to be levied only on the positive net cash flow from a mining project.⁹⁵ In instances of negative cash flows, there are no refunds, but rather such costs are carried forward with interest (the uplift rate) to preserve value. The next refinement was the allowance for corporate capital (ACC) cash flow method derived by Boadway and Bruce. Their method calculated net project receipts and expenses (that only include book value depreciation) and then deducted the ACC (the uplift rate) before the rent tax is applied. The ACC preserves value particularly for the spread of capital expenditure over a project's effective life.⁹⁶ All three approaches disallow interest deductions and claimed that the 'cash flow' method provides a non-distorting, tax neutral design. Australia's petroleum resource rent tax (PRRT) was based on the Garnaut and Clunies Ross method and its minerals resource rent tax (MRRT) on the Boadway and Bruce method, much-modified.⁹⁷

Australia's petroleum tax was introduced in 1987, without extensive media discussion.⁹⁸ However, by 1996 questions were being asked about whether Australia's natural resources could sustain both economic growth and welfare enhancement.⁹⁹ Sustained demand for mineral resources, from the early 2000s, led to the introduction of the MRRT in 2012, with an attendant research and commentary characterised as varied and

⁹⁴ E.Cary Brown, "Business-Income Taxation and Investment Incentives," in *Income, Employment and Public Policy: Essays in Honor of Alvin H. Hansen* (Norton Inc., 1948).

⁹⁵ Ross Garnaut and Anthony Clunies Ross, 'Uncertainty, Risk Aversion and the Taxing of Natural Resource Projects' (1975) 85, no. 338 *Economic Journal*.

⁹⁶ Robin Boadway and Neil Bruce, 'A General Proposition on the Design of a Neutral Business Tax' (1984) 24 *Journal of Public Economics*.

⁹⁷ For a more detailed discussion of the methods for Australia's resource rent taxes, see namewithheld, "Resource Rent Taxes: The Politics of Legislation." For illustrations of model minerals rent tax cash flow charts, see namewithheld, 'Minerals Resource Rent Tax (Mrirt): Mining Project Evaluation Techniques' (2010) 14, no. 1 August *The Tax Specialist*.

⁹⁸ namewithheld, "Resource Rent Taxes: The Politics of Legislation."

⁹⁹ Peter Hall, 'Trade, Growth and Welfare in a Natural Resource-Rich Country' (1996) 23 *International Journal of Social Economics*.

fractured. Garnaut called for a balance between private and public interests when considering the merits of the then proposed minerals resource tax.¹⁰⁰

Economists and tax researchers have supported a resource rent tax, even in a modified form, claiming both investors and community benefit.¹⁰¹ Others claim, for example, that mining-related environmental issues have been neglected;¹⁰² problems of a two-speed economy without structural reform have emerged; social justice issues—including criticisms of inadequate community infrastructure in mining communities—are seen as prescient; and family breakdown, a consequence of the demand for a mobile ‘fly-in fly-out’ workforce is common.¹⁰³ The preceding shows the call to government for leadership in policy to guide sustainable mining development into the future.

V CONCLUSIONS AND PROGRESSION OF THE STUDY

To progress this study to stage two of the larger comparative project, and after due reflection, it is feasible that social practice theory will help explain: if and how class-based power and privilege in the tax field, for the purposes of tax reform, has changed from 1983 to 1994 and from 2007 to 2012; the extent of Paul Keating’s contributions to tax reform since he first entered parliament, and now as a commentator; and how Keating negotiated the heterodoxy of tax reform through the tax field by considering his social practice (or practical knowledge), a combination of his habitus, capital and field position. Bourdieusian conceptual tools are argued as appropriate for the next stage of the project, for the three main assumptions in Bourdieu’s practice theory are evident and applicable: that mental schemata and social division are linked in the legal and policy process of tax reform; second, that symbolic instruments were used by Keating for domination of his ‘competitors’; and third, there were constant struggles between the individual, Keating, and groups, such as the mining stakeholders, in field of tax.

¹⁰⁰ Ross Garnaut, ‘The New Australian Resource Rent Tax: The Resources Super Profits Tax’ (2010) 8 *Insights*.

¹⁰¹ See e.g. Lindsay Hogan, ‘Non-Renewable Resource Taxation: Policy Reform in Australia’ (2012) 56 *The Australian Journal of Agricultural and Resource Economics*; Greg Smith, ‘The Way Forward on State Tax Reform: An Aftsr Perspective’ (2012) 10, no. 1 *eJournal of Tax Research*; John Freebairn and John Quiggin, ‘Special Taxation of the Mining Industry’ (2010) 29, no. 4 December *Economic Papers*.

¹⁰² Frank G Nicholls, ‘Environmental Policy in the Howard and Rudd Eras’ (2010) 40, no. 5 *Environmental Policy and Law*.

¹⁰³ See e.g. Ian McAuley, ‘Taxing the Miners’ Uncommonly Large Profit’ (2010) 1, Spring *Dissent*; Robert J Stimson, ‘Australia’s Changing Economic Geography Revisited’ (2011) 17, no. 1 *Australasian Journal of Regional Studies*; Kerry Carrington and Margaret Pereira, ‘Assessing the Social Impacts of the Resources Boom on Rural Communities’ (2011) 21, no. 1 *Rural Society*.

This study contributes to the literature on the use of Bourdieusian concepts in the legal field of taxation. Stage two of the project will adopt Bourdieu's practice theory into the methodology, over other, perhaps more common perspectives. Either way, the common ground is to analyse and explain tax reform, and in particular Paul Keating's contribution.

Paul Keating, as prime minister, delivered a welcome speech to the Australian cricket team at a reception in the nation's capital city of Canberra, where he uncharacteristically admitted 'scant knowledge' of the finer points of that sport. Importantly however, he made an analogy between the game of cricket and his approach to performance in the Parliament:

It is where the game is won or lost, and if you're serious about your profession and the country you're playing, you play seriously.¹⁰⁴

Keating would have concurred with Gillard's 'Game on!' rhetoric.

¹⁰⁴ Paul Keating, *Paul Keating, Prime Minister: Major Speeches in the First Year* (Australian Labor Party 1993), 192.

THE AUSTRALIAN CAPITAL TERRITORY HAS ADOPTED MEASURES TO ABOLISH STAMP DUTY AND IMPOSE A LAND TAX ON ALL REAL PROPERTY: WILL THIS APPROACH BE ADOPTED BY OTHER STATES IN AUSTRALIA?

JOHN MCLAREN *

ABSTRACT

From 1 July 2012 the Australian Capital Territory (ACT) imposed land tax, in the form of general rates, on all commercial and residential property in the ACT, including owner occupied homes, on a progressive basis. Marginal rates of tax are applied on increased values of the land. The ACT is unique in that there is no local government so the ACT government was able to increase its general rates on owner-occupied homes and reduce land tax on investment properties and commercial properties. As a result of the subsequent increase in government revenue, the ACT has substantially reduced stamp duty on real property conveyances with a view to abolishing stamp duty over the next 20 years. The ACT government undertook a review of its tax system in 2012 and one of the major recommendations was to broaden the land tax base to all principal places of residence and to abolish stamp duty on conveyances of real property. This approach follows the recommendations of the Henry Tax Review. This paper will examine the current approach to the imposition of land tax in the ACT as well as the recommendations on the need to broaden land tax contained in the Henry Tax Review. The conclusion arrived at in the paper is that the ACT approach to the abolition of stamp duty and the imposition of a land tax on all property in the ACT should eventually be adopted by all States in Australia and the Northern Territory.

* Senior Lecturer, School of Accounting and Finance, University of Wollongong.

I INTRODUCTION

The Australian Capital Territory (ACT) government undertook a review of its tax system in 2012¹ and one of the major recommendations was to broaden the land tax base to all principal places of residence and to gradually abolish stamp duty on the conveyances of real property. By the year 2032, it is envisaged that there will be no stamp duty paid by the buyers of real property in the ACT.² This approach generally follows the recommendations of the report into 'Australia's Future Tax System' (the Henry Tax Review) chaired by Dr Ken Henry. However, the ACT government recognised the benefits of a land tax over other forms of taxation such as stamp duty, but only in terms of the raising of revenue in the ACT. The Henry Tax Review recommended a uniform land tax for Australia and the abolition of stamp duty in all States and Territories in Australia. It is not intended in this paper to examine the merits of a uniform land tax applying throughout Australia or the issues of Commonwealth – State taxation powers in the area of land tax. This is a topic for a separate discussion. At present the Australian States and the ACT impose land tax at progressive rates on the average value of land that is not used as a principal place of residence or land used for primary production. Local government imposes a land tax in the form of 'rates'. The Commonwealth government no longer imposes a tax on land.³

The main purpose of this paper is to examine specifically the ACT initiative in applying a progressive rate of land tax, in the form of general rates, to all owner-occupiers of land in the ACT. This is a radical departure from the way in which the States impose land tax as the ACT taxes all principal places of residence. However, in this context it is important to examine the basis for the recommendation of a uniform land tax in the Henry Tax Review because of its influence on the ACT.

In 2009 the Australian Government commenced a review of Australia's future tax system under the Chairmanship of the Secretary of the Treasury, Dr Ken Henry. The Henry Tax Review states that the future Australian tax system should increasingly rely

¹ Quinlan, T (Chair); Smithies, M; and Duncan, A, 2012, *ACT Taxation Review*, Report to the Treasurer, ACT.

² It is interesting to note that one of the main beneficiaries of this reform will be the Commonwealth government. At present in the ACT the owners of real property used for income producing purposes are able to claim a deduction for stamp duty on the basis that all land in the ACT is leasehold and that s 25-20, *Income Tax Assessment Act 1997* (Cth) provides the basis for the deduction.

³ The Commonwealth of Australia did impose a tax on land from 1910 until 1952 under the *Land Tax Act 1910* (Cth) and the *Land Tax Assessment Act 1910* (Cth).

on land values as a tax base. The Review recommended that a rent tax should be applied to land either at a flat rate or at marginal rates on all land including owner-occupied housing.⁴ The Henry Tax Review pointed out the obvious fact that because land is immobile people cannot change their behaviour in order to avoid paying the land tax. It is an efficient form of taxation because it does not affect the way in which land is used or how much is used but would result in a reduction in the price of land.

The following statement contained in the Henry Tax Review provides a very good summary of the importance of a uniform land tax.

Land value tax therefore differs from taxes on other productive resources: taxes on labour reduce people's work effort; and taxes on capital can cause the capital to be employed elsewhere particularly overseas. In contrast, a broad land value tax is borne by landowners and the supply of land is unchanged. Land value tax falls on the owner's 'economic rent'.

The relative efficiency of land value tax is supported empirically. A recent OECD report found that a 1 per cent switch to land or property tax (but not to taxes on transactions) away from income tax would improve long-run GDP per capita by 2.5 percentage points (Johansson et al. 2009). This study did not assess taxes on the economic rent from natural resources, which are also potentially efficient tax bases.⁵

The Henry Tax Review contends that there are three implications for owners of land when a land tax is introduced: first; the price of land will suffer a one-off fall in value, second; the land tax only applies to the unimproved value of the land. This means that the owner of the land still has an incentive to improve the land in the form of a new factory or improvements to a family home. Third; there should be very few exemptions from land tax. Owner occupied homes and some agricultural land that is located on the fringe of cities such as market gardens should not be exempt.⁶ The Review also noted that with an ageing population there may be owner occupied homes where the owner is asset rich but income poor. In that situation it was recommended that some system of loan arrangement be introduced so that the tax was paid when the property was finally sold.⁷ As will be seen in Part III of this paper, such a system exists in the ACT under the *Rates Act 2004* (ACT).

⁴ Commonwealth of Australia, *Review of Australia's Future Tax System*, (2010), 247.

⁵ Ibid, 266.

⁶ Ibid.

⁷ Ibid, 267.

The need for a uniform land tax as a means of raising government revenue must be seen in the context of an ageing population in Australia. This situation is most aptly summarised in the following passage from Rob Heferen, Executive Director, Revenue Group, Department of Treasury when discussing the problem of funding the needs of an ageing population with a reduced number of individual income tax payers.

... [W]e should not forget the looming challenge of an ageing population. The *2010 Intergenerational Report* again brought into focus that, on current trends, spending on existing programs will become unsustainable over the medium to long term. The report estimates that there will be just 2.7 people of working age to support every person over the age of 65 by 2050, compared to 5 people in 2010. Real GDP growth per person is projected to slow to an average of 1.5 per cent per year over the next 40 years. An increasingly large population of older Australians is expected to contribute to a substantial rise in Commonwealth Government spending as well. The key message taken from all three intergenerational reports is that, apart from the need for continued vigilance in the relevant outlays, attention needs to be given to increasing the size of the economy through increasing labour force participation and improving labour productivity. And it is with respect to these two policy imperatives, together with the need to provide stable, secure revenue for the Government, a number of tax initiatives have been progressed.⁸

The Henry Tax Review proposed a land tax⁹ as part of its vision for the taxation of economic rent, in conjunction with a raft of other taxes mainly on economic rent such as a 'super profits tax on minerals' which is now the Minerals Resource Rent Tax. It sees the unimproved capital value of land as the surplus over and above the costs of production and adequate returns on them. So at the heart of Dr Henry's ideas about land tax is the concept of economic rent. An unimproved land value tax does not seemingly tax the labour and capital input into land because it arguably removes from the calculation process those inputs into the value of land itself.¹⁰ An added benefit of a tax on economic rent, or the unearned incremental increase in land values, was identified by Judith Yates in that the land tax could replace the lack of capital gains taxes on owner-

⁸ Rob Heferen, 'Beyond the Tax Forum', Executive Director, Revenue Group, December 5, 2011.

⁹ AFTS *Chapter C: Land and resources taxes C2. Land tax and conveyance stamp duty C2-1 Land is (potentially) an efficient tax base*, 6 December 2010.

¹⁰ The valuation methodology and process used by local governments and State governments throughout Australia has not been harmonised and problems still exist. For a detailed examination of the problems associated with land tax see Vince Mangioni, Transparency in the Valuation of land for tax purposes in New South Wales, (2011) 9(2) *eJournal of Tax Research* 140.

occupied housing.¹¹ The taxation of land is the taxation of rent because rent is the increment of market gain that accrues to choice land parcels.¹² As the Henry Tax Review states the economic rent flows from the efforts of others or simple luck. The value of land rises due to population growth near cities and the demand for portions of the land close to roads and infrastructure increases. When this is coupled with the fixed supply of land this resulting increase in value is the economic rent.¹³

This paper will examine the philosophical basis for a tax on land and the broader concept of economic rent in Part II. This will be followed by an examination of the ACT land tax initiative in part III. This will also include a discussion of the merits of the ACT land tax from the perspective of those who will gain and those who will lose under the present system. Part IV will provide a conclusion and in particular the basis for all State and Territory governments to seriously consider following the ACT governments' approach to land tax. The following discussion of land tax and stamp duty will be limited to the merits of the ACT tax initiative and will not examine the possible impact the tax changes may have on housing affordability in Australia. This area has been more than adequately discussed in the work by Professor Stewart and other academics.¹⁴

II THE CONCEPT OF A TAX ON LAND

The issues facing Australian society mean that an extension of current and proposed taxes on economic rents cannot be dismissed. Indeed, as mentioned previously, the Henry Tax Review and Garnaut and Clunies Ross recognise theoretically that there is no reason for limiting the taxation of economic rent to specific examples like resources.¹⁵ This aspect of economic rent has been critically examined for other industries that have a natural monopoly such as the exploitation of timber and fish resources.¹⁶ Economic rent is the return over and above the return necessary for the activity to take place.¹⁷

¹¹ Judith Yates, 'Housing and Tax: The Triumph of Politics over Economics' in Chris Evans, Richard Krever and Peter Mellor (eds), *Australia's Future Tax System: The Prospects After Henry* (Thomson Reuters, 2010) 233, 258.

¹² H William Batt 'The Compatibility of Georgist Economics and Ecological Economics ' 2003 *Wealth and Want in 21st Century America* http://www.wealthandwant.com/docs/Batt_GEE.html viewed 9 December 2012.

¹³ Commonwealth of Australia, above n 3, 249.

¹⁴ M. Stewart (ed), *Housing and Tax Policy*, (Australian Tax Research Foundation, 2010).

¹⁵ Ross Garnaut and Anthony Clunies Ross, *Taxation of Mineral Rents* (Clarendon Press, 1983) 26.

¹⁶ John McLaren, 'Petroleum and Mineral Resource Rent Taxes: Could these taxation principles have a wider application?' (2012) 10 *Macquarie Law Journal* 69.

¹⁷ W.H. Wessel, 'A Note on Economic Rent' (1967) 57(4) *American Economic Review* 873, 885.

For example, what does it take to get a super model to work? Linda Evangelista told *Vogue* that 'we don't wake up for less than \$10,000 a day.'¹⁸ While the example is hardly scientific, for the purposes of exposition it is appropriate. If a supermodel were paid anything more than that, and they are, it is economic rent. This is similar to the example provided in the Henry Tax Review to illustrate the concept of economic rent.¹⁹ So a Government could tax almost all of that excess without affecting a supermodel's work decisions at all. They would still go to work even if the economic rent tax reduced the return to 'just' \$10,000 a day.²⁰

A very succinct explanation of the concept of 'economic rent' is contained in the following definition provided by Professors Garnaut and Clunies Ross:

Economic rent is the excess of total revenue derived from some activity over the sum of the supply prices of all capital, labour, and other 'sacrificial' inputs necessary to undertake the activity. ... In essence, it referred to the reward that a landowner could derive by virtue simply of being a landowner and without exerting any effort or making any sacrifice.²¹

Garnaut and Clunies Ross acknowledge that the definition is based on the work by Ricardo.²² Adam Smith also examined the concept of economic rent in his treatise on '*The Inquiry into the Wealth of Nations*' and contended that rent is an unearned surplus which is appropriated by the landlords through the exercise of their monopoly power.²³ Smith and Ricardo considered rent to be the unearned income obtained from renting land to entrepreneurs who then grew crops or livestock. The entrepreneur took the risk in buying seeds, planting the crop, harvesting the crop and finally selling the product. The fact that the owner of the land had a monopoly and was able to extract a rent without undertaking any activity or risk, caused political economists such as Smith to develop the theoretical concept of taxing the economic rent of the landowner.

In order to eliminate any confusion when discussing a tax on land, the term 'rent' is used in the way in which David Ricardo described it as the 'compensation paid to the owner

¹⁸ Van Meter J, 'Pretty Women' in *Vogue* (October 1990)

¹⁹ Definition of economic rent provided in the Henry Tax Review stated that 'An economic rent is the excess of the return to a factor of production above the amount that is required to sustain the current use of the factor (or to entice the use of the factor). For example, if a worker is paid \$100,000 but would still be willing to work at the same job if they were paid \$75,000, their economic rent would be \$25,000.' Commonwealth of Australia, above n 4, 737.

²⁰ John McLaren, above n 16, 71.

²¹ Ross Garnaut and Anthony Clunies Ross, above n 15, 26.

²² Ibid, 27.

²³ Joseph Keiper, Ernest Kurnow, Clifford Clark et al, *Theory and Measurement of Rent* (1961), 14.

of land for the use of its original and indestructible powers'.²⁴ He distinguishes this approach from the 'economic rent' derived from the use of the land which produces a profit after deducting the cost of capital and labour. This is in line with the approach taken by the Henry Tax Review, as stated above, that the owner of land derives 'economic rent' when the value of the land increases as a result of economic growth. In effect it is recognition of the unrealised capital gain in the land which is not currently subject to any form of taxation. To some extent this increase in value is captured by the State governments and Local governments by increases in the rate at which land tax is imposed or local government rates are levied, but the whole system is ad hoc and in need of harmonization.

Similarly, a mine owner obtained a rent after capital and labour costs were deducted from the price of the minerals that had been sold. It is also acknowledged that a tax on the economic rent has a neutral effect on the landowner or mine owner.²⁵ A landowner or a mine owner would continue with their activity even though their excess profit or economic rent was subject to tax. The costs of capital and labour are already a factor in arriving at the economic rent. A simple way of demonstrating the way in which economic rent is calculated is found in the following formulation:

$$\text{Economic rent} = \text{total revenue} - \text{total economic cost}^{26}$$

The total 'economic cost' includes a return on capital and a return on labour plus an uplift factor to compensate the investor. As with the mineral resource rent tax, the tax on the economic rent only applies after the mine owner receives a return on capital and labour of the long term bond rate plus an uplift factor of seven percent.

The idea of imposing a rent tax on land is not new, as can be seen from the above discussion. The classical economists have always advocated the merits of land tax. Henry George advocated the abolition of all other forms of taxation other than the collection of the ground rent from the value of land irrespective of the improvements.²⁷ George did not advocate the nationalisation of all land by the state in order to achieve this goal.²⁸ Land was to be left in the hands of the owner. He believed that a land tax would provide

²⁴ David Ricardo, *The Principles of Political Economy and Taxation* (J.M.Dent & Sons, 1911) 34.

²⁵ Ibid.

²⁶ G. C. Watkins, 'Atlantic Petroleum Royalties: Fair Deal or Raw Deal?', (2001) *Atlantic Institute for Market Studies*, The AIMS Oil and Gas Papers (2), 5.

²⁷ Henry George, *Social Problems*, (1938, The Henry George Foundation of Great Britain) 179.

²⁸ Ibid.

the state with sufficient revenue that it would be unnecessary to tax capital or labour.²⁹ To him, these forms of taxation were inefficient.³⁰ By abolishing the taxation of capital and labour this would lead to greater incentives for production.

Henry George also believed a land tax would destroy land monopoly by making the holding of land unprofitable unless it was being put to a profitable use.³¹ Land speculation would cease to exist because of the land tax. This was similar to the original intent of land tax in the Australian States where the tax was seen as a mechanism to break up large land holdings. The Commonwealth of Australia introduced a land tax with the enactment of the *Land Tax Act 1910 (Cth)* and the *Land Tax Assessment Act 1910 (Cth)*. It was contended that the main purpose of the legislation was to control the ownership of land in Australia and to penalise land owners that were not resident in Australia by imposing a progressive rate land tax on the unimproved value of land in excess of five thousand pounds. The High Court of Australia in the case of *Osborne v The Commonwealth and George Alexander McKay* (1910-11) 12 CLR 321 examined the legality of the legislation on the basis that it was not concerned with raising tax but its main purpose was to break up large land holdings in order to promote greater agricultural pursuits and reward returning soldiers from the first World War.³² Griffith CJ acknowledged that a consequence of the Act may be to prevent large holdings of land but that did not affect the competence of the Act to impose a land tax.³³ The Commonwealth government abolished land tax in 1952 and now States and Territories impose land tax to a limited extent and local government imposes land tax in the form of 'rates' on all homes including owner-occupied homes.

A Specific Recommendations on Land Tax and the Abolition of Stamp Duty

The Henry Tax Review provides four specific recommendations on land tax and the abolition of stamp duty on conveyances. In order to adequately assess the actions taken by the ACT government in gradually abolishing stamp duty on conveyances, it is appropriate that those recommendations are summarised below:³⁴

²⁹ Ibid, 181.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ *Osborne v The Commonwealth and George Alexander McKay* (1910-11) 12 CLR 321, 335.

³⁴ Commonwealth of Australia, above n 4, Part One, 90.

Recommendation 51 – stamp duty on conveyances be abolished by States and replaced with more efficient taxes such as those levied on consumption or land. Abolishing stamp duty at the same time as increasing the tax on land would have the additional benefit of offsetting the impact on land prices.

Recommendation 52 – land tax should be levied on as broad a base as possible, with few exemptions, and at progressive rates reflecting the value of land to be determined by a per-square-metre value.

Recommendation 53 - in the long run land tax should be levied on all land.

Recommendation 54 – land tax could be improved if it was imposed on each holding and not on an entities' total holding as this would promote investment in land; eliminate stamp duty on commercial and industrial properties in return for a broad land tax; and investigate various transitional arrangements in order to achieve a broadening of land tax.

As will be seen below, the ACT government has implemented many of the above recommendations. The key question to be answered in this paper is will the other States in Australia adopt the same approach or will the ACT be the only jurisdiction in Australia to abolish stamp duty on conveyances and broaden the base of the existing land tax system?

III AN EXAMINATION OF THE ACT LAND TAX PROPOSAL

As stated above, the ACT does not have local government in the form of municipal councils. Therefore the Territory government acts in the capacity as an equivalent state government and the various local governments found in the States in Australia. The Henry Tax review examined the issue of stamp duty on the purchase of property and concluded that it discouraged people from moving as it was generally twice the cost of real estate agents fees and removal costs.³⁵ Similarly, stamp duty acts as a barrier to entry for first home buyers as they have to save the stamp duty up front and discourages older home owners from downsizing as it reduces their equity.³⁶ The review also contended that stamp duty inhibited people moving for employment purposes which may result in higher unemployment. Basically stamp duty is inequitable and the burden of the tax falls on those who move frequently in their life due to a number of reasons such as divorce, birth of children or work opportunities.³⁷

A Specific tax reforms in the ACT

The main policy consideration for the abolition of stamp duty on conveyances was the fact that only 9 percent of the population of the ACT contributed to a quarter of the total

³⁵ Commonwealth of Australia, above n 4, 254.

³⁶ Ibid, 255.

³⁷ Ibid, 257.

amount of tax collected through this source of revenue.³⁸ The burden of this tax fell on those who were required to move homes or when families could least afford it.³⁹ The ACT government not only stated that this tax was unfair but that it was an unpredictable and volatile source of revenue.⁴⁰ The ACT Taxation Review recognised the fact that the ACT economy was highly dependent on decisions of successive Commonwealth Governments for public expenditure which would have a direct impact on economic activity in the territory.⁴¹ While the high number of public servants employed in the ACT provided some stability, the current Commonwealth budgetary situation is adding to the uncertainty for the future of stamp duty as a reliable tax. This situation facing the ACT is arguably being experienced in all States with a slowdown in the property market. The ACT government intends to abolish stamp duty on general insurance and life insurance over the next five years (20 percent each year) from 2012-2013 as a result of increasing the general rates.

The following table shows a comparison of new conveyance duty with the current system. It can be seen that for a conveyance of a property purchased for say \$300,000, that the stamp duty saving if purchased in 2016 compared with 2012 would amount to \$4,040 (9,500 – 5,460).

| Current system until 5 June 2012 | | 6 June 2012 | 1 July 2013 | 1 July 2014 | 1 July 2015 | 1 July 2016 |
|---|--------------------------|--------------------|--------------------|--------------------|--------------------|--------------------|
| Property value thresholds (\$) | Duty payable (\$) | | | | | |
| 100,000 | 2,750 | 2,400 | 2,200 | 2,000 | 1,800 | 1,480 |
| 200,000 | 5,500 | 4,800 | 4,400 | 4,000 | 3,600 | 2,960 |
| 300,000 | 9,500 | 8,550 | 8,100 | 7,500 | 6,600 | 5,460 |
| 500,000 | 20,500 | 18,050 | 17,100 | 15,800 | 14,600 | 13,460 |
| 750,000 | 34,875 | 31,800 | 29,600 | 28,300 | 27,100 | 25,960 |
| 1,000,000 | 49,250 | 48,050 | 45,850 | 44,550 | 43,350 | 42,210 |

³⁸ Quinlan, above n 1, 12.

³⁹ ACT Tax Reform Fact Sheet – ‘Duty on Conveyance – abolishing stamp duty’ www.treasury.act.gov/TaxReform/Index.shtml 12 December 2012.

⁴⁰ Ibid.

⁴¹ Quinlan, above n 1, 13.

The ACT has both a land tax on investment and commercial property as well as a general rate which is imposed on all property with limited exemptions. By decreasing the level of land tax the government expects a greater level in the supply of investment properties which are then available for rent. However, the level of the general rate increases on a progressive basis similar to land tax. The general rate is levied on all property similar to rates imposed by local governments throughout Australia. The general rate is based on the average unimproved value of the property. The general rate has two components; a fixed charge and a valuation charge. The current fixed charge is \$555 and the valuation charge is subject to assessment on progressive rates as shown below.

The new land tax rates, as shown below, will result in seventy six percent of properties receiving a decrease in land tax and twelve percent an increase due to a change in the progressive rates. The rates are shown in the table below:

Land Tax Rates

| Current system until 30 June 2012 | | New system from 1 July 2012 |
|--|-----------------|------------------------------------|
| Average unimproved value | Rate (%) | Rate (%) |
| Up to \$ 75,000 | 0.60 | 0.60 |
| From \$75,001 to \$150,000 | 0.89 | 0.70 |
| From \$150,001 to \$275,000 | 1.15 | 0.89 |
| \$275,001 and above | 1.40 | 1.80 |

The new residential land tax rates will reduce the land tax on all properties with an average unimproved value (AUV) between \$75,000 and \$390,000.

General Rates

| Thresholds | Rate (%) |
|------------------------|-----------------|
| 0 to \$150,000 | 0.2236 |
| \$150,001 to \$300,000 | 0.3136 |
| \$300,001 to \$450,000 | 0.3736 |
| Above \$450,001 | 0.4136 |
| Fixed charge | \$555 |

Under the new general rates system properties with an AUV below \$200,000, around 33,700 ACT households will have a decrease in General Rates. Properties with an AUV

above \$200,000, around 108,000 ACT households, will incur an increase in General Rates. The ACT government allows for the payment of the general rates to be deferred and paid when the property is finally sold. Interest is imposed on the outstanding amount.⁴² This provides some relief for retired property owners unable to pay the increase in the general rates especially if the value of their land increases substantially over time. This is in line with the recommendations made by the Henry Tax Review.⁴³

The idea of the tax reform is for the general rate on land tax to increase as the revenue from stamp duty declines over the next twenty years. The general rate will increase as the value of land in the ACT increases and the progressive rates are applied to an ever increasing value. Ben Phillips from NATSEM,⁴⁴ undertook research into the likely level of rates if stamp duty was entirely replaced within twenty years. He found that the general rate on all real property would need to double relative to current levels being imposed on all property owners in the ACT. Allowing for bracket creep with house prices increasing by 6 percent per annum provides an 80 percent increase over 20 years. However, he did not believe that allowing for bracket creep for a 20 year period was realistic.⁴⁵

Therefore it may be concluded that the ACT initiative to abolish stamp duty and replace it with a land tax in the form of an increase in the general rates may not achieve its objective within a twenty year period. The ACT government may need to increase the current progressive rates within the next 20 years or the growth in the population may be such that more people are paying the land tax. However, the reform does follow the recommendations contained in the Henry Tax Review and the arguments in support of abolishing stamp duty on conveyances are overwhelming.

B The losers as a result of the reforms

From the above analysis the current level of the general rate on land in the ACT would need to virtually double in 20 years in order to maintain the level of revenue collected

⁴² The *Rates Act 2004* (ACT), sections 44, 48, 55 and 56.

⁴³ Commonwealth of Australia, above n 4, 266.

⁴⁴ Ben Phillips: Principal Research Fellow, NATSEM, 15 November 2012, Tax Reform in the ACT: Distributional Impacts <http://www.natsem.canberra.edu.au/storage/ACT%20Tax%20Reform.pdf>.

⁴⁵ Ibid.

by the ACT government. This means that the cost of living in the ACT will increase. However, if all State governments followed the ACT example then a level playing field would be created within Australia. This would mean that property owners are not encouraged to live outside the ACT as a result of the high level of land tax. It would be very easy for ACT residents to relocate to NSW. Some people will be paying more than they currently would if this system of land tax had not been introduced. Older people, often on fixed incomes, would be significantly affected by a shift to property taxation since, even though inequities between taxpayers seem to be far greater where capital value, rather than land value is used, superannuitants tend to own disproportionately expensive properties relative to their incomes. However, '[d]ifferences in land ownership patterns make it difficult to generalize across countries, states, or even cities when considering the distributional effects of a land value tax'.⁴⁶

Property owners who have in the past paid stamp duty will be aggrieved by the abolition of stamp duty and will now be required to pay an increased land tax. However, the fact that these specific reforms are being phased in over a 20 year period provides some relief.

C The winners as a result of the reforms

Those residents of the ACT that intend to buy a new property in the ACT and those new residents buying their first property in the ACT are clear winners from these reforms. Stamp duty acted as a disincentive for home owners to either upgrade the size of their main residence or to downsize their main residence when their children left home. The Commonwealth government also wins because now when an investment property is purchased in the ACT and the stamp duty is claimed as a deduction against the owner's income tax liability, the amount of the deduction is reducing down to zero over the next 20 years. As stated above, stamp duty in the ACT only directly affects 9 per cent of the population so statistically not a very large percentage of the population gain from this measure. However, there are no other direct winners except real estate agents and home builders benefiting from a potential increase in real estate activity.

⁴⁶ Riël C D Franszen, 'International Experience' in Richard F Dye and Richard W England (eds), *Land Value Taxation: Theory, Evidence, and Practice* (Lincoln Institute of Land Policy, 2009) 27, 47.

IV CONCLUSION

The ACT government has taken a bold step in implementing some of the recommendations of the Henry Tax Review in relation to the abolition of stamp duty and its replacement by a tax on land. There are compelling arguments for taxing the economic rent generated by the mere ownership of land. The classical economists recognized the non-distorting effects of taxing the economic rent associated with land. The Henry Tax Review advocated the broadening of the land tax base especially with an ageing population in Australia and the reduction in the number of individual tax payers in the future. Moreover, there are compelling arguments in favour of abolishing stamp duty on conveyances. The ACT government has taken a great deal of initiative in abolishing stamp duty and increasing land tax through its general rates on all owner occupied land in the ACT. This means that property owners are facing a substantial increase in their rates on their property. The main issue facing the ACT government and other State governments is just how much land tax will have to increase in order to generate sufficient revenue once stamp duty has been completely abolished.

It is understandable if State governments are reluctant to adopt similar tax reforms to the ACT as the burden of tax is shifted from purchasers of real property to all owners of property in the ACT and an increased burden for the owner-occupier. Within the next 10 years the ACT government will be able to assess the impact of these reforms on the property owners living in the ACT, especially the retired owner facing the prospect of paying a substantial sum of money each year in general rates as their property increases in value. However, this is in essence a rent tax on the unearned increase in the value of the land and what was extensively examined in the Henry Tax Review.

In conclusion, there are strong reasons that have been discussed above, for all State governments to seriously consider adopting the initiatives implemented by the ACT government. It is contended in this paper that the positives outweigh the negatives.

NEOLIBERALISM IN AUSTRALIA AND THE HENRY TAX REVIEW

JOHN PASSANT*

ABSTRACT

This paper looks at the development of tax reform in Australia in the light of the rise of neoliberalism globally and its impact on tax policy. It argues that the fall in profit rates across the globe and the lack of class struggle in Australia have allowed neoliberalism and neoliberal tax policy to dominate the agenda. That agenda is to shift more wealth to capital to address falling profit rates and the Henry Tax Review is part of that process by both reducing taxes on capital and increasing tax burdens on labour. A return to class struggle offers the best opportunity to reintroduce equity into the tax debate.

* PhD student, School of Politics and International Relations, ANU, and Tutor, School of Humanities and Social Inquiry, University of Wollongong

I INTRODUCTION

In this paper I examine the neoliberal nature of Australia's Future Tax System Report, the Henry Tax Review.¹ Because tax is a deduction by the state from surplus value,² tax reform is about the form (the 'tax mix') and level of that state extraction. Given the decline in profit rates in much of the developed world since the late 1960s and early 1970s³ and the collapse of strike levels in Australia since the mid-1990s,⁴ neoliberal tax policy attempts to address this decline by reducing the State's share of surplus value and hence increasing the share going to capital without any resistance by workers as workers.

¹ Ken Henry et al, *Australia's Future Tax System Report to the Treasurer* (AGPS, 2010). There are 3 parts to the Report and they have 3 distinct footnote references in this article. 1 (a) Ken Henry et al, *Australia's Future Tax System Report to the Treasurer* (AGPS, 2010) Part One the Overview; 1 (b) Ken Henry et al, *Australia's Future Tax System Report to the Treasurer* (AGPS, 2010) Part Two Detailed Analysis Volume One and 1 (c) Ken Henry et al, *Australia's Future Tax System Report to the Treasurer* (AGPS, 2010) Part Two Detailed Analysis Volume Two. The link to the Final Report – all 3 sections plus other material - can be found here. <http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs_reports.htm>.

² Chris Harman *Zombie Capitalism: Global Crisis and the Relevance of Marx* (Bookmarks 2009) 114. Surplus value is the wealth that workers create through their labour. It is the difference between what workers are paid and the value they create. Joseph Choonara, *Unravelling Capitalism: A Guide to Marxist Political Economy* (Bookmarks London 2009) 21. Workers sell their labour power and receive in return wages which reflect their value – the cost of necessities and raising the next generation - but they create more value than that and the difference is the surplus value the bosses expropriate and realise on the market.

³ See for example Chris Harman, 'The rate of profit and the world today' (Summer 2007) 115 *International Socialism Journal* <<http://www.isj.org.uk/?id=340>>; Andrew Kliman, *The Failure of Capitalist Production: Underlying Causes of the Great Recession* (Pluto Press 2011); Joseph Choonara, *Unravelling Capitalism: A Guide to Marxist Political Economy* (Bookmarks London 2009) 74 et ff; Kieran Allen, *Marx and the Alternative to Capitalism* (Pluto Press 2011) 142 et ff; Gerard Duménil and Dominique Lévy, 'The profit rate: where and how much did it fall? Did it recover? (USA 1948-2000)' (Fall 2002) 34 (4) *Review of Radical Political Economics* 437; Gerard Duménil and Dominique Lévy, *The Economics of the Profit Rate* (Edward Elgar 1993); Gerard Duménil and Dominique Lévy, *Capital Resurgent: Roots of the Neoliberal Revolution* (Harvard University Press, 2004); Guglielmo Carchedi, 'Behind and beyond the crisis' (Autumn 2011) 132 *International Socialism Journal* <<http://www.isj.org.uk/index.php4?id=761&issue=132>>; Alex Callinicos, 'The crisis of our time' (Autumn 2011) 132 *International Socialism Journal* <<http://www.isj.org.uk/index.php4?id=755&issue=132>>; Joseph Choonara, 'Once more (with feeling) on Marxist accounts of the crisis' (Autumn 2011) 132 *International Socialism Journal* <<http://www.isj.org.uk/index.php4?id=762&issue=132>>; Michael Roberts, 'The long depression – the waste of capitalism' *Michael Roberts Blog: blogging from a Marxist Economist* 3 May 2012 <<http://thenextrecession.wordpress.com/2012/05/03/the-long-depression-the-waste-of-capitalism/>>; Michael Roberts, 'The UK rate of profit and others' *Michael Roberts Blog: blogging from a Marxist Economist* 4 January 2012 <<http://thenextrecession.wordpress.com/2012/01/04/the-uk-rate-of-profit-and-others>>; Minqi Li, Feng Xiao and Andong Zhu, 'Long Waves, Institutional Changes, and Historical Trends: A Study of the Long-Term Movement of the Profit Rate in the Capitalist World-Economy' (December 2007) XIII:1 *Journal of World-Systems Research* 33, 46 <http://jwsr.ucr.edu/volumes/vol13/Li_etal-vol13n1.pdf>.

⁴ Australian Bureau of Statistics, *4102.0 - Australian Social Trends, 2008: Industrial Disputes* <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Chapter7302008>>; Tom Bramble, *Trade Unionism in Australia: A history from flood to ebb tide* (Cambridge University Press, Melbourne, 2008) 7.

The rise of neoliberalism globally over the last 4 decades⁵ and in Australia since 1983⁶ can only be understood against this background of falling profit rates in the developed world⁷ and, in relation specifically to Australia, the collapse in the level of class struggle here. The decades long policy and practical shift to and deepening of neoliberalism⁸ is as true of tax policy as it is of other areas of policy.⁹ One almost universal state response to falling profit rates has been to reduce taxes on capital.¹⁰ Optimal tax theory is one justification for lessening taxes on capital and adopting other neoliberal tax policies. Optimal tax theory is the idea ‘...that different activities respond to different degrees to the same level of taxation...’¹¹ Perhaps even more appropriately, in light of its arguments for differential taxation, it might also be described as the idea that different activities respond to in optimum ways to different levels of taxation. Optimal tax theory gives intellectual weight and justification to the process of reducing extractions from surplus value and thus improving the amount of surplus value going to capital. What underlies

⁵ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005) 7. Harvey identifies General Pinochet’s US supported dictatorship in Chile from September 11, 1973 as ‘the first experiment with neoliberal state formation.’ See also John Quiggin, ‘Globalisation, neoliberalism and inequality in Australia’ (1999) 10(2) *The Economic and Labour Relations Review* 240, 241.

⁶ Tom Bramble and Rick Kuhn, ‘Making Capitalism Acceptable? The economic policy of Australian social democracy since the 1970s’ 2010 *Marxism* 21 306, 318. <http://nongae.gsnu.ac.kr/~issmarx/eng/article/20/20_bramble&khun.pdf>; Bramble and Kuhn argue the first hints of neoliberalism were evident in the Whitlam government’s response to deepening global economic crisis such as the 25% cut in tariffs in 1973 and the 1975 Bill Hayden ‘monetarist-inspired’ Budget. See pages 315 and 317 respectively.

⁷ Karl Marx, *Capital Volume III* (Foreign Languages Publishing House, Moscow 1959) 207-261. For an explanation of the theory see Chris Harman, *Zombie Capitalism: Global Crisis and the Relevance of Marx* (Bookmarks 2009) 68-72.

⁸ This is exemplified politically by the election of Thatcher in 1979, Reagan in 1980 and Hawke in 1983.

⁹ Duane Swank and Sven Steinmo, ‘The New Political Economy of Taxation in Advanced Capitalist Democracies’ (2002) 46(3) *American Journal of Political Science* 642; Duane Swank, ‘Tax Policy in an Era of Internationalization: Explaining the Spread of Neoliberalism’ (2006) 60(4) *International Organization* 847. Swank, and Steinmo, attribute the diffusion of neoliberal tax policy to the influence of US capitalism and its groundbreaking 1986 Tax Reform Act. What they don’t explain is why the turn to neoliberalism has and is occurring. See also Johan Christensen, ‘Bringing the bureaucrats back in: neo-liberal tax reform in New Zealand’ (2012) 32 (2) *Journal of Public Policy* 141 where Christensen argues that neo-liberal tax reform in New Zealand is best understood as the product of autonomous bureaucratic action, an argument I find unconvincing; Johan Christensen, ‘Bureaucracies, Neoliberal Ideas, and Tax Reform in New Zealand and Ireland’, forthcoming in *Governance: An International Journal of Policy, Administration and Institutions*; preview version published online 21 November 2012 DOI: 10.1111/gove.12009; Adam Jamrozik, *Social Policy in the Post-welfare State: Australian Society in a Changing World 3rd edn.*(2009, Frenchs Forest, Longman). For a rebuttal of sorts to Jamrozik’s post-welfare state thesis in Australia see Alan Fenna & Alan Tapper, ‘The Australian Welfare State and the Neoliberalism Thesis’ (2012) 47(2) *Australian Journal of Political Science* 155.

¹⁰ Ken Henry et al, above n 1 (b), 160. This is true for both the headline and effective company tax rates. Ken Henry et al, above n 1(b), 160-162.

¹¹ Jacob Saulwick, ‘Balancing act between tax theory and reality’ *The Sydney Morning Herald* 19 April 2010 <<http://www.smh.com.au/business/balancing-act-between-tax-theory-and-reality-20100418-smls.html>>.

the Henry Tax Review is a pragmatic, almost disguised, adoption and adaptation of optimal tax theory, a form in my view of neoliberalism in tax theory and increasingly, although with some difficulty,¹² in tax policy and practice.

The paper is divided into 5 parts. Part II looks briefly at some indicators of and reasons for the collapse of class struggle in Australia and the impact this has had on the development of policy, including tax policy, in Australia. Part III examines what neoliberalism is and the Australian Labor Party's embrace of the ideology in light of falling profit rates in the developed world and the lack of counterbalancing class struggle in Australia. In Part IV the paper looks at neoliberalism in the context of tax policy and the rise of optimal tax theory. It argues that the Henry Tax Review is both a reflection of that neoliberal trend and the catalyst for future deepening of neoliberal tax policy in Australia. The paper concludes that only a return to class struggle can put a progressive tax system back on the policy and political agenda.

Given the importance I attach to class struggle or lack of it in setting the political and economic environment and its flow through to tax policy and tax reform, what then has been happening to strike levels in Australia over the last 3 decades?

II THE COLLAPSE OF CLASS STRUGGLE IN AUSTRALIA

Tax is a deduction from surplus value. As Harman puts it taxes '...are part of the total social surplus value – part of the total amount by which the value of workers' output exceeds the cost of reproducing their labour power.'¹³ The ultimate incidence of tax both in terms of the direct burden and indirectly through the impact on living standards, jobs, prices, profits, wages and so on depends on the level of class struggle in Australian society. That level today is very low. As Tom Bramble puts it class struggle has moved from the flood of the late 1960s to the ebb tide today, an ebb tide that began in 1983 with the election of the Hawke Labor government and which continues to this day.¹⁴ Bramble says that '[t]he Accord marked the onset of the ebb tide in union affairs, a

¹² For a discussion of both the difficulties of implementing optimal tax theory as on the ground policy, and the trend in policy towards optimal tax theory, see Robin Boadway, *From Optimal Tax Theory to Tax Policy: Retrospective and Prospective Views* (The MIT Press, 2012). See also N. Gregory Mankiw, Matthew Weinzierl and Danny Yagan, 'Optimal Taxation in Theory and Practice' (2009) 23(4) *Journal of Economic Perspectives* 147.

¹³ Chris Harman, above n 2, 114.

¹⁴ Tom Bramble, *Trade Unionism in Australia: A history from flood to ebb tide* (Cambridge University Press, Melbourne, 2008). His chart at page 7 shows the decline graphically.

period of retreat that is still in progress.¹⁵ The Accord engineered not only a cut in real wages,¹⁶ a collapse in union membership,¹⁷ the destruction of effective grass roots and rank and file organisation in unions,¹⁸ the suppression of militancy and in some cases militant unions,¹⁹ but a massive collapse in the number of strikes and the number of days lost. Two graphs from the Australian Bureau of Statistics illustrate the magnitude of the collapse in class struggle, the first one from 1987 to 2007 and the second from 2008 to 2013.

INDUSTRIAL DISPUTES, NUMBER OF WORKING DAYS LOST²⁰



The strike figures since 2007 have continued at historically low levels, with minor ups and downs.²¹ Here are the quarter by quarter figures from March 2008 to March 2013 from the Australian Bureau of Statistics, keeping in mind the decline outlined above puts these figures into their real context at the very low end of class struggle.²²

[The rest of this page is blank.]

¹⁵ Ibid 125.

¹⁶ Tom Bramble and Rick Kuhn, *Labor's Conflict: Big business, workers and the politics of class* (Cambridge University Press 2011), 106.

¹⁷ Ibid 169.

¹⁸ Tom Bramble, above n 14, 130.

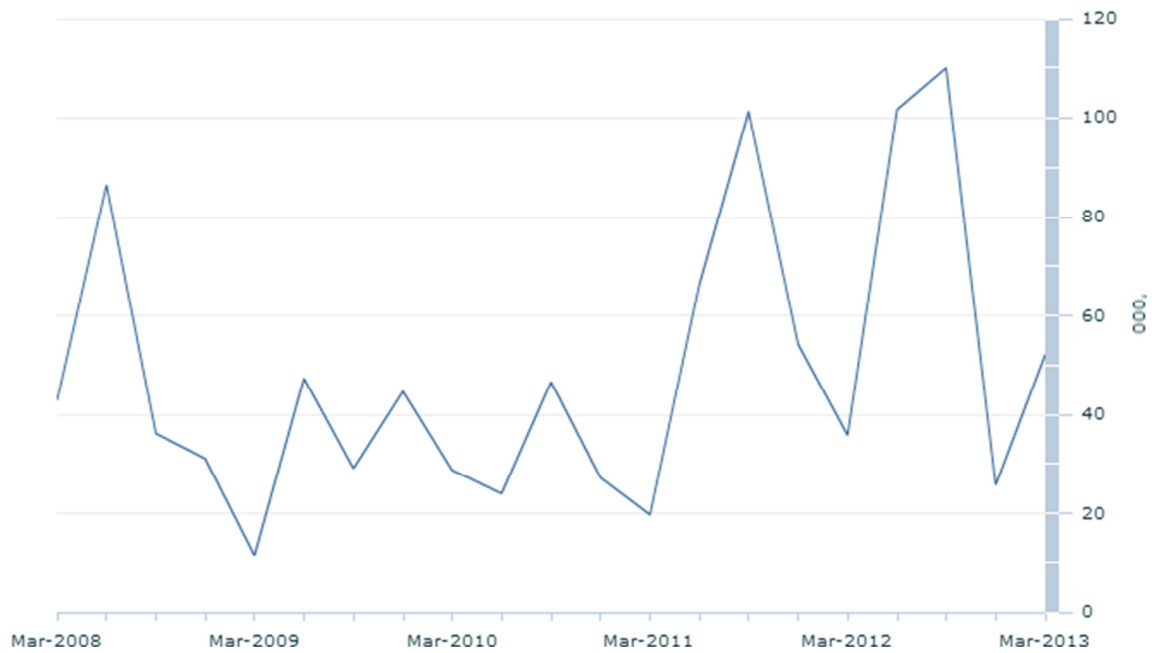
¹⁹ Tom Bramble and Rick Kuhn, above n 16, 106.

²⁰ Australian Bureau of Statistics, *4102.0 - Australian Social Trends, 2008: Industrial Disputes* <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Chapter7302008>>. The graph refers to working days lost per 1000 employees.

²¹ Tom Bramble and Rick Kuhn, above n 16, 169.

²² Australian Bureau of Statistics, *6321.0.55.001 - Industrial Disputes, Australia, Mar 2013* <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6321.0.55.001>>.

Working days lost, Australia



Australian Bureau of Statistics

© Commonwealth of Australia 2013.

It is this loss of class combativeness, this lack of class struggle, that helps explain the ongoing and deepening neoliberalisation of Australia. This has impacted on tax policy. Without struggle, in particular class struggle, the ability to win progressive change becomes less likely.²³ This is because without pressure from below social democratic parties like the ALP will move to the right economically (and often socially) under pressure from capital and conservative elements in society in times of declining profit rates, or where there are perceptions of economic crises and the need for the policies of austerity to address them.

Collective action can force progressive policies on supportive and sometimes even on reluctant governments.²⁴ For example after the Second World War mass strikes in Australia over wages pressured government to extend the welfare state.²⁵ The election

²³ Tom Bramble and Rick Kuhn, 'Continuity or Discontinuity in the Recent History of the Australian Labor Party?' (June 2009) 44 (2) *Australian Journal of Political Science* 281, 290.

²⁴ Ibid 292-293. See also Erin E. O'Brien, *The Politics of Identity: Solidarity Building among America's Working Poor* (State University of New York 2008) 147.

²⁵ Tom Bramble and Rick Kuhn, above n 6, 315-316. This was not a peculiarly Australian phenomenon. For example, David Harvey says: 'As in almost all advanced capitalist societies, labour unrest [in Sweden] burgeoned in the late 1960s, sparking a wave of regulatory reform that curbed the power of capital and extended the power of labour even into the workplace.' David Harvey, above n 5, 112.

of the Whitlam government was in part a response to the industrial and social ferment of the 1960s and that background of militancy saw it adopt a number of progressive policies which also advantaged capital by producing a more educated and healthy workforce.²⁶ On the other hand a passive working class will accept, however unwillingly and reluctantly because of a sense of powerlessness,²⁷ the neoliberalisation of society, including shifts in national income to capital over time.²⁸ The tax system has contributed to this shift as it has become less progressive.²⁹

The reasons for a link between working class struggle and progressive and sometimes overtly pro-working class policies³⁰ are complex. Bramble and Kuhn identify the nature of the ALP's policies as dependent on the interactions, conflicts and battles in what they call its material constitution – its working class base of voters, its members and their class, the trade union leadership, the Party's leadership itself and the pressure from the capitalist class.³¹ Changes in the strengths of each component of that material base, and the level of pressure they bring to bear, can see Labor move to the Left or the Right³² but in the context of the ALP being a 'steadfast defender of the capitalist system.'³³ Without working class pressure it is more likely to move to the right in times of declining profit rates globally.³⁴ With working class pressure it can move to the left.³⁵

Without that working class base fighting for its own material interests in any major way there is little or no pressure on the Party and its leadership to develop or implement pro-working policies and the ruling class's economic ideology du jour or de siècle can and does then dominate Labor Party thinking and practice. Traditionally the Labor Party has 'followed the economic orthodoxy of the day.'³⁶ When the world is Keynesian, Labor is Keynesian. When the world is neoliberal, Labor is neoliberal. The neoliberalisation of the Party's policies and practice can continue unchecked, especially if the trade union

²⁶ Tom Bramble and Rick Kuhn, above n 6, 316.

²⁷ Tom Bramble and Rick Kuhn, above n 23, 284.

²⁸ Tom Bramble and Rick Kuhn, above n 6, 315-316.

²⁹ Organisation for Economic Cooperation and Development (OECD), *Divided We Stand: Why Inequality Keeps Rising - Country Note: Australia* (Paris 2011) 1 < <http://www.oecd.org/australia/49177643.pdf>>; Andrew Leigh, *Battlers and Billionaires: The Story of Inequality in Australia* (Redback Press 2013).

³⁰ At least in times of relative economic good times when profit rates are adequate and the pool of surplus value out of which reforms can be paid is adequate.

³¹ Tom Bramble and Rick Kuhn, above n 16, 14-18.

³² Tom Bramble and Rick Kuhn, above n 23, 293.

³³ Tom Bramble and Rick Kuhn, above n 16, 186.

³⁴ Tom Bramble, above n 14, 15.

³⁵ *Ibid* 240.

³⁶ Tom Bramble and Rick Kuhn, above n 16, 183.

leadership is embedded in the process and workers are quiescent.³⁷ Tax policy becomes part of that process of societal neoliberalisation. To this end the Rudd Labor government established the Henry Tax Review and its terms of reference focused on efficiency and the market rather than equity. These are the concerns of neoliberalism.

It is these two systemic drivers – a collapse in strikes in Australia and the fall in profit rates globally – that explain the turn to neoliberalism and its expression in Australia in the tax field in the neoliberal recommendations of the Henry Tax Review.

What then is neoliberalism?

III NEOLIBERALISM

It was Elizabeth Martinez and Arnaldo Garcia in an oft quoted piece who identified five main elements of economic neoliberalism – the rule of the market, cutting public expenditure for social services, deregulation, privatisation and eliminating the concept of public good or community and replacing it with individual responsibility.³⁸ This concentrates on the aims and outcomes of neoliberalism and not the mechanism for arriving at these outcomes, a strong state. Eddie Cimorelli identifies these deeper concerns. He says that '[n]eoliberalism is a particular organisation of capitalism. Its most basic feature is the use of the state to protect capital, impose market imperatives on society and curb the power of labour.'³⁹ Tax reform is about reinvigorating or protecting capital and the flow of profits. It reinforces or extends market imperatives by attempting to reduce the level of state extractions from surplus value and allowing more to flow to capital for reinvestment.

Under neoliberalism the state uses its power to open up or impose the market on and across society and not all sectors will be accepting and compliant. Reducing the tax take of the state and its spending on the working class allows more surplus value to go to capital and hence back into the capital accumulation and production process. The state exercises its monopoly of legislative power to deliver tax cuts to capital and often spending cuts to labour.

³⁷ Ibid 183-14.

³⁸ Elizabeth Martinez and Arnaldo Garcia, 'What is Neoliberalism? A brief definition for activists' *CorpWatch – holding corporations accountable* <<http://www.corpwatch.org/article.php?id=376>>.

³⁹Eddie Cimorelli, 'Taking neoliberalism seriously' (Autumn 2009) 122 *International Socialism Journal* <<http://www.isj.org.uk/index.php4?id=537&issue=122>>.

What is the point of neoliberalism? As David Harvey puts it, neoliberalism is ‘a *political* project to re-establish the conditions for capital accumulation and to restore the power of economic elites.’⁴⁰ The crisis of profitability from the late 1960s and early 1970s forced a rethink on those who own capital and those who oversee the capital accumulation process, for example, capitalists, the state, the main political parties, high ranking managers, mainstream academics, think tanks, media commentators and the rest of the industry devoted to manufacturing consent.⁴¹ That rethink was not aimed at re-establishing the class power of capital but reinforcing and strengthening its economic and political power of capital over labour, (i.e. the power they already had,) and thus increasing surplus value going to capital to address falling profit rates in the developed world. Neoliberalism is thus about the redistribution of surplus value, not its creation.

Of course, if the state reduces its tax take it allows more surplus to flow to capital and this will have short and long term consequences for accumulation and the creation of future surplus value, especially for small open economies like Australia.⁴² The argument is that low taxes on capital attract foreign investment. The paradox is that success in diverting more surplus value back to capital and hence into accumulation or re-investment doesn’t of itself increase the amount of surplus value created. That occurs in the production process with the surplus value created by the labour of productive workers, that is, workers who produce goods and services for the market. What capital does is harness that process and appropriate that value. Tax cuts on capital and other pro-capital reforms do however reinforce the very production process – increasing investment in capital, the means of production, at a rate greater than in value producing labour⁴³ - that leads to declines in profit rates.⁴⁴

The band of hostile brothers that is the various sections of capital and the state⁴⁵ battle among themselves for a share of surplus value, both within and across industries. The

⁴⁰ David Harvey, above n 5, 19.

⁴¹ Edward S Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Pantheon Books, New York 1988).

⁴² Ken Henry et al, above n 1(a), 8.

⁴³ Marx called this an increase in the organic composition of capital. It is the key to understanding the tendency of the rate of profit to decline. See for example Chris Harman, above n 2, 70-71.

⁴⁴ *Ibid* 68-72.

⁴⁵ The band of hostile brothers is made up of the various members of the capitalist class such as productive capital, finance capital, landlords and the state. I would use siblings instead of brothers but the phrase is now so entrenched in Marxist and leftwing writing that it is seemingly untouchable. Interestingly, although Marx talked about hostile brothers, he never called them a band. Later writers ascribed the whole phrase to Marx and it is now so entrenched in leftwing discourse that I use it to

battle is over state revenues as an extraction from the social surplus value.⁴⁶ In essence then neoliberalism is an attempt to lessen the state's share of surplus value to enable more to go to capital. The use of the tax monopoly to reduce taxes on capital and to shift the tax mix from capital (especially mobile capital) to consumption and fixed assets like resources and land and to some extent labour⁴⁷ is an exercise of state power to ensure its retreat from purloining the surplus value the other brothers extract. The return of the amounts the state has appropriated from the expropriators to the expropriators is neoliberalism itself.

What unifies these various neoliberal matters into a cohesive whole, with debates between different factions of capital and the pro-capitalist parties about the way forward, is the need for policies and actions - countervailing tendencies - to address the tendency of the rate of profit to fall.⁴⁸ Reducing taxes on capital is one way to do this.

Tax reform is part of the wider political and economic neoliberal process of shifting wealth from labour and the poor to capital and the rich.⁴⁹ As David Harvey puts it: 'The main achievement of neoliberalism ... has been to redistribute, rather than to generate, wealth and income.'⁵⁰ It is also about increasing ruling class power and hegemony.⁵¹ Tax reform both reflects and reinforces ruling class power and the attempts of that class to reduce the tax burden on itself and increase if needed the burden on workers.⁵² This

describe capitalists who own and control the commanding heights of the economy and have interests in common (against labour) and opposed (in competition) to each other, and their state. Productive capital is that section of capital in which workers create surplus value, i.e. produce goods and services for sale on the market. See for example Karl Marx, *Capital Volume I* (Progress Publishers, Moscow 1977) 149 and 201; Alex Callinicos, *The Revolutionary Ideas of Karl Marx* (Bookmarks, London, 1996) 219; Chris Harman, above n 2, 114.

⁴⁶ Chris Harman above n 2, 114.

⁴⁷ Ken Henry et al, above n 1 (a), 8.

⁴⁸ Karl Marx, *Capital Volume III* (Foreign Languages Publishing House, Moscow 1959) 207 - 261. For a discussion of the theory, see Chris Harman, *Zombie Capitalism: Global Crisis and the Relevance of Marx* (Bookmarks 2009) 68-72. Harman also discusses countervailing tendencies like lengthening the working day, devalorisation, cutting real wages, increasing productivity and so on at pages 72-75.

⁴⁹ Australian Bureau of Statistics, *5206.0 - Australian National Accounts: National Income, Expenditure and Product*, Mar 2013
<<http://www.abs.gov.au/Ausstats/ABS@.nsf/Latestproducts/5206.0Main%20Features4Mar%202013?opendocument&tabname=Summary&prodno=5206.0&issue=Mar%202013&num=&view=>>; Australian Council of Social Service Poverty in Australia ACOSS Paper 194 (ACOSS 2012) <http://www.acoss.org.au/uploads/ACOSS%20Poverty%20Report%202012_Final.pdf>.

⁵⁰ David Harvey, above n 5, 159.

⁵¹ Gérard Duménil and Dominique Lévy, *The Crisis of Neoliberalism* (Harvard University Press, Cambridge, Mass, 2011) 1.

⁵² Because taxes, including those on workers, come out of the surplus value productive workers create they don't necessarily impact on the value of workers' labour power. If they do, and that depends on the level of class struggle among other factors, it may lead to battles over the real price of labour power, that is, the after tax wage.

wealth shift from labour to capital has been in part an achievement of tax policy and tax reform, directly through for example income tax cuts that have disproportionately favoured the rich⁵³ or companies⁵⁴ and indirectly through tax mix changes for example from income to consumption.

One result of the 3 decades of neoliberalism in Australia has been that income and wealth inequality in Australia have increased since the 1980s.⁵⁵ According to the OECD '[i]ncome inequality among working-age people [in Australia] has been rising since 2000 and is today above the OECD average.'⁵⁶ At the same time the tax and transfer system in Australia has become less able to address this growing income and wealth inequality. The OECD has found that in Australia now '...taxes and benefits reduce inequality by 23%...'⁵⁷ The increase in inequality is a pre-tax issue,⁵⁸ suggesting its resolution will occur in that pre-tax environment, that is in the workplace in the battle over wages.⁵⁹ Class struggle for better wages and thus great equality can then flow through to demands for greater equity and equality, including in tax.

The Henry Tax Review was about finding 'efficient' taxes⁶⁰ which both improve the capital accumulation process and the power of the dominant class but also in the main fall on workers to facilitate that.⁶¹ A major direction for a robust and efficient tax system that the Review suggested⁶² was focusing taxes on immobile tax bases including resources, land and by implication that section of labour that is immobile, i.e. most labour in Australia. For example, there are not many opportunities for Australian tax teachers to ply their trade overseas. Dr Henry summed up the approach recently when

⁵³ The Australia Institute, 'Australia: A low-tax country' < <https://www.tai.org.au/?q=node/277>>. According to Andrew Leigh MP 'one-third of the rise in top incomes over recent decades is due to cuts in top tax rates.' Andrew Leigh, *Battlers and Billionaires: The Story of Inequality in Australia* (Redback Press 2013) 77. Indeed, Leigh says there that 'for most high income earners, a generation of reforms to "broaden the base and lower the rate" has seen a reduction in their average tax rate.'

⁵⁴ Ken Henry et al, above n 1(b), 160-161.

⁵⁵ Andrew Leigh, above n 53.

⁵⁶ OECD, above n 29, 1.

⁵⁷ Ibid.

⁵⁸ Andrew Fieldhouse, 'Rising Income Inequality and the Role of Shifting Market-Income Distribution, Tax Burdens, and Tax Rates' *Economic Policy Institute* 14 June 2013 < <http://www.epi.org/publication/rising-income-inequality-role-shifting-market/>>; Jared Bernstein, 'Trickle-up Economics' *On the Economy* 3 January 2012 <<http://jaredbernsteinblog.com/trickle-up-economics/>>

⁵⁹ The rise of inequality and the role of tax in it is a large topic deserving of in-depth discussion in another article.

⁶⁰ Ken Henry et al, above n 1 (a), 12-13.

⁶¹ John Passant, 'Lessons from the Recent Resource Rent Tax Experience in Australia', (2011) 10(2) *Canberra Law Review* 159, 177; for a more global and less recent analysis, see R. Avi-Yonah, 'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State (2000) 113(7) *Harvard Law Review* 157.

⁶² Ken Henry et al, above n 1 (a), xvii.

he said: 'Over time we need to find ways to apply higher rates of tax to natural resources including mineral resources and land. And lower rates of tax to more mobile labour and capital. The least damaging way of imposing tax is on the least mobile things.'⁶³ Mobile labour is well paid labour; less tax on that section of labour is about lower marginal tax rates on top income earners, one optimal tax approach.⁶⁴ Land tax too is in effect a tax imposed on workers, taxing part of the surplus value some of them reclaim or recapture through home ownership.

Tax reform can also be about redistributing surplus value among the hostile brothers. This is especially so in the hands of a Labor Party which traditionally, because of its links to the trade union movement and in the past its lack of links to specific sections of capital, has sometimes been able to impose solutions that are at the expense of some of the hostile brothers but benefit them all.⁶⁵ The Minerals Resource Rent Tax (MRRT) and its proposed but ultimately doomed predecessor, the Resource Super Profits Tax, (RSPT), were attempts by the Labor government to tax the economic rent or super profits accruing to mining capital and to redistribute those profits to all capital through company tax cuts.⁶⁶ The tax on economic rent mimics competition by helping to equalise high profit rates back towards the average.⁶⁷ The failure to implement the RSPT and the structural weaknesses of the MRRT suggest that Labor's role of sometimes being able to impose solutions on some capitalists for the benefit of capital is in doubt.⁶⁸

The neoliberal move to the market was and is a global phenomenon.⁶⁹ Reductions in taxes on capital are part of that move – to allow more of the surplus value to go to capital and thus to be reinvested in further capital accumulation.⁷⁰

As profit rates in most of the developed world fell and continue to fall, tax policy in OECD country after OECD country has more and more been about the search for ways to address that decline. Government after government has attempted to remove tax

⁶³ Peter Hartcher, 'Henry warns of need to increase taxation' The Canberra Times 6 August 2013 <<http://www.canberratimes.com.au/federal-politics/federal-election-2013/henry-warns-of-need-to-increase-taxation-20130805-2ra5w.html>>.

⁶⁴ Robin Boadway, above n 12, 12-13; Gregory Mankiw, Matthew Weinzierl and Danny Yagan, above n 12, 147.

⁶⁵ Tom Bramble and Rick Kuhn, above n 16, 184.

⁶⁶ John Passant, above n 61, 172.

⁶⁷ John Passant, 'A basic guide to taxing economic rent in Australia' (2012) 11(2) *Canberra Law Review* 100, 102.

⁶⁸ Tom Bramble and Rick Kuhn, above n 16, 184.

⁶⁹ Jennifer Curtin, Francis G. Castles and Jack Vowles, 'Public policy in Australia and New Zealand: The new global context' (2006) 41 (2) *Australian Journal of Political Science* 131, 142.

⁷⁰ Ken Henry et al, above n 1(b), 166.

burdens on capital and the rich, and return some of the surplus value taken by the state through for example tax cuts for capital in general.⁷¹ It has seen company taxes cut and shifts to consumption taxes and flatter income tax systems.

Treasury in the run up to the Review in 2008 released its *Architecture of Australia's Tax and Transfer System* to provide some facts, figures and analysis for the then forthcoming discussions and debate about tax reform prompted by the establishment of the Henry Tax Review that year. It said that by comparison to other OECD countries 'Australia has a low share of tax revenue from labour income and the highest share from capital income. In part, this reflects the relatively greater contribution of corporate income taxes to total tax revenue.'⁷² The tax burden on capital was the fourth highest and that on labour the fourth lowest of any OECD country.⁷³ The consumption tax burden was also the fourth lowest.⁷⁴

It is no surprise then that the Henry Tax Review made recommendations to lower the company tax rate,⁷⁵ to give a 40% discount on the tax on savings⁷⁶ and strongly backed a broad based consumption tax and further reliance on it.⁷⁷ Apart from anything else these recommendations and suggestions if adopted would bring Australia closer to the international average in terms of tax mix.

At times a counterbalance to the fall in capital taxation - exemplified by falling company taxes across the developed world⁷⁸ - has been a relative increase in the tax burden on labour or, what is essentially the same thing but less directly, taxing or increasing the tax on its consumption.⁷⁹ The trend over the last five decades to consumption taxes and increasing their rate and breadth is a global one.⁸⁰ Compared to income tax it is an efficient (i.e. a less distorting) tax.⁸¹ The danger for capital is that such taxes might see wages fall below their value and provoke workers to fight for better remuneration.

⁷¹ Ibid 160-162.

⁷² The Treasury, *Architecture of Australia's Tax and Transfer System* (AGPS 2008) 215.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ken Henry et al, above n 1 (a), 86.

⁷⁶ Ibid 83.

⁷⁷ Ibid 80 and 91.

⁷⁸ PwC, Corporate Income Tax - a global analysis (PwC, 2012) 2 <http://www.pwc.com/en_GX/gx/paying-taxes/pdf/pwc-corporate-income-tax-report.pdf>.

⁷⁹ Duane Swank and Sven Steinmo, above n 9, 642.

⁸⁰ Organisation for Economic Cooperation and Development, *Consumption Tax Trends 2012 VAT/GST and Excise Rates, Trends and Administration Issues* (Paris, OECD, 2012) 44.

⁸¹ Ibid 52.

It was one of the principles of the Henry Tax Review that 'the personal income tax system should raise revenue fairly...'⁸² This means a broad income tax base and progressive rates.⁸³ Yet its recommendations were actually about moving towards a less progressive tax system with 97% of taxpayers, those earning between \$35000 and \$180,000, in the 35 cents in the dollar rate⁸⁴ and differential tax rates for different types of income with for example higher rates on labour than capital income. Indeed the Review suggests that in an ideal world for a small open economy like Australia's there should be no taxes on capital income.⁸⁵ So despite the Review's rhetoric about tax fairness, the reality seems somewhat different. As Neil Brooks has noted:

[T]he growing inequality in Anglo-American countries is, and will continue to be, one of the most serious social problems those societies face and that the tax system is both a necessary and appropriate instrument for mitigating extremes of income and wealth distribution. Somewhat surprisingly, *Australia's Future Tax System* had almost nothing to say about the use of the tax system to achieve a more equitable distribution of income...⁸⁶

To understand why, we need to look a little more closely at the Henry Tax Review and neoliberal optimal tax theory, in my view the underlying philosophy of the Review.

IV NEOLIBERALISM, OPTIMAL TAX THEORY AND THE HENRY TAX REVIEW

Why did the Rudd Labor Government set up the Henry Tax Review? In the 2008/09 Budget the Treasurer Wayne Swan announced a comprehensive review of Australia's tax system⁸⁷ '... to create a tax structure that will position Australia to deal with its social, economic and environmental challenges and enhance economic, social and environmental wellbeing.'⁸⁸ There was discussion about a modern economy needing a more modern tax system⁸⁹ and one '... that is fairer, that is simpler, that better rewards

⁸² Ken Henry et al, above n 1 (b), 4.

⁸³ Ibid.

⁸⁴ Ibid 22. According to ACTU Research Officer Matt Cowgill 'anyone earning between \$35600 and \$94100 would pay more tax under this system, while anyone earning above that amount would get a tax cut.' Matt Cowgill, 'Against the flat tax' *We are all dead* 1 November 2010 <<http://mattcowgill.wordpress.com/2010/11/01/against-the-flat-tax/>>.

⁸⁵ Ken Henry et al, above n 1 (b), 155.

⁸⁶ Neil Brooks 'Taxing the wealthy' in Chris Evans, Richard Krever and Peter Mellor (eds), *Australia's Future Tax System: The Prospects After Henry* (Thomson Reuters 2010) 197, 197.

⁸⁷ Wayne Swan, *Budget Speech 2008-09* (Canberra 13 May 2008) 12. <<http://www.budget.gov.au/2008-09/content/speech/download/speech.pdf>>.

⁸⁸ Ken Henry et al, above n 1 (a), v.

⁸⁹ Wayne Swan, above n 87, 12.

people for their hard work, that responds to our environmental and demographic challenges, that makes us internationally competitive, and that creates the incentives to invest in our productive capacity.’⁹⁰

There remain a number of pressures on the Australian economy, governments and society. These include an ageing population, the shift of production to Asia, the ongoing integration of the Australian economy into the global economy, the fact that Australia is a capital importing nation, the mobility of finance capital, the desire of the Australian population for adequate spending on social services like health, education and aged care, environmental challenges and the global economic uncertainty unleashed by the GFC and continuing to today.⁹¹ Deeper reasons might well be revealed by examining if that global economic uncertainty arises from the tendency of the rate of profit to fall⁹² and the pressure this puts on capital and its politicians to develop countervailing policies and actions to combat the fall. Allowing capital to expropriate more surplus value at the expense of the state – essentially what optimal tax theory and neoliberal reforms do – is from the point of view of capital a sensible and deliverable response to falling profit rates.

Membership of the Henry Tax Review gives us a good background to understanding the neoliberalism of the Henry Tax Review. The Review was led by Ken Henry, the then head of the Treasury and the chief economist for government. One member was Heather Ridout, the then head of the Australian Industry Group – a business group - and often described as a de-facto member of the Labor Cabinet.⁹³ In December 2011 she was appointed to the Reserve Bank Board.⁹⁴ The other members of the Panel were Greg Smith, former Treasury official and an Adjunct Professor in Economic and Social Policy at the Australian Catholic University, Dr Jeff Harmer, Secretary to the Department of Families, Housing, Community Services and Indigenous Affairs and Professor John Piggott, Professor of Economics and Associate Dean, Research in the Australian School of

⁹⁰ Ibid.

⁹¹ Ken Henry et al, above n 1 (a), 3.

⁹² See Andrew Kliman, *The Failure of Capitalist Production: Underlying Causes of the Great Recession* (Pluto Press 2011). See also the authors referred to above in n 3, including Kliman, on the tendency of the rate of profit to fall.

⁹³ Christine Jackman, ‘A woman of influence’ *The Weekend Australian Magazine* 6 August 2011 <<http://www.theaustralian.com.au/news/features/a-woman-of-influence/story-e6frg8h6-1226108361541>>.

⁹⁴ Reserve Bank of Australia, ‘Appointments to the Reserve Bank Board’ *The RBA Media Release* 6 December 2011 <<http://www.rba.gov.au/media-releases/2011/mr-11-27.html>>.

Business at the University of New South Wales. It says much about the distance from the union movement that the Rudd government has kept⁹⁵ that, despite being established by a Labor government, there was no union representation on the Review. This was very much a group of like-minded pro-capitalist individuals.

The terms of reference also give an indication of the outcomes the Rudd Labor Government wanted. For example the second term of reference refers to the idea that taxes should do the least harm to economic efficiency, provide horizontal, vertical and intergenerational equity and minimise complexity.⁹⁶ This is standard Adam Smith fare and rhetoric. The test is in the reality. Neither equity nor equality received much of a mention after that⁹⁷ and the dominant ethos in the terms of reference and the Review was that an efficient tax system provides benefits for all – the tax trickle down approach.

A Efficiency

Efficiency is one of the key tax policy principles,⁹⁸ and its dominance in the age of neoliberalism at the expense of equity⁹⁹ is reflected in the Henry Tax Review.¹⁰⁰ Thus the Review not surprisingly emphasises economic growth¹⁰¹ and says for example that its vision is of a 21 st century tax and transfer system that would 'support per capita income growth rates at the upper end of developed country experience ...'¹⁰² The mechanism for doing this is the market and that includes the least interference by tax in the market. The terms of reference capture this when they say that '[r]aising revenue should be done so as to do least harm to economic efficiency.'¹⁰³ This equating of least harm with tax efficiency is one key to understanding the Review recommendations for a

⁹⁵ Tom Bramble and Rick Kuhn, above n 16, 169.

⁹⁶ Ken Henry et al, above n 1 (a), vii.

⁹⁷ Neil Brooks, above n 86, 198-199.

⁹⁸ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth Of Nations* (An Electronic Classics Series Publication, Pennsylvania State University 2005) 677 < <http://www2.hn.psu.edu/faculty/jmanis/adam-smith/wealth-nations.pdf>>.

⁹⁹ Duane Swank, 'Tax policy in an era of internationalization: an assessment of a conditional diffusion model of the spread of neoliberalism' in Beth A. Simmons, Frank Dobbin, Geoffrey Garret, (eds), *The Global Diffusion of Markets and Democracy* (Cambridge University Press 2007) 64 et ff; Duane Swank and Sven Steinmo, above n 9, 643.

¹⁰⁰ Ken Henry et al, above n 1 (a), 12-13.

¹⁰¹ Ibid xvii.

¹⁰² Ibid.

¹⁰³ Ibid vii.

move to four robust and efficient tax bases to replace the more than 100 mainly State and Territory inefficient taxes.¹⁰⁴ These efficient bases were:

- personal income, assessed on a more comprehensive base;
- business income, with more growth-oriented rates and base;
- private consumption, through broad, simple taxes; and
- economic rents from natural resources and land, on comprehensive bases, noting that revenue from rent taxes will likely be more volatile than from the existing resource royalties it will replace.¹⁰⁵

Efficient taxes are about improving the capital accumulation process. They are an attempt to raise revenue in ways that impact less harmfully on the distribution of already existing surplus value and to make attractive the creation of surplus value in Australia by improving after tax rates of return for local and foreign investors.¹⁰⁶ Some of the most inefficient taxes are State and Territory taxes.¹⁰⁷

Neoliberalism dominates tax policy as much as it does all other economic policy.¹⁰⁸ One consequence is a concentration on efficiency. As Sholte puts it 'neoliberalism assigns priority to efficiency over equity when the two conflict.'¹⁰⁹ Conflict they do in times of economic decline. Thus the focus of tax policy has become efficiency.¹¹⁰ That is why the Henry Tax Review talked almost exclusively about efficiency.¹¹¹

What is efficiency in a tax context? An efficient tax is a tax which does the least economic harm, or as the Review puts it: 'An efficient tax system involves taxes that result in relatively low losses in consumer welfare per dollar of revenue raised.'¹¹² The lesser this

¹⁰⁴ Ibid 11.

¹⁰⁵ Ibid xvii.

¹⁰⁶ If of course the systemic trend is for those returns (crudely, profit rates) to fall, then the tax cuts 'solution' can at best only be temporary, morphine for a mortal wound.

¹⁰⁷ Ken Henry et al, above n 1 (a), Chart 1.5, 13.

¹⁰⁸ Swank is slightly more circumspect. He says that '[n]ational structures of taxation have not been immune to neoliberalism.' See Duane Swank, above n 99, 64. Swank says the 1986 Tax Reform Act in the US is the key to understanding the diffusion of neoliberal tax policies across the developed world. However this doesn't explain why they have become popular in the first place to business and politicians. Falling profit rates in much of the developed world and the decline of class struggle are the two key ideas, in my opinion, which help explain the dominance of neoliberalism since the 1970s and 1980s.

¹⁰⁹ Jan Aart Scholte, 'The Sources of Neoliberal Globalization' *UNRSID Programme On Overarching Concerns Paper* Number 8 (UN, Geneva, 2005) 13 <[http://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)F/9E1C54CEEB19A314C12570B4004D0881/\\$file/scholte.pdf](http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)F/9E1C54CEEB19A314C12570B4004D0881/$file/scholte.pdf)>.

¹¹⁰ Duane Swank and Sven Steinmo, above n 9, 643.

¹¹¹ Neil Brooks, above n 86, 197.

¹¹² Ken Henry et al, above n 1(a), 13.

deadweight loss is, the more efficient the tax is.¹¹³ According to the Henry Tax Review 'most taxes result in some loss of economic efficiency.'¹¹⁴ This is because all taxes in some way and to differing degrees 'alter [people's] incentive to work, save, invest or consume things of value to them.'¹¹⁵ This is not about the administrative cost imposed on the taxpayers. It is about the price changes the taxes produce and the changed economic activity, if any, the tax produces. As the Henry Tax Review says, '[t]axes change the prices that consumers or businesses face. But a price change is not the source of the efficiency cost of a tax. The efficiency cost depends on whether people change their behaviour in response to the change in price.'¹¹⁶ In summary inefficient taxes adversely affect economic activity more than efficient ones.

The more efficient taxes include the petroleum resource rent tax (with arguably no lessening of efficiency), local government rates and broad based taxes on land and consumption.¹¹⁷ That is why the Review recommended a shift from the less efficient taxes¹¹⁸ to these more efficient ones, coupled with the politically possible, namely retention of the income tax system but with flatter individual income tax rates.¹¹⁹ Further, the Review proposed a move over the short to medium term, subject to economic and fiscal circumstances, to a company tax rate of 25 percent,¹²⁰ a 40% tax discount for '... income from bank deposits, bonds, rental properties and capital gains,¹²¹ a flatter individual income tax, a uniform resource rent tax of 40%¹²² and broadening the land tax base to include all land, at progressive rates and using the revenue among

¹¹³Alan J Auerbach and James Hines Jr, 'Taxation and economic efficiency,' in A J Auerbach and M. Feldstein (eds), *Handbook of Public Economics*, (Elsevier 2002) edition 1, volume 3, chapter 21, 1347, 1347.

¹¹⁴ Ken Henry et al, above n 1 (a), 13.

¹¹⁵ Ibid 17.

¹¹⁶ Ken Henry et al, above n 1 (b), 247.

¹¹⁷ Ken Henry et al, above n 1 (a), 13.

¹¹⁸ The very inefficient ones include State and Territory taxes on payroll (because of the exemptions), insurance, and stamp duty on property conveyances. Other less inefficient ones include the income tax, especially company tax.

¹¹⁹ Ken Henry et al, above n 1(a), 29-30. The recommendation was for a \$25,000 tax free threshold and a 35% tax rate for 97% of taxpayers. The Labor government rejected it because it would have meant an increase in tax paid by workers earning between \$37,000 and \$94000.

¹²⁰ Ibid 40. It is currently 30%. Part of the argument in favour of reducing the company tax rate was that such a reduction would help attract highly mobile capital to Australia. Ken Henry et al, above n 1(a), 8.

¹²¹ Ibid 33.

¹²² Ibid 47-48.

other things to cover the loss of State and Territory revenue for abolishing inefficient conveyancing stamp duties.¹²³

B Optimal Tax Theory

What underlies the Henry Tax Review is the neoliberal philosophy of efficient markets and, unacknowledged, optimal tax theory. Optimal tax theory is about differential taxation to produce so-called optimum outcomes. Those outcomes are often framed in terms of economic efficiency as the guide to appropriate social, revenue or other outcomes with a progressive chimera.¹²⁴ Because it accepts that capital accumulation is the key to best or second best societal outcomes,¹²⁵ because rates of profit globally have been falling, because class struggles in Australia have collapsed dramatically in the last 30 years, capitalist efficiency, not equity, is the focus of optimal tax theory as a way to justify the transfer of more surplus value to capital compensate for the decline in profit rates. Even if in one or two specific developed countries their profit rates were or are holding up because of a mining boom, the global ideology of low taxes on capital that has spread from the US¹²⁶ means that tax reviews, academics, think tanks, politicians and others will repeat the mantra of low taxes, especially on capital, as a way to (re)invigorate the economy.

Optimal tax theory can be framed as a question. 'What is the optimal tax ... for a government which has some social welfare function when a given revenue has to be raised without using lump sum taxes?'¹²⁷ Given that lump sum taxes are politically difficult to impose, optimal tax theory searches for second best options¹²⁸ and those include schedular tax systems, with no or low rates for capital, sheltering asset income, higher taxes on labour income, flat taxes on company income, a shift to consumption

¹²³ Ibid 49.

¹²⁴ Some leftists support Optimal Tax Theory as progressive because of its theoretical potential to address systemic disadvantage, for example women and work. This I think misses the point that in a time of falling profit rates in much of the developed world and the lack of class struggle, and the resulting neoliberalisation of tax policy arising from these two fundamental drivers, such hopes appear fundamentally misplaced.

¹²⁵ Robin Boadway, above n 12, 7.

¹²⁶ Duane Swank, above n 99, 64-65.

¹²⁷ Knud Jorgen Munk, 'Optimal taxation and Pure Profit' (1978) 80(1) *The Scandinavian Journal of Economics* 1, 1.

¹²⁸ Robin Boadway, above n 12, 7.

taxes and a flattening of progressive tax rates, most notably large reductions in the top marginal rates of high income earners.¹²⁹

Mankiw, Weinzierl and Yagan look at some major elements of optimal tax theory. According to them:

...[there are] eight general lessons suggested by optimal tax theory as it has developed in recent decades: 1) Optimal marginal tax rate schedules depend on the distribution of ability; 2) The optimal marginal tax schedule could decline at high incomes; 3) A flat tax, with a universal lump-sum transfer, could be close to optimal; 4) The optimal extent of redistribution rises with wage inequality; 5) Taxes should depend on personal characteristics as well as income; 6) Only final goods ought to be taxed, and typically they ought to be taxed uniformly; 7) Capital income ought to be un taxed, at least in expectation; and 8) In stochastic dynamic economies, optimal tax policy requires increased sophistication.¹³⁰

The search for a trade-off between the revenue needs of governments and the adverse impacts on work, investment, savings and consumption that various taxes can have¹³¹ has produced broadly similar results across the developed world over the last 50 years.¹³² They include the adoption of value added tax systems, flatter income tax rate structures, flat tax rates for capital income, sheltering of some forms of asset income from income tax, such as savings and housing, the demise of wealth and wealth transfer taxes, refundable tax credits, and states beginning to cast an eye over resource taxes, including rent taxes.¹³³

The Henry Tax Review recommended many of these optimal tax theory prescriptions or variations on them. So the Review wanted to concentrate revenue raising on 'four robust and efficient tax bases' encompassing a comprehensive personal income tax, growth oriented business income tax, a broad simple consumption tax and taxes capturing economic rents in resources and land.¹³⁴ The Henry Tax Review differentiates between

¹²⁹ Ibid 3-4.

¹³⁰ N. Gregory Mankiw, Matthew Weinzierl and Danny Yagan, above n 12, 147.

¹³¹ Ken Henry et al, above n 1 (a), 17; Michael P Keane, 'The Tax-Transfer System and Labour Supply' in *Melbourne Institute – Australia's Future Tax and Transfer Policy Conference: Proceedings of a Conference* (Commonwealth of Australia 2010) 108,108 <http://www.taxreview.treasury.gov.au/content/html/conference/downloads/AFTS_Tax_and_Transfer_Policy_Conference.pdf>.

¹³² Robin Boadway, above n 12, 3.

¹³³ Ibid 3-4.

¹³⁴ Ken Henry et al, above n 1 (a), xvii.

personal income and business income, creating tax shelters¹³⁵ and cutting rates for business income.¹³⁶ In proposing a resource rent tax at 40% the Review recognised its potential efficiency.¹³⁷ The Review also recognised the potential efficiency of the current consumption tax, the GST, but lamented its lack of a truly comprehensive base¹³⁸ – in effect an attack on its current exemptions for fresh food, health and education. It argued for replacing a number of State and Territory inefficient consumption taxes and narrow payroll taxes with ‘a low-rate broad-based cash flow tax that more effectively utilised the consumption base.’¹³⁹ In addition the Review saw a broad based and progressive land tax as presenting an opportunity to reduce or abolish stamp duty, especially on property transfers.¹⁴⁰

The Review drew an important distinction between mobile and immobile factors as objects of taxation. Immobile factors include land and resources and the review made recommendations for them to become a greater focus for efficient taxation.¹⁴¹ Further, as a capital importing nation,¹⁴² and in light of the shift of growth in and hence competition for investment from the Asia region, the Review recommended that mobile investment be taxed lightly¹⁴³ and immobile factors like fixed capital, land, resources¹⁴⁴ and (in the main workers’) consumption,¹⁴⁵ be taxed more.

The development of optimal tax theory and its attraction for academics and a growing number of politicians and policy makers since it was rebooted by Mirrlees’ groundbreaking 1971 paper¹⁴⁶ appears no accident against a backdrop of the fall in profit rates in the developed world since the late 1960 and early 1970s. Optimal tax theory directs the debate towards what are the most efficient tax systems¹⁴⁷ and suggests lower tax

¹³⁵ Ken Henry et al, above n 1 (a), 33. These include a tax rate on superannuation fund earnings of 7.5% and a broad 40 per cent discount for individuals’ income from bank deposits, bonds, rental properties, and capital gains and for certain interest expenses.

¹³⁶ Ibid xix.

¹³⁷ Ken Henry et al, above n 1(b), 221-224.

¹³⁸ Ken Henry et al, above n 1(a), 51.

¹³⁹ Ibid.

¹⁴⁰ Ibid 90.

¹⁴¹ Ibid xvii.

¹⁴² OECD, *Economic Policy Reforms 2013 Going for Growth: Going for Growth* (OECD 2013) 100.

¹⁴³ Ken Henry et al, above n 1(a), 18.

¹⁴⁴ Ibid xxi.

¹⁴⁵ Ibid 51.

¹⁴⁶ J. A. Mirrlees, ‘An Exploration in the Theory of Optimum Income Taxation’ (1971) 38 (2) *The Review of Economic Studies* 175.

¹⁴⁷ Globalisation theory suggests this will be on labour through consumption and land taxes for example. See Duane Swank and Sven Steinmo, above n 9, 642 for both an explanation and critique – up to the mid

rates on capital for a growing economy.¹⁴⁸ If my argument that tax is a deduction from surplus value is correct, and against the background of a tendency of profit rates to fall, then optimal tax theory reflects and reinforces the search for more efficient taxes and taking less from surplus value, leaving more for the non-state hostile brothers to receive and fight over. It is about picking tax winners such as mobile capital. The actual incidence of tax¹⁴⁹ in real life at the point of production, exchange and consumption will then depend on the class struggle or lack of it. The low level of strike days lost indicates that capital is winning the tax battle.

Many optimal tax theoreticians intellectually if not in practice see the non-taxation of capital income as optimal.¹⁵⁰ Some also argue for a zero marginal tax rate at the top personal income tax rate scale because otherwise high achievers might be tempted to become low achievers.¹⁵¹ They note too that tax policy has moved partly in the directions optimal tax theory has suggested.¹⁵² Thus the Henry Tax Review hints strongly about broadening the consumption tax base and recommends a greater use of taxing fixed assets like land and resources, as well as flatter income tax rates and a less progressive income tax system. This is the Henry Tax Review drawing on optimal tax theory in the realm of the possible; it is pragmatic optimal tax theory in practice.

Nothing in this broad overview of the Henry Tax Review suggests it is outside the general vision and direction of optimal tax theory. The neoliberalism of the market and 'efficiency' dominate its thinking, vision, directions and recommendations. It is aimed at reducing the tax take on surplus value going to the State and redirecting it to capital. The Henry Tax Review has an optimal tax theory neoliberal vision - an efficient economy

90s - of this approach. The Henry Tax Review made the point that while revenue from personal income tax as a percentage of GDP 'has fallen over the past two decades,' in order to keep social spending at reasonable levels in light of various challenges including an aging population, and to avoid increasing debt or cuts to government services, 'action will be needed to increase the amount of revenue raised from this or other tax bases.' Ken Henry et al, above n 1 (b), 3.

¹⁴⁸ N. Gregory Mankiw, Matthew Weinzierl and Danny Yagan above n 12, 147. A long term reduction in company tax has in fact been occurring in many countries. Analysis by the Henry Tax Review shows that both headline and effective company income tax rates have fallen globally and in Australia over the past 3 decades. See Ken Henry et al, above n 1(b), 160-163.

¹⁴⁹ This includes not just where the tax actually falls, but also the impact on jobs, living standards, prices, profits, wages and the like.

¹⁵⁰ Anthony Atkinson and Joseph E. Stiglitz 'The Design of Tax Structure: Direct Versus Indirect Taxation' (1976) 6(1-2) *Journal of Public Economics* 55-75.

¹⁵¹ N. Gregory Mankiw, Matthew Charles Weinzierl and Danny Ferris Yagan, above n 12, 147-148; Robin Boadway, above n 12, 3.

¹⁵² N. Gregory Mankiw, Matthew Charles Weinzierl and Danny Ferris Yagan, above n 12, 147.

'creating' profit and jobs or in its terms 'strong and sustainable economic growth'¹⁵³ assisted by an efficient tax system or systems that impose few impediments on capital accumulation. The Review emphasises that growth is more important than redistribution. This is the idea that equity is dependent on the process of capital accumulation. Thus the Review counsels that '[w]e need policies that not only redistribute income but also promote the growth of incomes at all levels.'¹⁵⁴ The Review is then effectively silent on real redistribution.¹⁵⁵

The failure of the working class to fight industrially has resulted in a shift of the tax battle field, the tax war, in favour of capital. As Neil Brooks points out, even if the Review had a fundamental focus on progressivity, rather than mere verbiage, the real point is developing a tax system which is redistributive, which taxes the 'undeserving' (i.e. all) rich as he calls them¹⁵⁶ in ways which really do make Australian society more equal.¹⁵⁷ It should also, in Brooks' view, put wealth transfer taxes firmly on the table.¹⁵⁸ The underlying systemic drivers of the need for tax reform - demographic changes, demands for adequate social spending on health, education and the like, globalisation, the inefficient mix of current taxes, the need to attract foreign investment, the changing nature of Australia's role in the global economy, the rise of Asia and climate change¹⁵⁹- remain. Irrespective of short term political considerations and timidity the vision and direction the Henry Tax Review has identified for tax in Australia remains relevant to all the members of the band of hostile brothers today and into the future. The Review has planted further seeds for a thoroughly neoliberal tax future. Those seeds will sprout and blossom unless there is an upsurge in class struggle to put a progressive tax system on the political and economic agenda.

V CONCLUSION

Declining profit rates across the globe and the collapse of class struggle in Australia have seen tax policy neoliberalise and move towards optimal tax theory outcomes. The Henry

¹⁵³ Ken Henry et al, above n 1 (a), xvi.

¹⁵⁴ Ibid.

¹⁵⁵ It does have a brief chapter on and discussion of a wealth transfer tax but makes no recommendations. Ken Henry et al, above n 1(b), 137-146.

¹⁵⁶ Neil Brooks, above n 86, 206.

¹⁵⁷ Ibid 216- 219.

¹⁵⁸ Ibid 223-228.

¹⁵⁹ Henry et al, above n 1 (a), 3.

Tax Review recommendations as a consequence are about increasing the amount of surplus value going to the other members of the band of hostile brothers at the expense of the state. They lay the groundwork for a further turn to neoliberal tax policy unless class struggle breaks out to put equity and equality in wages, and by extension in tax, on the table.

SOCIAL ENTERPRISE: SOME TAX POLICY CONSIDERATIONS

JONATHAN BARRETT AND JOHN VEAL *

ABSTRACT

Bright lines do not demarcate altruistic and entrepreneurial domains: many charities engage in trade and many companies perform some public benefit functions. The emergence of social enterprises, which employ features of business and charitable practices, has highlighted the desirability of revisiting simple policy and legal distinctions drawn between altruistic and for-profit firms. Since charitable firms are commonly thought to enjoy advantages over for-profit firms competing in the same market, and have come under increased scrutiny from revenue authorities, the social enterprise phenomenon makes the reformulation of tax policy a pressing concern. Using New Zealand as a jurisdictional focus, but drawing on overseas research and experience, this article discusses how tax policy might be reformulated in the face of the social enterprise phenomenon.

* Jonathan Barrett is an Associate Professor, who teaches business law at the Open Polytechnic School of Business.

John Veal is a Principal Lecturer in Taxation in the Open Polytechnic School of Business.

I INTRODUCTION

New Zealand charities and related tax law is fundamentally derived from the Preamble to the *Charitable Uses Act 1601*¹ and its subsequent restatement in *Commissioner of Income Tax v Pemsel*.² Consequently a charity must, in short, have a charitable purpose (relieving poverty, advancing education, advancing religion or otherwise benefiting the community) and have a public benefit.³ Charities may engage in trade, provided such a business is 'not carried on for the private pecuniary profit of any individual'.⁴ Broadly, charities are exempt from income tax.⁵

* Jonathan Barrett is an Associate Professor, who teaches business law at the Open Polytechnic School of Business. His doctoral research related to taxation and human rights. John Veal is a Principal Lecturer in Taxation in the Open Polytechnic School of Business. John is a co-author of *Staples Tax Guide*, an annual guide to New Zealand taxation.

¹ 43 Eliz I c 4, also known as the *Statute of Charitable Uses* or the *Statute of Elizabeth*. For a reproduction of the Preamble, see *The Statute of Charitable Uses and the English Origins of American Philanthropy* Harvard Kennedy School <<http://www.hks.harvard.edu/fs/phall/01.%20Charitable%20uses.pdf>>; for a discussion of the role of the Preamble in the development of charities law, see Fiona Martin, 'The History of the Taxation of Charities: How the Common Law Development of a Legal Definition of 'Charity' Has Affected the Taxation of Charities' in John Tiley (ed), *Studies in the History of Tax Law 4* (Hart Publishing, 2010) 297, 297-325.

² *Commissioner of Income Tax v Pemsel* [1891] AC 531 established that other charitable purposes could be accommodated if consistent with the Preamble's 'spirit and intendment'.

³ See LexisNexis, *Laws of New Zealand* (at 31 January 2013) Charities, '(2) Charitable Purpose' [12].

⁴ *Charities Act 2005 (NZ)* s 13(1)(b). The Charities Board and the chief executive of the Department of Internal Affairs, which replaced the Charities Commission with effect from 1 July 2012, are responsible for oversight of New Zealand charities.

⁵ Charities registered in terms of the *Charities Act* do not pay income tax on their business income to the extent that such income is applied for charitable purposes within New Zealand: see *Income Tax Act 2007 (NZ)* s CW 42.

Bright lines do not demarcate charitable and business operational domains. In New Zealand, for example, Sanitarium,⁶ the non-spiritual arm of the Seventh Day Adventist church, directly competes with multinational corporations, such as Kellogg's,⁷ and domestic firms, notably Hubbards,⁸ in the same breakfast cereals market.⁹ As a registered charity, Sanitarium is exempt from income tax; its competitors are not and yet also engage, to a degree, in activities that benefit the public through corporate social responsibility (CSR)¹⁰ and sustainable development programmes.¹¹ The principal

⁶ The Sanitarium brand is used in New Zealand by the New Zealand Health Association Ltd which is owned by The New Zealand Conference Association, itself part of the Seventh Day Adventist Church in New Zealand 1 group; all these organisations are registered charities. For convenience sake, in this article, we refer to Sanitarium as if it were a trading company.

⁷ Kellogg (New Zealand) Ltd is a wholly owned subsidiary of Kellogg (Aust.) Pty. Ltd and part of the United States-listed Kellogg's Company.

⁸ Hubbard Foods Ltd – trade mark 'Hubbards' – is a non-listed company based in Auckland which employs roughly 130 staff: see Jodyanne Kirkwood and Brendan Gray, 'From Entrepreneur to Mayor: Assessing the Impact of the Founder's Changing Reputation on Hubbard Foods Ltd' (2009) 17(2) *Australasian Marketing Journal* 115, 115-124.

⁹ The comparison between Sanitarium and Kellogg's is particularly apposite since both companies were founded by the Kellogg brothers. See Christopher Adams, 'Lifting the Lid on Sanitarium', *The New Zealand Herald* (online), 30 June 2012 <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10816412>. For a less reliable, but more entertaining, account, see T C Boyle, *The Road to Wellville* (Viking, 1993).

¹⁰ Kellogg's bases its CSR programme on 'the four pillars' of 'Marketplace, Workplace, Environment and Community': see Kellogg's Company, *Corporate Responsibility Strategy* (2012) <<http://www.kelloggcorporateresponsibility.com/overview/corporate-responsibility-strategy>>.

¹¹ Hubbards pioneered triple bottom line reporting in New Zealand: see Hubbard Foods Ltd, *Hubbards Triple Bottom Line Report April 2000-March 2001* <<http://www.hubbards.co.nz/userDocuments/TBL01.pdf>>. (Triple bottom line is 'an accounting framework that incorporates three dimensions of performance: social, environmental and financial': see Timothy F Slaper and Tanya J Hall, 'The Triple Bottom Line: What

grounds for preferential tax treatment of charities are:¹² their playing the role of a quasi-government agency;¹³ their advocating for the disempowered;¹⁴ the problems associated with assessing their taxable income;¹⁵ compensating them for their inability to raise capital;¹⁶ rewarding their responsiveness and effectiveness;¹⁷ and their role in correcting market failure.¹⁸ It is a moot point whether a charitable company, such as Sanitarium,

Is It and How Does It Work?' (2011, Spring) *Indiana Business Review* 4, 4.) Hubbard's also engages in sustainable business practices: see Sustainable Business Council, *Sustainable Development Reporting Case Study: Hubbard Foods* <http://www.sbc.org.nz/_data/assets/pdf_file/0003/55587/Hubbards-SDR-Case-Study.pdf>.

¹² See Gino Dal Pont, *Charity Law in Australia and New Zealand* (Oxford University Press, 2000) 448 on the persuasiveness of these arguments when considered together.

¹³ See John Simon, Harvey Dale and Lisa Chisholm, 'The Federal Tax Treatment of Charitable Organizations' in Walter W Powell and Richard Steinberg (eds), *The Nonprofit Sector: A Research Handbook* (2nd ed, Yale University Press, 2006) 267, 274-275. There is no evidence that Sanitarium acts as a proxy for government.

¹⁴ See Kerry O'Halloran, *Charity Law and Social Inclusion: An International Study* (Routledge, 2007) 35. Sanitarium does not play a noticeable advocacy role in New Zealand, other than for its own interests.

¹⁵ See Boris I Bittker and George K Rahdert, 'The Exemption of Non-Profit Organizations from Federal Income Tax' (1976) 85 *Yale Law Journal* 299, 305. As a registered company, Sanitarium is subject to normal financial reporting obligations under the *Financial Reporting Act 1993* (NZ) and presumably complies with New Zealand generally accepted accounting practice.

¹⁶ See Henry Hansmann, 'The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation' (1981) 91 *Yale Law Journal* 54, 72. Like Hubbards, Sanitarium may not be able to offer shares to the public but, unlike Hubbards or Kellogg's, can draw on congregation donations and tithes.

¹⁷ See Policy Advice Division, *Tax Incentives for Giving to Charities and Other Non-Profit Organisations: A Government Discussion Document* (Inland Revenue Department, 2006) 3.

¹⁸ See John D Colombo, 'The Role of Access in Charitable Tax Exemption' (2004) 82(2) *Washington University Law Review* 343, 345. The provision of healthy breakfast food appears to have been the motive for both

meets all, or indeed, any of these criteria but the law does not engage with that question: the simple but critical consideration that fundamentally distinguishes a charity from any other firm is whether the firm is constitutionally prohibited from distributing its surpluses to individuals.¹⁹

In contrast with what might be characterised as a long-term shift towards trade on the part of traditional charities,²⁰ more recently, social enterprises have emerged that seek to achieve public benefits through corporate structures and entrepreneurial behaviours.²¹ Overseas legislatures have recognised the increasing hybridisation of altruism and enterprise to establish vehicles that 'blur the line between non-profits and for-profits by allowing for some profit, although directed at a charitable or altruistic purpose'.²²

The pivotal public/individual benefit distinction drawn by the law to distinguish charitable from for-profit firms fails to reflect the practice of convergence of altruism and entrepreneurship.²³ Different treatment of firms, which appear to be similarly situated, may be considered inequitable and, furthermore, may cause the potential efficiency advantages of entrepreneurial delivery of public benefits to be lost. Despite hard and fast legal and tax categorisation, in practice, a continuum runs from pure charity to Friedmanite, shareholder value-maximising firm.²⁴ Points between these poles

the Kellogg brothers. Once Kellogg's established itself as a purveyor of similar foods to Sanitarium, it is arguable that no market failure existed to be corrected.

¹⁹ See Anup Malani and Eric A Posner, "The Case for For-Profit Charities" (2007) 93 *Virginia Law Review* 2017, 2020; see also *Charities Act* s 13(1)(b).

²⁰ 'Of the total income for non-profit institutions, 61 percent came from the sale of goods and services': see Statistics New Zealand, *Non-profit Institutions Satellite Account: 2004* (2007) <<http://www.stats.govt.nz>>.

²¹ See, generally, Nic Frances, *The End of Charity: Time for Social Enterprise* (Allen & Unwin, 2008).

²² *Not-for-Profit Project, Taxing Not-For-Profits: A Literature Review* (Melbourne Law School, 2011) 37.

²³ As Malani and Posner, above n 19, 2020 observe, under the traditional 'all or nothing' approach, any distribution of surplus to stakeholders negates all charitable tax concessions.

²⁴ See Milton Friedman, "The Social Responsibility of Business is to Increase its Profits", *The New York Times Magazine* (New York), 13 September 1970, 32, 32-33.

include: charities that engage in ancillary trade;²⁵ charities that employ corporate disciplines;²⁶ charities that are businesses;²⁷ hybrids that have surplus distribution caps and specific community interests;²⁸ and for-profit firms that have some social or environmental goals.²⁹ Since charitable firms are commonly thought to enjoy significant advantages over for-profit firms,³⁰ notwithstanding plausible arguments to the contrary,³¹ the different manifestations of the social enterprise phenomenon make the

²⁵ See, for example, the Salvation Army's 'Family Stores'.

²⁶ Skylight, for example, which is registered as The Children's Grief Centre Charitable Trust CC27206, describes itself as operating 'as a social enterprise, balancing our social mission with the need to generate income to ensure we contribute to our own sustainability': see Skylight, *Skylight's Beginnings* <<http://www.skylight.org.nz/About+Skylight%27s+Beginnings>>. We are grateful to Nazir Awan for discussing his research into Skylight's ethos and practices with us.

²⁷ Mark von Dadelszen, *Law of Societies in New Zealand: Unincorporated, Incorporated and Charitable* (Butterworths, 2000) [13.2.7] n 79 cites examples of a drapery, furnishing and warehouse business; a construction business; and an automobile and engineering parts business.

²⁸ Hybrid social enterprise companies are sketched at III B below.

²⁹ See, nn 10 and 11 above, on CSR and sustainable business practices.

³⁰ See, for example, *Taxation in New Zealand: Report of the Taxation Review Committee* (Government Printer, 1967) 308-313; Policy Advice Division, *Tax and Charities: A General Discussion Document on Taxation Issues relating to Charities and Non-Profit Bodies* (Inland Revenue Department, 2001) 43.

³¹ See Henry Hansmann, 'The Effect of Tax Exemption and Other Factors on the Market Share of Nonprofit versus For-Profit Firms' (1987) 60 *National Tax Journal* 71, 71-82; Eleanor Brown and Al Slivinski, 'Nonprofit Organizations and the Market' in Walter W Powell and Richard Steinberg (eds), *The Nonprofit Sector: A Research Handbook* (2nd ed, Yale University Press, 2006) 140, 154; Colombo, above n 18, 345.

formulation of tax policy for the third sector more problematic and worthy of revisiting.³²

Using New Zealand as a jurisdictional focus but drawing on overseas research, in this article we discuss tax policy regarding traditional charitable firms in the light of emerging social enterprises. In particular, we consider the radical proposition that tax policy in relation to public benefit might be informed by institutional function rather than institutional status, which is derived from constitutional structure. First, we discuss specific issues that arise from New Zealand's current tax treatment of charitable trade. Second, to demonstrate the convergence of altruism and enterprise, we sketch the phenomenon of social enterprise and the different forms of hybrid corporate structures that are permitted overseas for jointly pursuing profit and public benefit. Third, we discuss the potential for neutral tax treatment of entities that pursue socially beneficial goals, and draw conclusions.

II SPECIFIC ISSUES

In this part of the article, we identify specific issues that arise from New Zealand's current treatment of charitable trade: these issues relate to the scope of public benefit and the position of charitable companies.

A The Scope of Public Benefit

A full discussion of public benefit lies beyond the scope of this article but certain issues raised by two recently decided High Court cases are particularly pertinent and

³² The first sector is government, the second sector business and third sector public benefit, non-profit organisation: see Commission on Private Philanthropy and Public Needs (CPPPN) *Giving in America, Toward a Stronger Voluntary Sector: Report of the Commission on Private Philanthropy and Public Needs* (CPPPN, Washington (DC), 1975) 1, 11. In this article, we do not follow Thomas Kelley's proposal that emerging forms of social enterprise should be identified as the 'fourth sector': see Thomas Kelley, 'Law and Choice of Entity on the Social Enterprise Frontier' (3 April 2009) Social Sciences Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1372313>.

illustrative:³³ first, financial activities may enjoy charitable status provided the participants believe these activities advance their particular religious beliefs, and, second, certain activities which, in a lay view, appear to be eminently for public benefit, may be excluded because of the *Pemsel* test. In short, the decisions demonstrate that the concept of public benefit is overly inclusive in certain regards and, conversely, unduly exclusive in other regards.

1 Inclusion

*Liberty Trust v Charities Commission*³⁴ concerned the charitable status of the Liberty Trust, a mortgage lending scheme principally funded by donations, which makes interest-free loans to donors and others. The trust argued that the lending scheme advances religion by teaching, through action, financial principles derived from the Bible. The Charities Commission decided that, although the scheme might be conducive to religion, it does not advance religion and its main purpose is to provide private benefits to members.³⁵ However, ordering reinstatement to the Charities Register, the High Court held that the purpose of the trust was to advance religion, which purpose it pursued by teaching biblical financial principles as understood by the trustees and participants. Because the trust's founding purpose was the advancement of religion, its public benefit could be rebuttably presumed. Justice Mallon observed:³⁶

³³ For a discussion of public benefit, see Debra Morris, 'Public Benefit: the Long and Winding Road to Reforming the Public Benefit Test for Charity: A Worthwhile Trip or 'Is Your Journey Really Necessary'?' in Myles McGregor-Lowndes and Kerry O'Halloran (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar Publishing, 2010) 103, 103-127.

³⁴ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68.

³⁵ See *Charities Act* ss 5(1) and 13(1).

³⁶ *Liberty Trust* [2011] 3 NZLR 68, [125]. Mallon J also observed that anyone could join the scheme and the money donated was 'recycled' for the benefit of others.

As a trust which has as its purpose the advancement of religion, the starting assumption is that it has a public benefit ... It is not for the Court to impose its own views as to the religious beliefs that are advanced through the scheme.

From this decision, it may be concluded that: first, the advancement of a religious doctrine, however eccentric it might appear to the general public,³⁷ is presumptively for the public benefit and therefore worthy of legal and tax privileges; and, second, ostensible openness equates to 'public' even though it may be inferred that the participants, in practice, would be a select group of co-religionists.

2 Exclusion

In contrast with the church considered in *Liberty Trust*, an organisation which has a seemingly obvious public benefit but whose activities do not exclusively meet the *Pemsel* test are denied tax free status. Thus in *Canterbury Development Corporation v Charities Commission*,³⁸ despite having been treated as a charity by the Inland Revenue Department for more than 20 years, the Canterbury Development Corporation, whose principal aim is to 'drive economic growth for the benefit of the community',³⁹ was denied registration as a charity, and thereby lost its tax privileges.

Susan Barker expresses the view that many are likely to hold when she argues that the Canterbury Development Corporation 'is precisely the type of entity the government

³⁷ The religious freedom guarantee affirmed by the *New Zealand Bill of Rights Act 1990* (NZ) s 13 is, of course, designed to protect unorthodox beliefs.

³⁸ *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707.

³⁹ Canterbury Development Corporation, *About CDC* <<http://www.cdc.org.nz/about-cdc/>>.

would wish to support, particularly in the current economic times'.⁴⁰ Michael Gousmett concurs and argues more broadly:⁴¹

the problem for the charity sector lies in the failure of the courts to look beyond charity law to other disciplines for inspiration, concerning the contribution entities such as [Canterbury Development Corporation] make to the economy, society, and commerce, in New Zealand ... Yet the courts insist on testing concepts that were not known in the 17th century against legislation that was relevant to those times, but not to the 21st century. It is time to move forward in our thinking about the relationship between charity and economic development.

These decisions indicate why the *Pemsel* test is an anachronism: on the one hand, it may be considered discriminatory in a greatly secular New Zealand,⁴² and, other the hand, it may be ineffective in capturing real public benefit in the contemporary socio-economic context.

⁴⁰ Susan Barker, 'Canterbury Development Case' [2010] *New Zealand Law Journal* 248, 256. The decision was made before the disastrous Canterbury earthquakes, but, in terms of the law, those events should have had made no difference to the court's decision, notwithstanding the corporation's enhanced public role in the earthquakes' aftermath.

⁴¹ Michael Gousmett, 'Charity and Economic Development' [2011] *New Zealand Law Journal* 63, 63.

⁴² Only 15 per cent of New Zealanders attend Christian churches every week: see Stephen Opie, *Bible Engagement in New Zealand: Survey of Attitudes and Behaviour* (2008) 11 <<http://biblesociety.org.nz/mediafiles/bible-society-research-2008.pdf>>.

With regard to unfair discrimination, the State accords ethical atheist belief a lesser value than religious belief because advancement of religion is presumed to be of public benefit: see Kerry O'Halloran, *Charity Law & Social Policy: National and International Perspectives on the Functions of the Law* (Springer, 2008) 299. Compare with the equality principle enshrined in *New Zealand Bill of Rights Act* s 19(1) and *Human Rights Act 1993* (NZ) s 21. The crime of blasphemous libel (*Crimes Act 1961* (NZ) s 123(1)), which applies only to offence against Christian sensibilities, may also be noted: see LexisNexis, *Laws of New Zealand* (at 31 January 2013) Criminal Law, '(20) Offences against the Person' [217].

B Charitable Companies

In the previous section, we highlighted anomalies arising from the inclusive/exclusive conception of public benefit. The cases discussed in this section demonstrate that, even when firms manifest a similar public benefit, the constitutional structure of the firm further determines charitable status. The decisions also indicate policy disinterest in the way charitable firms raise funds to finance their public benefits.

1 Controller Benefits

In *Commissioner of Inland Revenue v Dick*,⁴³ a trust set up to hold gaming licences and operate gaming machines, and later to invest in commercial property, was held by the High Court to be a charitable trust. However, the Court further held that the trust's business income was not exempt from income tax because the trustees were able to influence the receipt of benefits from the trust's business income: Justice Salmon critically observed, '[t]he legislation is directed at the ability to influence benefits rather than the actual payment of them'.⁴⁴ In short, the law is not concerned with whether the activity which funds a charity is, in itself, socially beneficial; rather concern lies with the constitutional structure of the 'feeder' entity.⁴⁵

2 Retention of Surplus

In *Calder Construction Co Ltd v Commissioner of Inland Revenue*,⁴⁶ a company's memorandum of association empowered the directors to set aside out of the profits such reserves as they deemed necessary for the needs and development of the company's

⁴³ *Commissioner of Inland Revenue v Dick* [2003] 1 NZLR 741.

⁴⁴ *Ibid* [82].

⁴⁵ The best known example of an income feeder company is C F Mueller Company, then the United States' largest manufacturer of macaroni, which was bought by alumni of the New York University Law School to fund their alma mater: see Michael A Knoll, 'The UBIT: Leveling an Uneven Playing Field or Tilting a Level One' (2007) 76(2) *Fordham Law Review* 857, 862.

⁴⁶ *Calder Construction Co Ltd v Commissioner of Inland Revenue* [1963] NZLR 921.

operations. The company was found to be entitled to the income tax exemption because the resulting assets ultimately had to be applied for charitable purposes; it was irrelevant that profits were retained in the company. The *Calder Construction* decision may be contrasted with *MK Hunt Foundation Ltd v Commissioner of Inland Revenue*,⁴⁷ a conveyance duty case. Here the court found that MK Hunt Foundation was neither a charitable trust, nor had it acquired the land in question to hold it on a charitable trust; the transfer of the land was therefore dutiable. In *Calder Construction*, Justice Wilson distinguished his decision from *MK Hunt Foundation* on the grounds that, despite similarities in their construction, the memoranda of association of the two companies were not identical.⁴⁸ Justice Hardie Boys found that MK Hunt Foundation's memorandum merely indicated the destination for profits; it did not establish a charitable trust.

These and the other reported cases on charitable trade were decided before the reform of company law in 1993.⁴⁹ A company now has 'capacity to carry on or undertake any business or activity',⁵⁰ unless restricted by its constitution. Previously, the critical consideration was, as Mark von Dadelszen observes, that, provided 'the income and capital of the entity itself [were] destined for charitable purposes it [could] trade if empowered to do so by its constitution'.⁵¹ Today, from an income tax perspective, the

⁴⁷ *MK Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405.

⁴⁸ *Calder Construction* [1963] NZLR 921, 924. A more plausible distinction perhaps lies with the particular legislative provisions: the stamp duty law exempted from conveyance duty, a 'conveyance of property to be held on a charitable trust in New Zealand' (*Stamp Duties Act 1954* (NZ) s 69(f)), whereas the income tax statute exempted income 'derived directly or indirectly from any business carried on by or on behalf of or for the benefit of any society or institution established exclusively for such purposes and not carried on for the private pecuniary profit of any individual' (*Income Tax Act 1954* (NZ) s 86(1)(o)).

⁴⁹ See also *Commissioner of Inland Revenue v Carey's (Petone and Miramar) Ltd* [1963] NZLR 450; *Commissioner of Inland Revenue v NTN Bearing-Saeco (NZ) Ltd* (1986) 8 NZTC 5,039.

⁵⁰ *Companies Act 1993* (NZ) s 16.

⁵¹ Von Dadelszen, above n 27, [13.2.7].

critical consideration is that the company's constitution restricts 'distributions of income to charitable purposes'.⁵²

New Zealand's current position on charitable enterprise is in line with the High Court of Australia's majority decision in *Word Investments*,⁵³ which 'unequivocally confirms that there is no strict dichotomy between a charitable purpose and the carrying out of 'commercial' activities; or potentially, between a charitable purpose and other activities that indirectly aid that charitable purpose'.⁵⁴ This fudging of purposes means, for example, that certain wealthy *iwi* (tribes), whose extensive business interests are housed in charitable structures, may appear to pay no tax on their business profits.⁵⁵

III SOCIAL ENTERPRISE

In the preceding part, we identified the specific issues of disputable public benefit and the constitutions of feeder businesses. In this part we consider a more recent issue – the emergence of social enterprise – and the ways in which this development problematises simple legal distinctions drawn between charity and business.

A What Is Social Enterprise?

In recent decades, almost all industrialised countries have experienced a phenomenal growth in 'socio-economic initiatives that belong neither to the traditional private for-

⁵² Ibid. See also *Companies Act* s 16(2) on the permissibility of such a constitutional restriction.

⁵³ *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* [2008] HCA 55.

⁵⁴ Ian Murray, 'Charity Means Business – *Commissioner of Taxation v Word Investments Ltd*' (2009) 31 *Sydney Law Review* 309, 328.

Income Tax Act s CX 25(1) distinguishes between charitable and business operations with regards to fringe benefits tax but this is a minor provision that does not change basic principles.

⁵⁵ See Daniel Adams, 'Super-Rich Tribes Pay No Tax', *The Waikato Times* (Hamilton), 11 June 2011, 3 on central North Island *iwi*; on Ngai Tahu charitable companies operating in the South Island, see Michael Gousmett, *Tax-Payer Subsidised Charities and Their Business Activities – Time for Change* New Zealand Centre for Political Research (2013) <<http://www.nzcpr.com/guest331.htm>>.

profit sector nor to the public sector'.⁵⁶ This broad concept of social enterprise is notoriously difficult to categorically define,⁵⁷ particularly given the many variations in form and goals of the different entities operating in the field,⁵⁸ and the diverse contexts in which the term is used across jurisdictions.⁵⁹ The Department of Internal Affairs identifies three characteristics of a social enterprise in New Zealand: public benefit purpose, proportionately substantial income from trade and constitutional restriction on profit distribution.⁶⁰ The last criterion is not in line with international definitions, which typically disregard 'ownership or legal structure'.⁶¹ For current purposes, then, it may be noted that: first, social enterprise is not synonymous with a particular institutional form – traditional charities, whose constitutions prohibit any surplus distribution to individuals, firms that constitutionally permit some distribution of surplus and fully for-profit firms may each claim to be social enterprises; second, social

⁵⁶ Jacques Defourny, 'Introduction: From Third Sector to Social Enterprise' in Carlo Borzaga and Jacques Defourny (eds), *The Emergence of Social Enterprise* (Routledge, 2001) 1, 1.

⁵⁷ On the numerous definitions in play, see François Brouard and Sophie Larivet, 'Essay of Clarification and Definitions of the Related Concepts of Social Enterprise, Social Entrepreneur and Social Enterprise' in Alain Fayolle and Harry Matlay (eds), *Handbook of Research on Social Entrepreneurship* (Edward Elgar Publishing, 2011) 29, 33-39.

⁵⁸ For graphics illustrating different conceptions of social enterprise, see Matthew F Doeringer, 'Fostering Social Enterprise: A Historical and International Analysis' (2010) 20 *Duke Journal of Comparative and International Law* 291, 325-329

⁵⁹ See Rory Ridley-Duff and Mike Bull, *Understanding Social Enterprise: Theory and Practice* (Sage, 2011) 12.

⁶⁰ See Department of Internal Affairs, *Mapping Social Enterprises in New Zealand: Results of a 2012 Survey* (2013) 21
<[http://www.dia.govt.nz/Pubforms.nsf/URL/SocialEnterpriseSurvey.pdf/\\$file/SocialEnterpriseSurvey.pdf](http://www.dia.govt.nz/Pubforms.nsf/URL/SocialEnterpriseSurvey.pdf/$file/SocialEnterpriseSurvey.pdf)>.

⁶¹ See François Brouard and Sophie Larivet, 'Essay of Clarifications and Definitions of the Related Concepts of Social Enterprise, Social Entrepreneur and Social Entrepreneurship' in Alain Fayolle and Harry Matlay (eds), *Handbook of Research on Social Entrepreneurship* (Edward Elgar Publishing, 2011) 29, 39. Brouard and Larivet considered some 30 definitions of social enterprise.

enterprises have public benefit goals which may or may not fall within the spirit and intendment of the Preamble.

B Hybrid Entities

In response to the emergence of the social enterprise phenomenon, among other jurisdictions, the United Kingdom has introduced a community interest company (CIC) regime.⁶² Likewise, many of the United States⁶³ have legislated for low-profit limited liability companies (L3Cs) or benefit corporations.⁶⁴ The common feature of these hybrid bodies corporate is that they have an explicit purpose of public benefit, and distribution of surpluses to investors is limited. Charities seeking ways to reduce their reliance on donations and philanthropic grants are increasingly developing programmes that resemble businesses; the hybrid structure allows them to stress their social mission, continue to attract philanthropic grants but also to access capital markets.⁶⁵

⁶² See *Companies (Audit, Investigations and Community Enterprise) Act 2004* (UK) and Community Interest Company Regulations, 2005, SI 2005/1788.

⁶³ For an analysis of state-level enactments, see Carter G Bishop, 'Fifty State Series: L3C & B Corporation Legislation Table' (Legal Studies Research Paper Series Research Paper 10-11, 2012, Suffolk University Law School) <<http://ssrn.com/abstract=1561783>>.

⁶⁴ On the distinctions between L3Cs and benefit corporations, see Dana Brakman Reiser, 'Benefit Corporations – A Sustainable Form of Organization' (2011) 46 *Wake Forest Law Review* 591, 606. Distinct from benefit corporations, 'B Corps' are, according to their promoter, 'certified by the non-profit B Lab to meet rigorous standards of social and environmental performance, accountability and transparency': see B Lab, *What Are B Corps?* (2012) <<http://www.bcorporation.net/what-are-b-corps>>.

⁶⁵ Stephanie Strom, 'A Quest for Hybrid Companies That Profit, but Can Tap Charity' *The New York Times* (online), 13 October 2011 <<http://www.nytimes.com/2011/10/13/business/a-quest-for-hybrid-companies-part-money-maker-part-nonprofit.html?pagewanted=all>>.

1 *Taxation of CICs*

Unlike charities,⁶⁶ CICs do not attract special tax benefits and are taxed in the same way as ordinary limited liability companies.⁶⁷ However, CICs may be used to harness specific tax concessions. Thus Community Investment Tax Relief (CITR) extends tax benefits to investors who back businesses in less advantaged areas through Community Development Finance Institutions (CDFIs); accredited CDFIs may invest in qualifying CICs.⁶⁸

2 *Taxation of L3Cs*

Although L3Cs themselves are taxed in the same way as for-profit firms,⁶⁹ L3Cs may enable private foundations to meet their program-related investment (PRI) distribution requirements.⁷⁰ They do therefore have an ostensible tax planning element but ordinary

⁶⁶ In the United Kingdom, a charity is exempt from income tax to the extent that its trading activities are part of its main charitable objective: see *Corporation Tax Act 2010* (UK) s 478 in relation to charitable companies and *Income Tax Act* (UK) 2007 s 524 in relation to charitable trusts.

⁶⁷ See HM Customs & Revenue, *CTM40145 – Particular Bodies: Clubs: Community Interest Companies* <<http://www.hmrc.gov.uk/manuals/ctmanual/ctm40145.htm>>.

⁶⁸ See Regulator of Community Interest Companies, *Frequently Asked Questions – Community Interest Companies* (2008) 9 <<http://webarchive.nationalarchives.gov.uk/+http://www.cicregulator.gov.uk/CICleaflets/FAQ%20-%20October%202009%20V7.00%20Final.pdf>>.

⁶⁹ An L3C does not qualify for tax-exempt entity status under IRC § 501(c)(iii).

⁷⁰ Broadly, private foundations must distribute five per cent of their capital annually to maintain charitable status: see 26 USC § 4942. Investment in an L3C will normally meet that requirement: see Thomas H Moody, 'The Promise of the L3C' (2008, September) *Trusts & Estates* 16, 18. See also Steve Davis and Sue Woodrow, 'The L³C [sic]: A New Business Model for Socially Responsible Investing' *Community Dividend* (2009, November) <http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=4305>.

limited liability companies (LLCs) may equally perform that PRI function.⁷¹ Nevertheless, Stephanie Strom reports on 'a quiet push to get preferential tax treatment for' hybrids.⁷² The most likely concession would be for automatic PRI approval for registered L3Cs or benefit corporations, since decisions are currently made on a case by case basis.⁷³

An assessment of hybrids lies beyond the scope of this article.⁷⁴ The pertinent point is to recognise the convergence both in institutional forms and organisational functions and goals. We submit that this sectoral crossover indicates the need for a reassessment of charities' tax privileges even in New Zealand where new forms of hybrid bodies corporate have not been legislated.

IV POLICY OPTIONS

The discussion so far leads us to conclude that, on the one hand, tax treatment of charitable companies, including income feeder entities, is not optimal, and, on the other hand, the practical convergence of altruism and enterprise manifest in social enterprises

⁷¹ See Daniel S Kleinberger, 'A Myth Deconstructed: The "Emperor's New Clothes" on the Low Profit Limited Liability Company' (William Mitchell College of Law Legal Studies Research Paper Working Paper No. 2010-03, 2010) <<http://ssrn.com/abstract=1554045>>.

⁷² Strom, above n 65.

⁷³ See William Callison, 'L3Cs: Useless Gadgets?' (2009) 19(2) *Business Law Today* <<http://apps.americanbar.org/buslaw/blt/2009-11-12/nonbindingopinions.shtml>>.

Daniel Kleinberger and William Callison note the failure of L3C lobbyists to convince the federal government to view L3C investments as automatically qualifying as PRIs and conclude that L3Cs are no better placed to receive PRI treatment than the ordinary LLC: see Daniel Kleinberger and J William Callison, 'When the Law is Understood-L3C No' *Community Dividend* (2009, November) <http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=4490>

⁷⁴ For a critique of L3Cs, see Carter G Bishop, 'The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion?' (2010) 63(2) *Arkansas Law Review* 243, 243-267. It is notable that certain regulators also oppose hybrids: see, for example, David Edward Spensard, 'Panacea or Problem: A State Regulator's Perspective on the L3C Model' (2010) 65(2) *Exempt Organization Tax Review* 36, 36-41.

may not attract appropriate legal and tax recognition. In this part, we consider those ideas further and consider solutions to make taxation fairer and arguably more efficient in relation to social enterprise.

A Ad Hoc Options

Before considering more radical policy options, ad hoc options are outlined.

1 Feeders and Retained Surplus

The issue of feeder companies having income that is unrelated to the charitable purpose of the organisation they fund is met in the United States by an unrelated business income tax (UBIT).⁷⁵ Following the *Word Investments* decision,⁷⁶ Australia has introduced an unrelated commercial activities tax (UCAT).⁷⁷ Whereas the UCAT will only apply to retained unrelated profits, the UBIT applies to all unrelated profits.⁷⁸ Following, in particular, revelations that Sanitarium has been using retained profits to invest offshore, some discussion has ensued in New Zealand about a possible UBIT.⁷⁹ However, since the mischief to be remedied, if any such mischief exists, relates to retained profits, a UCAT-type tax would be more appropriate. That noted, the possibility of changes to the taxation of charities, without a comprehensive first principles review, seems

⁷⁵ The UBIT (IRC § 511 (1982)) essentially taxes a not-for-profit corporation's income which is not related to the principal purpose for which it was formed. For a discussion, see Henry B Hansmann, 'Unfair Competition and the Unrelated Business Income Tax' (1989) 75(3) *Virginia Law Review* 605, 605-635.

⁷⁶ *Word Investments* [2008] HCA 55.

⁷⁷ For an analysis of the provisions, which are due to come into effect on 1 July 2014, see Matthew Dwight Turnour and Myles McGregor-Lowndes, 'Taxing Charities: Reform without Reason?' (2012) 47(2) *Taxation in Australia* 74, 74-77, noting, in particular, arguments against the need for a UCAT.

⁷⁸ See Micah Burch, 'Australia's Proposed Unrelated Commercial Activities Tax: Lessons from the U.S. UBIT' (2012) 7(1) *Journal of the Australasian Tax Teachers Association* 21, 25

⁷⁹ See Rob O'Neill, 'Unfair Tax Rules Go against the Grain' *Sunday Star-Times* (New Zealand), 31 July 2011, D12.

remote.⁸⁰ Besides, the likely effectiveness of a UCAT is not obvious: first, presuming that Sanitarium would be the principal target, since Seventh Day Adventist teachings promote health and wellbeing, Sanitarium products may be seen as a natural extension of the church's doctrine;⁸¹ second, a company's donations to registered charities are fully deductible.⁸² Consequently, any potential liability for tax on retained profits could be eliminated by donating the surplus.⁸³

2 Definition of Public Benefit

Statutory intervention has ensured that Māori charities are included within the ambit of public benefit, despite apparent inconsistency with *Pemsel*.⁸⁴ It is plausible, then, that regional development organisations, such as the Canterbury Development Corporation, which already enjoy special concessions under securities laws,⁸⁵ could be specifically included in the public benefit provisions of the *Charities Act*. However, such an ad hoc response appears undesirable from a policy perspective, particularly since other special

⁸⁰ A first principles review of the charities regime has been ruled out on the grounds that there may be fiscal implications of such a review: see Jo Goodhew (Community and Voluntary Sector Minister), 'No Review of the Charities Act at This Time' (media release), 16 November 2012.

⁸¹ Not all commercial activities, it will be noted, are as easily distinguished as macaroni production is from the teaching of law.

⁸² *Income Tax Act* s DB 41.

⁸³ Compare with the United Kingdom where a common arrangement is for charities to house their non-primary purpose trading activities in a separate private company. The company then donates its profits to the charity, thereby effectively eliminating the feeder company's corporation tax liability: see *Corporation Tax Act* s 189.

⁸⁴ For a general analysis of the taxation of Māori charities, see Audrey Sharp, 'The Taxation Treatment of Charities in New Zealand with Specific Reference to Maori Authorities including Marae' (2010) 16 *New Zealand Journal of Taxation Law and Policy* 177, 177-216.

⁸⁵ See Securities Act (Venture Capital Schemes) Exemption Notice 2008 (SR 2008/218).

cause lobbying might ensue. Conversely, as noted,⁸⁶ government has retreated from a first principles review of not-for profits.

3 Public Benefit Disclosure

Seen in securities and consumer protection legislation,⁸⁷ and, indeed, charities law,⁸⁸ New Zealand policymakers demonstrate a strong confidence in the policing power of transparency, that sunlight is the best disinfectant.⁸⁹ Following United Kingdom precedent,⁹⁰ Gousmett argues that New Zealand should require charities to report annually and publicly on how they have advanced public benefit,⁹¹ thereby ensuring that charities really do perform a public benefit. However, the success of this initiative in the United Kingdom has been so far variable, indeed unimpressive. Thus Gareth Morgan and Neil Fletcher report that 26 per cent of charities above the audit threshold (annual income of more than £500 000), 10 per cent of those in the £100 000 – £500 000 income band and only two per cent in the £25 000 – £100 000 income band fully and properly complied with the regulations.⁹²

⁸⁶ See, above n 80.

⁸⁷ For example, rather than prohibiting usurious interest rates, the *Credit Contracts and Consumer Finance Act 2003* (NZ) presumes that disclosure by usurious lenders will protect vulnerable borrowers.

⁸⁸ Publication of their annual reports, policymakers presume, will effectively police charities: see *Charities Act s 22*.

⁸⁹ Louis D Brandeis, *Other People's Money: and How the Bankers Use It* (F A Stokes, 1914) 92 said: 'Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.' Highlighting an egregious example of charitable opacity, Ole Holsti, 'Letters', *The Economist* (United Kingdom), 30 June 2012, 20 claims that the Mormon Church has not released financial statements since 1959.

⁹⁰ See *Charities (Accounts and Reports) Regulations 2008* (UK) reg 40.

⁹¹ See Gousmett, above n 55.

⁹² Gareth G Morgan and Neil J Fletcher, *Public Benefit Reporting by Charities: Report of a Study Undertaken by Sheffield Hallam University on behalf of the Charity Commission for England and Wales* (2011) 7 <http://www.charitycommission.gov.uk/.../public_benefit_reporting_shu.pdf>.

4 Mandatory Controls

Various directive measures could be adopted. These might include: mandatory distribution of capital in the way of PRIs in the United States or caps on officers' remuneration. But such measures would be inconsistent with New Zealand's broadly laissez faire approach to charitable regulation.

We submit that more radical policy options deserve consideration in the face of these traditional issues and the more recent emergence of social enterprise; these possibilities call for certain taxation fundamentals to be revisited.

B Why Distinguish between Taxpayers?

The main arguments for charitable tax concessions have been noted,⁹³ but why distinguish between taxpayers in the first place?

In accordance with basic principles of distributive justice that inform income taxation, similarly situated taxpayers should be taxed similarly (horizontal equity), whereas differently situated taxpayers may be treated differently (vertical equity).⁹⁴ However, since no two taxpayers are similarly situated in all ways, social judgment determines both similarity and difference.⁹⁵ Thus the profits of a cigarette manufacturer and those of a maker of lung cancer treatments are taxable in the same way because they are similarly engaged in trade, notwithstanding the differences in harm/benefit their trading operation bring to society.⁹⁶ In contrast, two drug manufacturers may be taxed differently because one is owned by a charity, notwithstanding their similar benefit to society. Income tax policymakers may be generally disinterested in the nature of a firm's business activities, but, from a moral perspective, it may seem odd, if not simply wrong, that the profits of a cigarette manufacturer should be taxed in the same way as those of the drug manufacturer.

⁹³ See above, nn 13-18.

⁹⁴ See Carl S Shoup, *Public Finance* (Weidenfeld and Nicolson, 1969) 23.

⁹⁵ See Bernard P Herber, *Modern Public Finance* (Irwin, 5th ed, 1983) 119.

⁹⁶ Indeed, the proceeds of crime are taxable in New Zealand: see *Income Tax Act* s CB 32.

This moral disinterest manifest in income tax policy extends to the business of charities. While some may argue that religion is, in itself, socially harmful,⁹⁷ those arguments lie beyond the scope of this article.⁹⁸ We are interested here in feeder business activities that have no special public benefit or, indeed, may be socially undesirable. In an egregious example, Benedictine monks at Buckfast Abbey (a registered charity) in Devon, England produce a tonic wine which has been linked to a disproportionate level of intoxicated violence in urban Scotland.⁹⁹ More widespread but similarly pernicious is charitable involvement with gambling.¹⁰⁰ Robert Nozick observes that '[p]eople want their society to be and to look just'.¹⁰¹ Are these policies just or do they look just?

Tax policy does not manifest a wholly amoral approach to trade; for example, society's disapproval of cigarettes is, in part, reflected in the imposition of swingeing excise duties on tobacco. Furthermore, the differential treatment of merit and demerit goods under value added tax (GST) systems shows that moral considerations can be

⁹⁷ See, generally: Sam Harris, *The End of Faith: Religion, Terror, and the Future of Reason* (W W Norton & Co, 2004); Richard Dawkins, *The God Delusion* (Houghton Mifflin Co, 2006); Daniel C Dennett, *Breaking the Spell: Religion as a Natural Phenomenon* (Allen Lane, 2006); Christopher Hitchens, *God Is Not Great: How Religion Poisons Everything* (Warner, 2007).

⁹⁸ On religion as a head of charity, see: Brian Lucas and Anne Robinson, 'Religion as a Head of Charity' in Myles McGregor-Lowndes and Kerry O'Halloran (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar Publishing, 2010) 187, 187-203.

⁹⁹ See BBC, *Buckfast Crime Link Revealed* (2010) <http://news.bbc.co.uk/2/hi/uk_news/scotland/8465957.stm>. An emerging trend in the United States is the charity pub concept, which Patrick Rooney, the associate dean at Indiana University's School of Philanthropy, somewhat uncritically describes as 'a clever idea and certainly a noble ambition': see Kirk Johnson, 'In New Pubs, Good Cheer and Good Works' *The New York Times* (online), 20 January 2013, <http://www.nytimes.com/2013/01/21/us/new-pubs-send-profits-to-charity.html?_r=0>.

¹⁰⁰ See Problem Gambling Foundation of New Zealand, *Facts and Figures – Auckland City* <http://www.pgfnz.org.nz/Uploads/PDFDocs/Auckland_City-Facts_and_Figures.pdf>.

¹⁰¹ Robert Nozick, *Anarchy, State, and Utopia* (Blackwell, 1984) 158.

accommodated.¹⁰² And, of course, the income tax privileges extended to charities under tax laws represent what is essentially a moral preference. In short, non-neutral treatment of different forms of income is both plausible and practicable. The pertinent question is this: should the constitutional structure of a firm determine its privileged tax status or should the real public benefits of its activities be determinative? If charities, hybrids and public benefit entrepreneurs are competing in the same market, it may be considered fundamentally unfair to tax them differently.¹⁰³

C Neutrality on Efficiency Grounds

Having considered and dismissed to their satisfaction the major economic arguments for coupling tax concessions with the particular charitable organisational form,¹⁰⁴ Anup Malani and Eric Posner conclude that current law leads to two principal inefficiencies:¹⁰⁵ first, such coupling ‘encourages inefficient production by rewarding nonaltruistic entrepreneurs who take non-profit status’;¹⁰⁶ second, ‘current non-profit law discourages talented altruists from establishing charitable enterprises, causing them at

¹⁰² The *Goods and Services Tax Act 1985* (NZ) does not distinguish between merit and demerit goods but compare with *A New Tax System (Goods And Services Tax) Act 1999* (Cth) sub-div 38-A-P.

¹⁰³ See Evelyn Brody, ‘Agents without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms’ (1996) 40 *New York Law School Law Review* 457, 535-536; David A Hyman and William M Sage, ‘Subsidizing Health Care Providers through the Tax Code: Status or Conduct?’ (2006) 25 *Health Affairs* W312. In their comprehensive literature review of non-profits, Melbourne Law School scholars compare Malani and Posner, above n 19 with James Hines Jr, Jill Horwitz and Austin Nichols, ‘The Attack on Nonprofit Status: A Charitable Assessment’ (2010) 108 *Michigan Law Review* 1179 but do not consider the equity issues of differential treatment raised by Brody: see above n 22, 37.

¹⁰⁴ These are: public good theory, agency theory, altruism theory, a theory of imperfect consumers and administration overload: see Malani and Posner, above n 19, 2029-53.

¹⁰⁵ *Ibid*, 2054.

¹⁰⁶ *Ibid*.

the margin to throw in their lot with commercial firms'.¹⁰⁷ Generally, the authors argue that 'nonprofit firms are less efficient than for-profit firms and that, if the law permitted for-profit firms to compete in charitable markets, charitable activity would become more efficient'.¹⁰⁸ They conclude:¹⁰⁹

The relevant consideration for the law is not whether the entrepreneur is altruistic but whether the effect of the entrepreneur's action is socially beneficial. If it is socially beneficial, and if ordinary market forces do not provide sufficient incentive for people to engage in that action, then a subsidy may be appropriate. Because the effect of the entrepreneur's behaviour is unrelated to her incentives to choose between the non-profit or for-profit form, the choice of form does not provide grounds for a tax subsidy.

James Hines and his co-authors note, by way of analogy, that consumers place very specific orders for the goods and services they require and do not hand over their money to a retailer and wait to see what the retailer might provide; they then ask:¹¹⁰

Why shouldn't the government behave this way when it buys charitable goods? Decide it wants something specific – buy it, evaluate it, and repeat. Rather, the government throws tax exemptions at something akin to a charity store and hopes it gets what it needs. Many observers find this approach puzzling, and – at least on the surface – it is.

Hines et al argue that Malani and Posner's arguments 'are founded on an economic analysis that is too limited' but do not prove that the analysis is wrong.¹¹¹ Nevertheless, for Hines et al, the most important argument against neutral treatment is that it 'would

¹⁰⁷ Ibid, 2055.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid, 2067.

¹¹⁰ Hines et al, above n 103, 1218.

¹¹¹ Ibid, 1219. In our view, horizontal equity grounds, together with an outcomes orientation (discussed in the following section), are sufficient to prompt a reconsideration of differential treatment of firms operating in the same market. Consequently any inadequacy in the scope of Malani and Posner's study is not fatal for neutral treatment arguments.

create new avenues for tax avoidance'.¹¹² This may be so, but only craven policymaking rejects measures that would promote fairness and, possibly, efficiencies for the tax system because some risk of abuse exists. They conclude:¹¹³

Properly encouraging and rewarding charitable activity does not entail making explicit tax benefits available to everyone, but instead involves identifying cases in which recipients of donated funds pursue clearly identified charitable ends without the potential conflict for interest that inevitably accompanies the profit motive.

We agree that tax concessions should not be available to *everyone* and yet the current system extends tax concessions to *any* entity that qualifies as a charity notwithstanding the true benefit their activities bring to contemporary society.

Compelling arguments against putting charities on an equal footing with other firms operating in the same public benefit market can be raised but they do not relate to administrative challenges, such as countering tax avoidance; rather they arise from the arguably unique nature of charities as an inherent public good.¹¹⁴ Nozick observes that people do not merely care about outcomes; they also tend to care about how those outcomes are attained.¹¹⁵ The general public may consider it intuitively wrong to extend the tax concessions traditionally reserved for charities, given their virtuousness, to partially or fully for-profit firms. But contemporary charities have already evolved into hybrid organisations that follow entrepreneurial practices, such as active marketing campaigns, and engage professional managers, as well as volunteers.

D Outcomes Orientation

The *Statute of Elizabeth* sought to solve particular social problems that England experienced in the early seventeenth century. Contemporary New Zealand faces

¹¹² Ibid.

¹¹³ Ibid, 1219-20.

¹¹⁴ See Policy Advice Division, above n 30, 3.

¹¹⁵ See Robert Nozick, 'Moral Constraints and Distributive Justice' in Michael J Sandel (ed), *Liberalism and Its Critics* (Blackwell, 1984) 100, 110.

different problems.¹¹⁶ However, the generalising ratio of *Pemsel*, to a great extent, decoupled charitable tax privilege from its direct historical contingency but also obfuscated the idea of public benefit and left it to judges to ultimately set important elements of charities policy.¹¹⁷ We submit that the Preamble, rather than *Pemsel*, was the better policy approach.¹¹⁸ Elizabethan lawmakers could have had no expectation of prescribing which activities ought to be considered charitable several hundred years into the future; their interest lay in identifying and privileging activities that might solve the temporally and spatially specific problems of their particular society.¹¹⁹ Society today might fruitfully follow the Elizabethan precedent in looking to here and now social needs and legislating accordingly.¹²⁰ Instead, reliance continues to be placed on a 'spirit

¹¹⁶ Indeed, as Martin, above n 1, 309 notes, some one hundred and fifty years ago, William Gladstone recognised the folly of granting tax concessions based on the anachronistic Preamble.

¹¹⁷ See, for example, *Re Greenpeace New Zealand Inc* [2012] NZCA 533. An unusual feature of that decision was the court's setting out five tests for the Chief Executive of the Department of Internal Affairs and the Charities Board to take into account when considering revocation of Greenpeace's charitable status (at [43]). The court's refusal to hold that engagement in illegal activity is fundamentally incompatible with charitable status is likely to encourage a certain level of law breaking: for example, Greenpeace's anti-oil drilling campaign received significant publicity with the trespass prosecution, but lenient punishment, of actress and activist Lucy Lawless: see 'Lawless Proud after Drillship Sentencing', *The Dominion Post* (Wellington), 8 February 2013, A3.

¹¹⁸ If the court in *Pemsel* had found that the charitable motive did not accord with the Preamble, it may be inferred that Parliament would have needed to reconsider the Preamble. Had it done so, it is likely that tax privileges would have been restricted to poverty relief: see 'Sweet Charity', *The Economist* (online), 9 June 2012, <<http://www.economist.com/node/21556570>>.

¹¹⁹ The long title to the Act, which was 'An Acte to redresse the Misemployment of Landes Goodes and Stockes of Money heretofore given to Charitable Uses', reflects the specific mischiefs sought to be remedied: see Harvard Kennedy School, above n 1.

¹²⁰ See Barker, above n 40 and Gousmett, above n 41 on the exclusion from charitable status of the Canterbury Development Corporation.

and intendment' test implied by a court centuries after the Preamble was enacted.¹²¹ Provision of affordable housing might, for example, replace the Preamble's seawall building, but the critical point is that whatever might be decided would be one of a limited number of democratically determined goals to meet the temporally and spatially specific needs of contemporary New Zealand. Such a reformulation seems imperative, whether or not neutral tax treatment of firms competing in the same public benefit market is accorded similar importance.

V CONCLUSION

To attract charitable tax privileges, a firm must meet two basic requirements: first, its purpose must be reconcilable with those set down in the Preamble and, second, its constitution must prohibit distribution of surpluses to interest holders. We have argued that the social goals recorded in the Preamble were specific to a particular time and place. Notwithstanding the principles approach established in *Pemsel*, reliance on a 400 year old statute is egregiously anachronistic – each generation might usefully deliberate and construct its own version of the Preamble, setting out its particular social goals.¹²² Tax privileges would then be awarded in order to promote achievement of the desired outcomes.¹²³ It is likely that the work of many charities, such as in relieving poverty, would always feature in such a list. It would also be open to government to provide direct grants to unpopular causes and, of course, no one would be prevented from donating to any cause but they would not necessarily gain tax privileges from doing so.

¹²¹ But see Hines et al, above n 103, 1219, who argue that 'the reasons for *not* adhering to this 400-year-old tradition are not compelling' (emphasis added).

¹²² Updating William Beveridge's 'Five Great Social Evils' of the mid-twentieth century, David Utting (ed), *Contemporary Social Evils* (Policy Press, 2009) examines the types of social evils whose elimination might be pursued in contemporary society; any firm that seeks to counter these social evils might attract tax privileges.

¹²³ Compare with the Jeffersonian proposal of Roberto Mangabeira Unger, *The Critical Studies Movement* (Harvard University Press, 1986) 35 for a rotating capital fund that would change hands every twenty years.

In a greatly secular New Zealand,¹²⁴ it is moot whether the promotion of religious belief in itself would make today's Preamble of social goals. Once more, this does not mean that the socially valuable activities of many church-affiliated organisations would not be tax-privileged; rather, that altruistic work would need to be separated from proselytising activity.

Using the example of for-profit and not-for-profit firms competing in the same market, we have indicated the ostensible unfairness of one of those firms enjoying special tax privileges simply because of the charitable nature of its shareholder. The emergence of different forms of social enterprise, including new corporate vehicles, has accentuated the irrationality of a simple altruism/enterprise distinction in law and taxation. In short, we propose that an outcomes-oriented approach to tax concessions should be adopted so that pursuit of socially agreed goals – not institutional form or conformity with historically contingent norms – would determine qualification.

¹²⁴ See, for example, Ben Heather, 'Are We Now So Godless that Christmas Is Irrelevant', *The Dominion Post* (Wellington) 11 December 2013, A3.

INCOME TAX AND ENVIRONMENTAL PROVISIONS – GREEN GOLD OR LEAD WEIGHT?

SALLY JOSEPH*

ABSTRACT

The income tax provisions pertaining to the mine site rehabilitation and land degradation are two tax expenditures that are able to assist environmental management. While environmental policy may not have necessarily been the impetus for their introduction, it has been a factor in their development over time. Using the policy behind each tax expenditure, derived from its history, this paper attempts to analyse their effectiveness with respect to environmental consequences. However, a lack of quality data means that their effectiveness cannot be ascertained. A conclusion drawn is that Australian tax policy is subject to the influence of various groups at any point in time resulting in a lack of clear direction and restrictive appeal. This raises the question: are income tax environmental provisions green gold or lead weight?

* PhD student at Australian School of Business, University of New South Wales

I INTRODUCTION

The primary function of the income tax system is to raise revenue to fund the general functions of government. Equally, the taxation system can be used to assist environmental management.

As a rule, expenditure on the environment is not deductible from income tax unless it is related to the earning or production of income or a specific tax expenditure applies. The term 'tax expenditure' refers to any provision of the tax law which provides a financial benefit to a particular class of taxpayer or a particular activity in the form of a tax preference or concession, most commonly as an exemption, deduction or offset¹.

Income tax provisions that are able to assist environmental management are characterised by being expenditure that is not incurred in gaining or producing assessable income and not necessarily incurred in a business for such purpose. This paper discusses two specific Australian taxation provisions in terms of policy and environmental outcomes: mine site rehabilitation and land degradation. The former attempts to integrate tax and environmental concerns into policy that is industry specific; the latter has evolved into a hybrid of industry and activity specificity. After an introduction to each tax expenditure, their history is outlined drawing particular reference to community and governmental discussion prevalent at each stage of evolution. From this, the policy behind the tax expenditure is determined and/or inferred. This is followed by an analysis of the environmental consequences including cost versus benefit. The two Australian tax provisions are then comparatively analysed in terms of their tax and environmental objectives, their scope and constraints, and the type of deductions covered. The paper concludes with a summary of the shortcomings of the process of using these specific tax expenditures. That is, using the tax system for environmental purposes is not the issue per se but rather the process involved in using the tax system. Areas of future research are highlighted.

¹ OECD, Tax Expenditures: A Review of the Issues and Country Practices (OECD, 1984) 7.

II INCOME TAX AND ENVIRONMENTAL POLICY

The Australian federal government uses taxation policy to encourage environmental responsibility. This is consistent with numerous Organisation for Economic Cooperation and Development (OECD), United Nations (UN) and World Bank reports that advocate the use of 'economic incentives to correct market failure in the management of natural resources and the control of pollution'.² Indeed, the arguably preeminent report on sustainable development, *Our Common Future* (also referred to as the Brundtland Report), espoused that, in order to implement ecological sustainable development, public policy should make use of incentives to encourage the business sector to refrain from polluting where '[p]ollution is a form of waste, and a symptom of inefficiency in industrial production'.³ The term 'polluting' is not restricted to carbon emissions but also incorporates land degradation and other environmental damage.⁴

Similarly, it is recognised that 'the sound management of private land may have to be encouraged by law'⁵ such as through the provision of taxation incentives and that tax policy should be used to encourage sustainable land use.⁶

The use of tax policy to encourage investment in natural resources is contentious as some taxpayers obtain a benefit not available to all. Yet the tax system has also been described as an appropriate tool for governments to implement policies achieve specified policy goals.⁷ It is also contentious from an environmental perspective: those who abstain from polluting or damaging the environment are not rewarded whereas polluters are rewarded through the tax expenditure.

² World Bank, *Environmental Fiscal Reform: what should be done and how to achieve it* (World Bank, 2005) 1. See also OECD, *Environmentally Related Taxes in OECD Countries, Issues and Strategies* (OECD, 2001); OECD, *Taxation, Innovation and the Environment* (OECD, 2010); United Nations Environment Program, *The Use of Economic Instruments in Environmental Policy: Opportunities and Challenges* (UNEP, 2004).

³ World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987) 220.

⁴ See, eg, Ann Hamblin, 'Australia State of the Environment Report 2001 (Theme Report)' (CSIRO report for the Department of the Environment and Heritage, 2001); Oxford English Dictionary, "Pollution".

⁵ Gerry Bates, *Environmental Law in Australia* (Butterworths, 3rd ed, 1992).

⁶ Steve Hatfield Dodds, Address to the Fourth Annual Global Conference on Environmental Taxation, Sydney, June 2003.

⁷ Paul McDaniel, 'Tax Expenditures as Tools for Government Action' in Lester M Salaman (ed) *Beyond Privatisation: The Tools of Government Action* (The Urban Institute Press, 1989) 167.

Historically, the literature has tended to focus on stand-alone environmental taxes and charges. These have generally been premised upon the 'polluter pays' principle and have attempted to allocate a market price to the environmental activity or item being taxed. The use of tax expenditures is an alternative policy tool that utilises the income tax system to deliver environmental goals. As such they are the result of selective tax legislation that benefits particular taxpayers. Since the government foregoes revenue that would have been collected in the absence of the special legislation, these policies have real costs, hence the term 'tax expenditures'.

The advantage of taxation-based measures is that they provide support for environmental projects where the private benefits are less than the overall cost of the project. Without such support, these projects may not be undertaken. They also encourage innovation, whether in technology or business practices, in order to achieve the government's policy goals. The alternative is for the government to impose a system of command and control that is generally difficult to establish and expensive to maintain.

Providing a tax expenditure for an activity has the dual impact of reducing the net benefits received from the activity and the net costs incurred in undertaking the activity.⁸ In effect, the tax system results in the community sharing financially both the costs and benefits of taxed activities. If it is assumed that all benefits and costs of an activity are financial and there are no externalities, including an activity within the tax system will reduce the private net return from the activity if it is profitable, and increase the private net return if the costs exceed the benefits (that is, reduce the private loss). Thus, the community will not only share in the gains from profitable activities but also share in the losses from unprofitable activities.

Tax expenditures are generally difficult to target to environmental projects with public benefits.⁹ Indeed, they have been criticised as being 'generally poorly targeted, always too difficult to cost, diametrically opposed to usual distributional goals, difficult to administer,

⁸ Robert Douglas, 'Potential effects of selected taxation provisions on the environment' (Report to the Productivity Commission, 2002).

⁹ Ibid.

structurally almost invisible and unaccountable”.¹⁰ Being ‘hidden’ in the tax system means that there can be an escalation of the tax expenditure without any explicit budgetary decision being made.¹¹ Their costs are also more difficult to predict and monitor.¹² Thus there is a public cost associated with using tax expenditures as policy tools. The question is whether the cost is worth the public benefit. Are they green gold or lead weight?

III MINING SITE REHABILITATION

3.1 Introduction

The rehabilitation of mining sites is now widely accepted by the industry as an integral and expected part of mining.¹³ It is also mandated through the requirement to lodge and maintain bonds or similar financial security as a condition for state licensing.¹⁴

To be effective, a regulatory system for mine site rehabilitation should provide incentives to minimise damage, ensure sufficient funds are available to finance the rehabilitation, develop clear standards for rehabilitation and ‘ensure that mining companies receive equitable tax treatment with respect to the costs incurred’.¹⁵

Contained in subdivision 40-H of the *Income Tax Assessment Act 1997* (ITAA97), section 40-735 provides an immediate deduction for capital and non-capital expenditure incurred rehabilitating a mining site, subject to certain conditions.

3.2 History

Mining companies are considered special taxpayers with income tax provisions expressly and exclusively for the industry. Section 40-735 is one such provision. To illustrate: A comparable expense to mining site rehabilitation is repairs, the tax

¹⁰ Robert McMullan, ‘Parliamentary Debates, Senate Hansard, 5 May 1992, NSW, 2227. See also Graham Hill, ‘Tax Reform: A Tower of Babel; Distinguishing Tax Reform from Tax Change’ (2001) 1(2) *Australasian Tax Teachers Association* 1, 5.

¹¹ Najma Rajah and Stephen Smith, ‘Taxes, Tax Expenditures and Environmental Regulation’ (1993) 9(4) *Oxford Review of Economic Policy* 41.

¹² Richard Wood, ‘Overview of Rural Income Taxation: Issues, Implications and Importance’ (1995) 63(1) *Review of Marketing and Agricultural Economics* 111.

¹³ Industry Commission, ‘Mining and Minerals Processing in Australia’ (Report No 7, Industry Commission, 25 February 1991).

¹⁴ See, eg, *Mineral Resources (Sustainable Development) Act 1990 (Vic) Part 7*.

¹⁵ Richard Auty, ‘Mining as a generator of wealth: potential conflicts and solutions’ (1998) 13(2) *Journal of Mineral Policy, Business and Environment* 4.

treatment for which does not differentiate between taxpayers whether by industry or activity. While the distinction between capital and non-capital expenditure is irrelevant for the purposes of section 40-735, it is a major consideration in relation to repairs.¹⁶

Referring to the mining industry as a special taxpayer, the 1975 Asprey Report said that the 'nature of the taxation treatment of anti-pollution and ecological expenditure should be no different in relation to mining from that accorded to other industries'.¹⁷ Nevertheless, the Committee recommended that a provision for the estimated total costs of site rehabilitation should be available as a deduction from assessable income. It was suggested that this be subject to the Commissioner of Taxation being satisfied that such amount was a reasonable sum to meet the obligations of the mining enterprise. However, it also recognised the difficulty of the tax system to allow deductions for expenses typically incurred once income-earning operations had ceased.¹⁸

Deductibility for mine site rehabilitation expenditure was inserted into the *Income Tax Assessment Act 1936* (ITAA36) as division 10AB with effect 1 July 1991¹⁹ (but without the Commissioner of Taxation being de facto auditor). This had been announced in the 1990-91 Budget²⁰ on 21 August 1990.

The Budget announcement was followed by the release of a three-volume report in February 1991: *The Industry Commission Inquiry into Mining and Minerals Processing (Inquiry)*.²¹ Commissioned by the then Treasurer on 18 October 1989, the Inquiry into the mining industry was broad, covering factors affecting minerals exploration and development, operating costs and access to technology while having regard to social and environmental objectives, the commonwealth/state arrangements and taxation structures and efficiencies.²² The Inquiry recommended that mining site rehabilitation

¹⁶ *Lindsay v FCT* (1961) 106 CLR 377; *Sun Newspapers Ltd v FCT* (1938) 61 CLR 337; *Hallstroms Pty Ltd v FCT* (1946) 72 CLR 634.

¹⁷ Taxation Review Committee, 'Full Report' (Report of the Commonwealth Taxation Review Committee, 31 January 1975) [19.30].

¹⁸ *Ronpibon Tin NL v FCT* (1949) CLR 47; *FCT v Munro* (1926) CLR 153; ITAA97 ss 8-1 and 8-5.

¹⁹ As part of *Taxation Laws Amendment Act (No 2) 1991* comprising ss 124BA to 124BF.

²⁰ Explanatory Memorandum, *Taxation Laws Amendment Act (No 2) 1991* (1991 EM).

²¹ Industry Commission, above n 13.

²² *Ibid.*

expenditure be tax deductible, including the demolition of old plant. It also recommended the carry-back of such expenditure in financial years where there was insufficient income available. Only the first recommendation was adopted.²³

As part of the 1997 Tax Law Improvement Program (TLIP), division 10AB ITAA36 was rewritten into ITAA97 as subdivision 330-I.²⁴ It was subsequently rewritten (in 2001) as subdivision 40-H as part of the uniform system of capital allowances.²⁵

Five years after its introduction and reflecting increasing societal concern, the Minerals Council of Australia, as the industry peak body, developed the Australian Minerals Industry Code for Environmental Management as a self-regulatory tool.²⁶ By 1998 41 companies had signed the code and were producing publically available environmental performance reports.²⁷ Mandatory environmental reporting for eligible entities was also introduced in 1998 under what was then the Corporations Law.²⁸

At an international level and in line with increasing community and societal environmental concerns on a meaningful scale, there were three major areas of development within the mining industry with respect to sustainability and the environment.

In 1991, the UN and the German Foundation for International Development organised the International Round Table on Mining and the Environment in Berlin. This resulted in the 'Berlin Guidelines', published in 1994 and revised in 1999. While the original guidelines focused on the technical and physical aspects of environmental management, the revised version reflected a greater understanding of, and concern for, social and community issues that had developed internationally over that decade.²⁹ Item 13 of the Berlin Guidelines states that governments should '[e]valuate and adopt, wherever

²³ See Taxation Laws Amendment Act (No 2) 1991.

²⁴ ITAA97 comprising ss 330-435 to 330-455.

²⁵ By the New Business Tax System (Capital Allowances) Act 2001.

²⁶ Natalie Stoianoff, Mary Kaidonis and Lindel H House, 'Do Tax concessions for Mining Site Rehabilitation Work? Evaluating 10 Years of Reform' in Alberto Cavaliere et al (eds) *Critical Issues in Environmental Taxation International and Comparative Perspectives: Volume III* (Oxford University Press, 2006) 513.

²⁷ Ibid.

²⁸ Corporations Act 2001 s 299(1)(f).

²⁹ United Nations, Berlin II: Guidelines for Mining and Sustainable Development (UN, 2002).

appropriate, economic and administrative instruments such as tax incentive policies to encourage the reduction of pollutant emissions and the introduction of innovative technology'.³⁰

In June 1994 the World Bank and two UN agencies organised the International Conference on Development, Environment and Mining.³¹ A key point noted was that the 'objective of rehabilitation of mine sites should be to restore them to a self-sustaining ecosystem that is as close as practical to its original state prior to mining activity.'³² The need for mechanisms to ensure the availability of funds to finance rehabilitation was also stressed.

The Global Mining Initiative was launched in 1998 by the chief executive officers of nine of the largest mining and metals companies.³³ This was perhaps the earliest large-scale industry-based effort to establish sustainability practices in the sector. Out of this came the Mining, Minerals and Sustainable Development project in 2000 (a fact-finding mission) and the International Council on Mining and Metals in 2001.³⁴

3.3 Policy

Particular from the early 1990s, there has been increasing societal concern over environmental issues. These concerns have influenced policy from both company and government perspectives and have led to increasingly stringent regulations governing activities that have an impact on the environment.³⁵ In its submission to the Inquiry, Coal & Allied Operations Pty Ltd acknowledged that many of the constraints imposed on

³⁰ Ibid, 4.

³¹ World Bank, UNEP and UNCTAD, Development, Environment and Mining: Enhancing the contribution of the mineral industry to sustainable development: Post conference summary (World Bank, Washington DC, 1994).

³² Ibid 2.

³³ Clarissa Lins and Elizabeth Horwitz, *Sustainability in the Mining Sector* 2007 <www.fbds.org.br/IMG/pdf/doc-295.pdf>.

³⁴ George Littlewood, *The Global Mining Initiative* (Address to Mining 2000, Melbourne, 20 September 2000) <www.icmm.com/document/104>.

³⁵ Chris Allen, Andrew Maurer and Marat Fainstein, 'Mine site rehabilitation: An economic review of current policy issues' (ABARE report prepared for the Department of Industry, Science and Resources, August 2001).

the industry resulted from community concerns with respect to environmental management and rehabilitation of mining sites.³⁶

The Explanatory Memorandum (1991 EM) accompanying the introduction of the tax expenditure provisions notes that 'rehabilitation expenditure *should* form part of the overall costs of the mining operation' [emphasis added].³⁷ The reasoning is that a right to quarry or mine is dependent on agreement to rehabilitate the site after operations have ceased. Rehabilitation requirements for mining projects are written into the laws of state and territory governments as a prerequisite for the issuance of exploration permits or mining leases. For example, in New South Wales (NSW) a title must be obtained prior to any operation involving prospecting, exploring or mining.³⁸ However, this title is dependent on the granting of development consent under the *Environmental Planning and Assessment Act* and its regulations.³⁹ Development consent requires the preparation of an Environmental Impact Statement which includes landscape management and rehabilitation.⁴⁰ Conditions for mining leases include requirements for the submission of a Mining Operations Plan (including a rehabilitation plan) prior to the commencement of operations and subsequent Annual Environmental Management Reports. Ensuring the compliance with NSW mining legislation, including regulating rehabilitation and supervising mine closures, is the responsibility of the NSW Trade & Investment – Division of Resources and Energy state government agency. Its powers include imposing and enforcing environmental management and rehabilitation conditions, and establishing rehabilitation security deposits.⁴¹ These deposits, also referred to as environmental bonds, ensure that funds are available for rehabilitation in the event of non-compliance.⁴² Yet no tax deduction is available for these.⁴³

³⁶ Coal & Allied Operations Pty Ltd (submission no 79), cited in Industry Commission, 'Mining and Minerals Processing in Australia Volume 2: Commentary, Statistics and Analysis' (Report No 7, Industry Commission, 25 February 1991) 33.

³⁷ 1991 EM, above n 20, ch 13, cl 2.

³⁸ See, *Mining Act 1992* (NSW) Pt 3 Exploration Licences, Pt 4 Assessment Leases and Pt 5 Mining Leases.

³⁹ *Mining Act 1992* (NSW) s 65.

⁴⁰ The development consent process is set out in ss 78A to 81 of the *Environmental Planning and Assessment Act 1979* (NSW) and its regulations made for the purposes of Part 4 of this Act.

⁴¹ See generally the Division of Resources and Energy website at <<http://www.resources.nsw.gov.au/>> accessed 11 September 2013.

⁴² *Mining Act 1992* (NSW) Pt 12A.

⁴³ ITAA97 s 40-745(b).

The reasons as to why a special deduction for mine site rehabilitation expenditure was warranted were provided by in the 1991 EM. It acknowledged that the majority of rehabilitation expenditure is capital in nature and therefore does not qualify for deduction under the general deduction provision. For capital expenditure to be deductible, it is restricted to expenditure incurred in the process of extracting minerals. This clearly excludes rehabilitation expenditure. And, in any event, such expenditure is generally incurred once the income earning operations have ceased and therefore excluded from deductibility as not being incurred for the purpose of producing assessable income.⁴⁴

But then again, certain expenditure may be non-deductible, not because of government policy but simply because the importance of the expenditure was not previously realised.⁴⁵ The deduction for mine site rehabilitation expenses is one example. Another is allowing a deduction for the demolition of old plant. Both of these were only made deductible following lobbying from the mining industry.⁴⁶ In other words, there is a time lag between acknowledging business practice and legislation.

The deduction is restricted to the restoration of the site to its pre-mining condition or to a reasonable approximation thereof. The only latitude is to use the condition of the surrounding land (also at the time the operations or activity commenced) as a guide and only if the original condition of the site is unknown – not in place of or as a substitute for. It is also worth noting that partial site rehabilitation is deductible expenditure, even if there is no intention that the work be completed.⁴⁷

The concept of 'site' is also restrictive. The deduction is limited to expenditure incurred in rehabilitating only that area where the exploration and/or mining operations were conducted, that is, the 'mine site'. Although not specifically stated, it is probably fair to state that the area considered to be the 'mine site' is that area covered by the

⁴⁴ *Ronpibon Tin NL v FCT* (1949) CLR 47; *FCT v Munro* (1926) CLR 153.

⁴⁵ Industry Commission, 'Mining and Minerals Processing in Australia Volume 3: Issues in detail' (Report No 7, Industry Commission, 25 February 1991).

⁴⁶ Industry Commission, above n 13.

⁴⁷ ITAA97 subsection 40-735(5).

exploration permit or mining lease. Expenditure spent rectifying any other area, although damaged by the mining operations, does not qualify for the deduction.⁴⁸

Rehabilitation expenditure is not, however, limited to mining sites. Typical examples are the removal of plant, equipment and facilities from 'off-site' areas that are, in other contexts, considered to be part of mining operations.⁴⁹ Examples include trunk lines, access roads, storage facilities, wharves, conveyors and railways.

Then there are areas even more removed from the actual 'site' but nevertheless impacted by the mining operations. An example is the Ok Tedi copper and gold mine in Papua New Guinea. The seventy-kilometre corridor of the Ok Tedi River has been declared 'biologically dead' and 150 square kilometres of Fly River floodplains downstream potentially affected by acid mine drainage.⁵⁰ Australian examples include Queensland's Mount Morgan gold and copper mine which has devastated the aquatic ecosystem of the Dee River⁵¹ and Tasmania's Mt Bischoff tin mine which has created a 'Dead Zone' in the upper 30 kilometres of the Arthur River.⁵² These outlying areas cannot be considered to be with the mine 'site'.

It was noted above that the mining site rehabilitation provision has been rewritten twice since its introduction. TLIP introduced a minor policy change by widening the deduction to include the cost of constructing dams and levees as part of the rehabilitation process.⁵³ When explaining subdivision 330-I, the Explanatory Memorandum (1996 EM) stated that the dams and levees must be 'essential for rehabilitation'.⁵⁴ The justification

⁴⁸ 1991 EM, above n 20, cl 4.

⁴⁹ Charles Birch, 'Rehabilitation Expenditures – does the law need cleaning up' (1999) (Nov-Dec) *Journal of Australian Taxation* 401. See also *FCT v Reynold Australian Alumina* 90 ATC 5018 which concerned a bauxite conveyor and *Robe River Mining Co Pty Ltd v FCT* 90 ATC 5028 which concerned an iron ore railway.

⁵⁰ Stuart Kirsch, 'Acting Globally: Eco-politics in Papua New Guinea' (1996) 3(3) *The Journal of the International Institute*.

⁵¹ Productivity Commission, *The Dee River* <www.pc.gov.au/_data/assets/pdf_file/0003/17265/sub008.pdf>; Queensland Government Department of Natural Resources and Mines, *Mount Morgan Mine Rehabilitation Program* (2013) <<http://mines.industry.qld.gov.au/safety-and-health/mount-morgan.htm>>.

⁵² Graham Green, 'North-west rivers environmental review. A review of Tasmanian environmental quality data to 2001' (Supervising Scientist Report 167, Environment Australia, 2001).

⁵³ Explanatory Memorandum, Income Tax Assessment Bill 1996, 11 (1996 EM).

⁵⁴ *Ibid*, 91.

is that they are an essential part of the rehabilitation process and have little or no residual value to the rehabilitator and, as a result, should not be treated as an enhancement or redevelopment. The 1996 EM gave dams as a means of securing a water supply for revegetation as an example of a dam 'necessary for proper rehabilitation'.⁵⁵ As such, tailings dams and dams for recreational purposes would not be deductible.

Not all issues relating to defining a mining site (such as what constitutes a mining building site) and what constitutes rehabilitation expenditure (such as sealing and stabilising operations, and planning costs), have been presented. Nevertheless, it is submitted that the above discussion demonstrates that rehabilitation expenditure incurred by mining operators is treated preferentially within the income tax legislation. It is also limited in its environmental features and scope of environmental application.

The policy behind legislative provisions is not always specifically stated. In such cases it can usually be gleaned from the history leading up to the legislation, from the explanatory memorandum accompanying the legislation and from the wording of the provision itself. With respect to the mining site rehabilitation provision, it would appear that the policy behind section 40-735 is more commercial than environmental. It has even been suggested that its purpose was to '[correct] an anomaly of the tax system as it applies to the natural resources industry'.⁵⁶

3.4 Analysis

Rehabilitating a mining site serves an environmental purpose. However, section 40-735, as currently drafted, fails to deliver.

The provision does not achieve full deductibility for rehabilitation expenditure. There are two aspects to this: the specified exclusions and the result of the restrictive interpretation of terms such as 'rehabilitation' and 'site'. What qualifies as deductible expenditure is defined narrowly; the majority of major environmental disasters arise off-site. Further, permitting partial rehabilitation with no penalty for non-completion, especially intentional non-completion, is clearly contrary to environmental principles.

⁵⁵ Ibid, 102

⁵⁶ Stoianoff et al, above n 26.

Tailings dams are often the most significant environmental liability yet these are specifically excluded. Tailings dams store waste material from mineral processing at mine sites.⁵⁷ A lack of tailings dams resulted in the Ok Tedi disaster, damaging agricultural land and displacing entire communities. The Los Frailes disaster in Spain in April 1998 caused approximately €152 million in socio-economic losses and approximately €147 million was spent correcting the environmental and agricultural impacts, including restoration of the area's natural resources.⁵⁸ This does not include the subsequent impacts on communities and local industries. Closer to home is Mount Todd. The company went into receivership leaving behind a tailings dam of acid water and heavy metals.⁵⁹ The environmental bond of \$900,000 was forfeited but, even with the additional \$5 million spent by the Northern Territory government, financing remediation has hardly begun.⁶⁰ Responsibility for the environmental clean-up rests with the Northern Territory Government. Hence taxpayers will pay for it.

The actual cost of section 40-735 cannot be accurately ascertained as it is not included in Treasury's Tax Expenditure Statements. While there is little detailed information, the estimates vary substantially. This may be because rehabilitation expenditure is mine-specific. As examples, it is estimated that rehabilitating March Mining at Moliagul would cost \$1 million, Denehurst at Benambra \$7 million and Mount Todd in the Northern Territory estimated at \$122 million.⁶¹

State governments have developed rehabilitation cost calculators to provide a consistent methodology for estimating rehabilitation costs.⁶² However, there is no requirement that

⁵⁷ M Rico, G Benito and A Diez-Herrero, 'Floods from tailings dam failures' (2008) 154(1-3) *Journal of Hazardous Materials* 797.

⁵⁸ Ibid.

⁵⁹ A Bevenge, 'Danger lurks in Territory's most toxic waters' *ntnews.com.au* 14 January 2012 <http://www.ntnews.com.au/article/2012/01/14/283275_ntnews.html>.

⁶⁰ Ibid; Stephen Garnett and Andrew Campbell, 'Insuring the environment - who pays when mining goes wrong' *The Conversation* 1 February 2012 <<http://theconversation.edu.au/insuring-the-environment-who-pays-when-mining-goes-wrong-5060>>.

⁶¹ John Mitas, 'Rehabilitation Bonds' (MCA Annual Environment and Communities Seminar, July 2012) <http://www.minerals.org.au/file_upload/files/presentations/aecs/DPI_Rehabilitation_Bonds.pdf>; Bevenge, above n 59.

⁶² See, for example, Industry & Investment, 'Rehabilitation cost estimate guidelines' (New South Wales Government, November 2010); Department of Environment and Heritage Protection, 'Estimation of Mine Rehabilitation Costs' (Queensland Government, January 1995).

they be adhered to and the calculations are only randomly audited.⁶³ An example is the White Dam Gold Project in South Australia where the miner has adopted a rehabilitation rate of \$800 per hectare and an ongoing maintenance rate of \$140 per hectare against the calculator's rate of \$4,070 per hectare and \$715 per hectare respectively.⁶⁴

There is limited publicly available statistics on mine site rehabilitation costs from the Australian Bureau of Statistics. The most recent relates to the 2000-2001 financial year where current expenditure amounted to \$97.7 million or 0.3 per cent of total current expenses, and capital expenditure amounted to \$7.4 million being 0.2 per cent of total capital expenditure.⁶⁵ On a per hectare basis this is approximately \$2,050 (current) and \$145 (capital). For these purposes, 'rehabilitation' includes landscaping, re-vegetation and removal of buildings, fixtures and equipment to a reasonable approximation of its pre-mining condition. The only other information relates to capital rehabilitation expenditure of \$22.7 million (1994-1995) and \$15.7 million (1995-1996).⁶⁶ It would appear that there is a year-on-year decline in capital rehabilitation expenditure which may be the result of more rehabilitation work being done while the mine is still operative, that is, more current than capital expenditure. Further research is required to test this hypothesis.

When section 40-735 was introduced, the cost to the revenue was expected to be \$10 million per annum from the 1992-1993 income year.⁶⁷ Taking into account the removal of the Bass Strait oil platforms, the cost was expected to increase to around \$40 million a year from early 2000s.⁶⁸ However, the actual or estimated expenditure far exceeds the original projections. Being specific to mining, the mining industry is being subsidised by the taxpayer to help it meet the costs of mining site rehabilitation.

⁶³ Department of Primary Industries, 'Establishment and Management of Rehabilitation Bonds for the Mining and Extractive Industries' (DPI, Victoria Government, 2010); Gareth Parker, 'Govt agencies failing on mine policing: audit' *The West Australian* 28 September 2011.

⁶⁴ Exco Operations (SA) Limited and Polymetals (White Dam) Pty Ltd, 'White Dam Gold Project: Mine and Rehabilitation Program' (Mineral Lease #6275, Volume 1 - MARP, Revised February 2011) 8-11.

⁶⁵ Susan Linacre, 'Environment Protection Mining and Manufacturing Industries Australia 2000-2001' (ABS Catalogue No 4603.0, Australian Bureau of Statistics, 4 September 2002); Dennis Trewin, '2003 Year Book Australia' (No 85, ABS Catalogue No 1301.0, Australian Bureau of Statistics, 2003).

⁶⁶ William McLennan, 'Environment Protection Expenditure, Australia 1994-95 and 1995-96' (ABS Catalogue No 4603.0, Australian Bureau of Statistics, 25 March 1998) 32.

⁶⁷ 1991 EM, above n 20, 5

⁶⁸ Productivity Commission, 'Industry Commission Annual Report 1989-90' (Appendix 13, Budgetary assistance) 206

It is also informative to examine the relationship between mining earnings and expected rehabilitation expenditure. In a 2001 report prepared for the Department of Industry, Science and Resources, the Australian Bureau of Agricultural and Resource Economics (ABARE) stated that annual provisions for rehabilitation expenditure (as determined by the value of rehabilitation bonds) had risen from around \$160 million to \$285 million in the decade while gross value of mine production for the 1998-99 income year equated to \$34.6 billion.⁶⁹ Expected rehabilitation expenditure represented only 3.3 per cent of the gross value of production. By 2011 the expected expenditure was \$420.7 million⁷⁰ with 2009-10 industry operating profit before tax exceeding \$50 billion.⁷¹

Two specific examples: the White Dam Gold Project's forecasted rehabilitation expenditure represents a mere 0.02 per cent of its 2012 profit margin on production.⁷² The Wonarah Phosphate Project, on the other hand, has apportioned 0.09 per cent of its projected net revenue from mining operations for the rehabilitation of the site.⁷³

From this it can be deduced that, generally and on average, expenditure incurred by the mining industry on rehabilitation costs is a small percentage of their profits. This, in turn, appears disproportionately low when compared to the cost incurred by governments in stabilising and/or rehabilitating abandoned mine sites. As previously mentioned, Mount Todd is expected to cost in excess of \$100 million to rehabilitate. This seeming disparity and the insignificance in respect of total earnings raises questions of whether the industry needs government, and hence taxpayer, support. In other words, it is arguable that mining companies should self fund the rehabilitation of mine sites without the benefit of a tax expenditure.

⁶⁹ Allen et al, above n 35.

⁷⁰ Construction Material Processors Association, 'CMPA Submission: Extractive Sector Rehabilitator bonds' 28 March 2011 <www.cmpavic.asn.au/downloads/F-PAS-150.pdf> at 30 November 2012.

⁷¹ Brian Pink, '2012 Year Book Australia' (No 92, ABS Catalogue No. 1301.0, Australian Bureau of Statistics, 2012) 571.

⁷² Derived from Exco Resources Ltd, *2012 Annual Report* <<http://www.excoresources.com.au/uploads/downloads/Exco-2012-AR.pdf>>.

⁷³ Derived from Minemakers Limited, 'Development Projects Wonarah Rock Phosphate' <<http://www.minemakers.com.au/projects-development-wonarah.php>>.

IV LAND DEGRADATION

4.1 Introduction

Over half of Australian agricultural land is considered degraded.⁷⁴ A significant contribution to this has been the clearing of over 80 per cent of native vegetation.⁷⁵ Environmental issues associated with land degradation include soil erosion, siltation and salinity. By definition, land degradation threatens the quality and quantity of soil resources⁷⁶ which, in turn, threatens productivity yields and hence income.

While technological developments have compensated for reduced yields resulting from land degradation, studies have identified yield declines due to land degradation as high as 30 per cent.⁷⁷ Gross output on farm production in 2009-2010 was \$48.7 billion,⁷⁸ nearly double the \$25 billion in 2003-2004.⁷⁹ Yield declines of even one or two per cent on adversely affected farmland would result in significant lost revenue even apart from the environmental consequences of poor land management. The threat to the viability of Australia's agricultural industries resulting from land degradation can be put another way: degradation costs \$1.5 billion annually in lost production or around six per cent of agricultural production.⁸⁰

The importance of native vegetation, food security and pristine landscapes to future generations cannot be evaluated in monetary terms. Yet the benefits are increasing as the adverse affects of excessive clearing become more defined.⁸¹ As a result, there are clear arguments in favour of public intervention in private rural and farmland management.

⁷⁴ Norman J Thomson, 'Fiscal Incentives for Australian Bushland' (1986) 10(5) *Environmental Management* 591.

⁷⁵ *Ibid.*

⁷⁶ Such as topsoil, embedded nutrients and moisture as well as soil biology.

⁷⁷ R Junor, D Marston and S Donaldson, 'A situation statement of soil erosion in the Lower Namoi area' (Soil Conservation Service of New South Wales, 1979).

⁷⁸ National Farmers Federation, 'NFF Farm Facts: 2012' (National Farmers Federation, 2012).

⁷⁹ Productivity Commission, Trends in Australian Agriculture (Research paper, 2005).

⁸⁰ Paul Gretton and Umme Salma, 'Land Degradation and the Australian Agricultural Industry' (Staff Information Paper, Industry Commission, 1996); Colin Mues, Lynelle Moon and John Grivas, 'Land Care Tax Provisions: Deductions versus alternative instruments' (ABARE research Report 96.6, 1996).

⁸¹ Thomson, above n 75.

Contained in subdivision 40-G of ITAA97, section 40-630 provides an immediate deduction for capital expenditure incurred, subject to certain conditions.

4.2 History

It would appear that, from the onset of income tax legislation, primary producers were able to deduct certain capital expenditure expended on rural land. Even the first taxation Royal Commission, established on 24 September 1920 and chaired by Warren Kerr, inquired into, inter alia, special rules for primary producers, 'particularly in relation to losses resulting from adverse weather conditions'.⁸²

In reviewing available extrinsic legislative material, the first reference to deductions for capital expenditure for 'improvements to pastoral properties' was made in 1941 when discussing the 'war tax'.⁸³ The next reference, in 1958, specifically referred to section 75 ITAA36 as allowing a tax deduction to primary producers for the capital cost of 'developing rural lands' in Australia.⁸⁴ That is, for the clearing, draining and otherwise preparing land for agriculture or pasture.

In 1963 the definition of 'primary production' was extended to include 'forest operations'.⁸⁵ That forestry operations should be treated as primary production was an outcome of the Commonwealth Committee on Taxation (Ligertwood Committee).⁸⁶ The amending legislation also extended the section 76 deduction for expenditure on fences to cover constructing or altering a fence to prevent animals pests entering land used in primary production and to mitigate the effects of deposits of mineral salts. Previously expenditure was only deductible if it was incurred on acquiring wire or wire netting and placing it in position on a fence.⁸⁷

From 21 August 1973, it was no longer possible to obtain a section 75 deduction unless there was a pre-existing contract between the primary producer and a supplier of

⁸² Report of the Royal Commission on Taxation, First Report (2 November 1921) iii-ix.

⁸³ Treasurer Chifley, Second Reading Speech, Income Tax Assessment Bill (No 2) 1941.

⁸⁴ Explanatory Memorandum, Income Tax and Social Services Contribution Assessment Bill 1958, 1.

⁸⁵ Explanatory Memorandum, Income Tax and Social Services Contribution Assessment Bill (No. 2) 1963, cl 4.

⁸⁶ Commonwealth Committee on Taxation *Report* (G. Ligertwood, Chair, 1961).

⁸⁷ Explanatory Memorandum, above n 85, cl 24.

relevant goods and services.⁸⁸ The expenditure would only be deductible either by way of depreciation under the general depreciation provisions or in equal annual instalments over 10 years in accordance with new section 75A.⁸⁹ Within the scope of section 75A(1) was

- (a) the eradication or extermination of animal or vegetable pests from the land;
- (b) the destruction and removal of timber, scrub or undergrowth indigenous to the land;
- (c) the destruction of weed or plant growth detrimental to the land;
- (d) the preparation of the land for agriculture;
- (e) ploughing and grassing the land for grazing purposes;
- (f) the draining of swamp or low-lying lands where that operation improves the agricultural or grazing value of the land;
- (g) preventing or combating soil erosion or flooding of the land; or
- (h) conserving or conveying water for use in carrying on primary production on the land.

Section 76 was also terminated under the same terms as section 75 with the ordinary depreciation provisions applying to post 20 August 1973 expenditure.⁹⁰

These amendments were only to last seven years. In his policy speech leading up to the 1980 election, then Prime Minister Malcolm Fraser announced full tax deductibility for capital expenditure on soil conservation by a primary producer.⁹¹ This was costed at \$1 million and became effective from 1 October 1980. The kinds of expenditure to benefit from this measure were those that were then deductible by way of equal instalments over 10 years and, for fencing, deductible under the depreciation provisions. Specifically, subsection 75A(1)(a), (c), and part of (g) relating to soil erosion were transferred to new section 75D as subsection (1)(a), (b) and (c).⁹² Section 76 became new subsection 75D(1)(d)⁹³ while (e) and (f) related to capital expenditure incurred in the construction of levee banks or similar improvements having like uses and construction of measures to control salinity or assist in drainage control but not extending to the draining of swamp or low-lying land, respectively. Anti-flooding expenditure would remain in section 75A. Section 75D therefore became the 'soil conservation' measures.

⁸⁸ Memorandum, Income Tax Assessment Bill (No 5) 1973 cl 17.

⁸⁹ Explanatory Memorandum, Income Tax Assessment Bill (No 5) 1973 cl 18.

⁹⁰ Ibid cl 19.

⁹¹ Malcolm Fraser, Policy Speech delivered at Melbourne, 30 September 1980 <<http://electionspeeches.moadoph.gov.au/speeches/1980-malcolm-fraser>>

⁹² Explanatory Memorandum, Income Tax Assessment Amendment Act (No. 6) 1980 cl 8, 9.

⁹³ Ibid cl 4, 9.

Effective 23 August 1983, the land clearing provisions of section 75A were abolished.⁹⁴ These were the initial clearing of land by the destruction and removal of timber, scrub or undergrowth indigenous to the land, the initial preparation of the land for agriculture, the ploughing and grassing of land to be used for grazing purposes and the draining of swamp land. The then Treasury Keating specifically stated that, while having no impact on deductions for capital expenditure on soil and water conservation, the amendment will 'remove the encouragement through the tax system of environmentally and economically unsound activities' and estimated to save \$3 million a year.⁹⁵

The availability of the immediate deduction was tightened in 1985 by inserting a 'primarily and principally' test.⁹⁶ Expenditure on all the subsection 75D(1) operations, except for (e) being the construction of levee banks or similar improvements, now were required to be incurred primarily and principally for that purpose. This was to differentiate between expenditure that was deductible immediately (under section 75D) and that which was deductible over five years (under section 75B). Subsection 75A(h), dealing with conserving or carrying water had been enacted as its own section 75B in 1980⁹⁷ permitting full deductibility in the year the expenditure was incurred.⁹⁸ Full deductibility was later withdrawn and replaced with deductions in equal instalments over five years.⁹⁹

At the same time as the introduction of the primarily and principally test, the scope of section 75D was broadened: references to 'soil erosion' and 'salinity' was replaced with 'land degradation'. The Explanatory Memorandum explains that this term was intended to include the 'decline of soil fertility or structure, degradation of natural vegetation, the effects of deposits of eroded material and salinisation'.¹⁰⁰

⁹⁴ Explanatory Memorandum, Income Tax Assessment Amendment Act (No. 4) 1983 cl 7.

⁹⁵ Paul J Keating, Second Reading Speech, Explanatory Memorandum, Income Tax Assessment Amendment Act (No. 4) 1983, 5.

⁹⁶ Explanatory Memorandum, Taxation Laws Amendment Bill (No. 4) 1985 cl 12.

⁹⁷ Six months prior to the enactment of section 75D.

⁹⁸ Explanatory Memorandum, Income Tax Assessment Amendment Act (No. 3) 1980 cl 4,5.

⁹⁹ Explanatory Memorandum, Taxation Laws Amendment Bill (No. 4) cl 11.

¹⁰⁰ Ibid 52.

Significant amendments were again made in 1991 following the review of the Landcare objectives.¹⁰¹ They gave effect to the undertaking of the Government announced in the July 1989 Statement of the Environment and in the 1990-91 Budget. In the first place, section 75D was extended to all taxpayers who carried on a business on and from rural land, excluding mining and quarrying operations.¹⁰² Secondly, the deduction for the cost of fences was no longer limited to fencing already degraded land.¹⁰³ Examples given were fencing off an area where the soil is lighter or where there is valuable native vegetation in order to prevent degradation through overgrazing. The only requirement being that the fences were erected in accordance with an 'approved whole farm plan', now referred to as a 'land management plan'. The prevention of land degradation became the qualifying criterion.

As part of TLIP, the landcare provisions (as they were now referred to) were rewritten into ITAA97 as subdivision 387-A.¹⁰⁴ While it was not intended to change its meaning, the rewrite did change the sentence structure and ordering. As with the mining site rehabilitation provision, the introduction of the Uniform Capital Allowance regime in 2001 applied to the landcare provisions. Contained in subdivision 40-G, this renumbering also did not change the effect of the special primary producer provisions.¹⁰⁵

The most recent significant amendments to the landcare provisions came in 2005.¹⁰⁶ In the first instance, access to the tax concession was extended to rural land irrigation water providers. Secondly, the definition of 'landcare operation', used to determine eligible capital expenditures for the landcare tax concession, was amended to include repairs of a capital nature (in addition to alternations, additions and extensions already legislated for). This was further broadened to include a structural improvement, repairs of a capital nature, or alteration, addition or extension that is 'reasonably incidental' to

¹⁰¹ Originally a grassroots movement established in 1985, Landcare became a national program in July 1989 when the Australian Government, with bipartisan support, announced its 'Decade of Landcare Plan' and committed \$320 million to fund the National Landcare Program.

¹⁰² 1991 EM, above n 20, 127-128.

¹⁰³ Ibid 128-129.

¹⁰⁴ Explanatory Memorandum, Tax Law Improvement Act 1997 Ch 11. The corresponding provisions are sections 387-55 and 387-60.

¹⁰⁵ Explanatory Memorandum, New Business Tax System (Capital Allowances) Act 2001 cl 6.3.

¹⁰⁶ Explanatory Memorandum, Tax Laws Amendment (2004 Measures No. 6) Act 2005 cl 6.7, 6.24.

the assets already deductible under a landcare operation associated with a levee or similar, or drainage works.¹⁰⁷ The examples given by the Explanatory Memorandum are that of a bridge constructed over a drain that was constructed to control salinity or a fence constructed to prevent livestock entering a drain that was constructed to control salinity but not the bulldozer that was used to construct the drain.

4.3 Policy

At an international level, the ratification of the UN Convention to Combat Desertification by 193 countries, including Australia, reflects a global consensus about the need to prevent and reverse land degradation.¹⁰⁸ The land degradation provision was already well established when the federal and state governments endorsed the National Strategy for Ecologically Sustainable Development in 1992.¹⁰⁹ This Strategy resulted in the establishment of the National Landcare Program, now the Caring for our Country initiative.¹¹⁰

Section 40-630 ITAA97, and its forerunner section 75D ITAA36, provide a 100 per cent deduction in the year of expenditure for capital works that are primarily for the control or prevention of land degradation. This provision is designed to provide an incentive 'to confront the problems associated with erosion, salinity and other forms of land degradation'¹¹¹ and to encourage primary producers and users of rural land to undertake capital expenditure that assists in the long-term sustainable use of the land.¹¹² The land degradation measures, also referred to as the Landcare provisions, provide an incentive for farmers and other businesses conducted on rural land to undertake capital works to combat land degradation. Being capital, they are explicitly designed to provide investment incentives. Examples of Landcare operations are the construction of drainage works to combat salinity, the construction of a levee or the

¹⁰⁷ Ibid, cl 6.26.

¹⁰⁸ Commonwealth Intergovernmental Working Group for the UNCCD, 'Australian Actions to Combat Desertification and Land Degradation' (National Report by Australia on Measures Taken to Support Implementation of the United Nations Convention to Combat Desertification, April 2002).

¹⁰⁹ Ecologically Sustainable Development Steering Committee, *National Strategy for Ecologically Sustainable Development* (Australian Government, 1992).

¹¹⁰ Department of Agriculture, Fisheries and Forestry, *National Landcare Program 2009* <http://www.daff.gov.au/natural-resources/landcare/national_landcare_program>.

¹¹¹ Parliamentary Research Service, Taxation Laws Amendment Bill (No. 2) 1991, 2.

¹¹² Explanatory Memorandum, Tax Laws Amendment (2004 Measures No. 6) Act 2005 cl 6.4.

erection of fencing to limit further degradation and assist in reclaiming the affected area.¹¹³

The relationship between the land and the environment has always been a factor of Australian public policy.¹¹⁴ Determining the extent of land degradation and devising mitigation solutions has been on policy agendas for many decades and certainly predates the increasing societal concern over environmental issues from the early 1990s. These include processes to manage the use of surface and ground waters, measures to improve water quality, financial incentives for improved vegetation management, diversifying the commercial use of agricultural land and providing comprehensive and integrated regulatory frameworks.¹¹⁵

Throughout the progression from section 75 ITAA36 to section 40-630 ITAA97 there have been numerous government-initiated reports and inquiries regarding issues of land degradation and the articulation of policy agendas for sustainable resource management in the primary production sector, addressing key questions such as how to cost and treat land degradation.¹¹⁶ These included the development of land use policy,¹¹⁷ soil conservation policy,¹¹⁸ and public good conservation.¹¹⁹ The interrelationship between the economy and the environment was also prominent in these reports. For example, one government standing committee, when reviewing the impact of taxes on land degradation (among other areas), noted the lack of integration between economic and environmental policy making.¹²⁰

¹¹³ ITAA97 s 40-635.

¹¹⁴ Commonwealth Intergovernmental Working Group, above n 108.

¹¹⁵ Ibid.

¹¹⁶ Examples include Australian Standing Committee on Soil Conservation (1971), Commonwealth and State Government Collaborative Soil Conservation Study (1978) and Department of Environment Conference on Conservation and the Economy (1984).

¹¹⁷ Senate Standing Committee on Science, Technology and the Environment, *Land Use Policy* (AGPS, 1984).

¹¹⁸ Department of Environment, Housing and Community Development, 'A basis for soil conservation policy in Australia' (Report No 1, AGPS, 1978).

¹¹⁹ House of Representatives Standing Committee on Environment and Heritage, 'Public good conservation: Our challenge for the 21st century' (AGPS, 2000).

¹²⁰ House of Representatives Standing Committee on Environment and Conservation, 'Fiscal Measures and the Achievement of Environmental Objectives' (AGPS, 1987).

While concern about land degradation problems amongst Australian landholders is now well established, many do not recognise the multiplicity of subtle or insidious manifestations. In 1997 ABARE conducted an inquiry into the land degradation tax concession and its effect on the undertaking of landcare works.¹²¹ It found that the tax deduction was probably the most efficient tool available to provide broad-based incentives for landcare works with an uptake rate of around 60 per cent. Another study found that some form of landcare work is undertaken on more than one third of all farms.¹²² However, such landcare work may or may not be significant in terms of ameliorating land degradation.¹²³ It is also important to note that reviews of landcare tax provisions acknowledge the argument that tax deductions provide greater benefit to primary producers with high taxable incomes.¹²⁴ The regressive distribution of benefits under a system of tax deductions has also been recognised in other studies.¹²⁵

It is clearly evident that environmental policy played a major role in shaping the land degradation provisions not only in respect of the operative provision of section 40-630 but also in regard to the eligible activities listed in section 40-635.

4.4 Analysis

From an environmental sustainability perspective, 'landcare operations' are defined narrowly as they do not cover expenditure, for example, in nature conservation areas. Further, it is unclear whether fencing off areas of bushland is included. While this was an example given by the explanatory memorandum introducing the 1991 amendments, the latter was qualified as being in order to prevent degradation through overgrazing.¹²⁶ Areas of bushland have ecological importance even apart from their soil and water

¹²¹ ABARE, 'Landcare Taxation Arrangements' (Evaluation Report, Department of Primary Industries and Energy, February 1997).

¹²² John Cary et al, 'Human and Social Aspects of Capacity to Change to Sustainable Management Practices' (Report for the National Land and Water Resources Audit Theme 6, Projects 6.2.2 and 6.3.4, Bureau of Rural Sciences, June 2001).

¹²³ John Cary and Ian Thompson, 'Some Resource Management Realities in Environmental Policy', in Justine Graham, Ian Reeve and David Brunckhorst (eds) *Landscape Futures: Social and Institutional Dimensions. Proceedings of the 2nd International Symposium on Landscape Futures* (Institute for Rural Futures, University of New England, 2002).

¹²⁴ Department of Primary Industries and Energy, 'Review of taxation arrangements relating to the prevention and treatment of land degradation' (Paper prepared for the Minister of Resources, March 1990).

¹²⁵ J Haynes and M Sutton, 'Taxation Measures and Soil Conservation' (Australia Bureau of Agricultural Economics, Occasional Paper 93, 1985).

¹²⁶ 1991 EM, above n 20, 128-129.

conservation values. In addition, without a definition of 'pest', the provision may provide tax deductions for eradicating or exterminating native animals as well as introduced species and for the clearing of native vegetation and regrowth.

Three activities most commonly cited by primary producers as deserving greater government assistance are soil and pasture improvements that cannot be claimed as operating expenses, catchment planning and protection of river corridors.¹²⁷ Environmentalists, on the other hand, are more concerned that environmental issues, such as biodiversity loss, may not be sufficiently addressed.¹²⁸

A criticism that has been levied is that only activities conducted for profit-making purposes can be considered primary production; a non-profit organisation can never be a primary producer.¹²⁹ This result is inevitable when using the income tax legislation to deliver environmental outcomes – taxable income is required in order to benefit from a tax deduction. A similar argument can be presented for hobby farmers. However land degradation does not discriminate between landholders. It is acknowledged that landholders who are not taxpayers only as a result of their land holdings¹³⁰ need incentives to invest in natural resource management.¹³¹

Arguably, the most acute problems associated with land degradation are sedimentation and salinisation. These are referred to as problems on non-point pollution, that is, it is either impossible or excessively costly to determine the contributions made by individual landholdings.¹³² It is therefore not feasible to penalise the primary producers individually for imposing external costs in direct proportion to the size of the costs. In

¹²⁷ Mues et al, above n 80.

¹²⁸ R Ashby and Lachlan Polkinghorne, 'Taxation of Primary Producers and Landholders: Improving Natural Resource Management Outcomes' (RIRDC Publication No 04/026, A report for the Rural Industries Research and Development Corporation, 2004).

¹²⁹ Douglas, above n 8.

¹³⁰ Although they may be taxpayers for other reasons such as salary and wage earners.

¹³¹ Ashby and Polkinghorne, above n 128.

¹³² Geoff Edwards, 'Commentary' in Anthony Chrisholm and Robert Dumsday (eds) *Land Degradation: Problems and policies* (Cambridge University Press, 1987).

one study it was estimated that 96 per cent of the external costs associated with dryland salinity are borne by the general community.¹³³

Problems such as these generate the largest off-farm costs. Incentives to landholders to invest in addressing landcare works would result in the greatest benefits to society, especially if these works would not be undertaken without the incentive. The impacts from land degradation extend beyond their geographical location and include issues related to food security and environmental health. However, it is difficult to accurately quantify the off-farm (or off-site) costs of degradation and hence equally difficult to match the level of incentive to the level of societal benefit.

As stated in the 1991 Parliamentary Digest, section 75D was designed to provide an incentive 'to confront the problems associated with erosion, salinity and other forms of land degradation'.¹³⁴ As noted above, the original insertion of section 75D providing full tax deductibility for capital expenditures on soil conservation was costed at \$1 million per annum. While the amendments are peppered with anticipated costs and savings, none of these amount to more than \$5 million.¹³⁵

There is limited data on annual expenditure on land degradation available from the Australian Bureau of Statistics, covering only the periods 1991-92 to 1996-97.¹³⁶ This includes both capital and non-capital expenditure whereas the tax expenditure is restricted to capital expenditure only.

Treasury's Tax Expenditures Statements generally show the combined landcare deduction for primary producers, the three-year write-off expenditure on water facilities for primary producers and, in later years, the water facilities and the land care concession for irrigation water providers, ranging between \$20 million and \$30

¹³³ Suzanne Wilson, 'Formulating cost efficient salinity management plans: a case study in the Kyeamba Valley' (Paper presented to the National Conference of Land Management for Dryland Salinity Control Conference, Bendigo, October 1993).

¹³⁴ Parliamentary Research Service, Taxation Laws Amendment Bill (No. 2) 1991, 2.

¹³⁵ See, for example, John Button, Second Reading Speech, Taxation Laws Amendment Bill (No. 2) 1991, 3; Keating, above n 95, 5.

¹³⁶ Financial years run from 1 July to 30 June.

million.¹³⁷ The only exception was 2007 where the landcare deduction for both primary producers and irrigation water providers were shown individually as nil.¹³⁸ It is therefore not possible to determine, nor even estimate, what the land degradation tax concession is likely to be costing taxpayers.

It is submitted that the landcare and the water facilities are not comparable for two reasons. Firstly, landcare expenditure is written off immediately while expenditures on water facilities are written off over three years.¹³⁹ Secondly, qualifying rural businesses are able to claim the deduction for landcare expenditure but not for water facilities.¹⁴⁰

In a survey conducted for the 1993-94 income year, the average size of landcare expenditures claimed amounted to \$2,800 with a total cost to the revenue of around \$10.9 million.¹⁴¹ The most common activities were tree establishment and weed control, although the expenditure per farm was relatively small. The largest individual landcare investments were in earthworks to control erosion or treat salinity. Further, the more profitable farms were more likely to undertake landcare expenditures and also spent more, on average, on landcare works. Expenditure to control salinity or fencing to separate land classes were more likely to be claimed under the landcare provision in order to take advantage of the accelerated rate of depreciation offered by the tax concession. Expenditure on pest management, however, was more likely to be claimed as normal operating expenses due to there being no timing or other advantage to counteract the increased compliance costs involved in separating the expenditure.

The survey also concluded that only about half of the \$10.9 million cost was directly attributable to the land degradation provision, the other being claimed as normal operating expenditure. No mention was made of the capital/non-capital differential. The survey also found that, if the capital items could otherwise have been depreciated, then the present value of tax revenue foregone as a result of claims may be less than \$2

¹³⁷ See, for example, Treasury, 'Tax Expenditures Statement 2009' (2010); Treasury, 'Tax Expenditures Statement 2008' (2009); Treasury, 'Tax Expenditures Statement 2004' (2005); Department of the Treasury, 'Tax Expenditures Statement 1996-97' (1997).

¹³⁸ Treasury, 'Tax Expenditures Statement 2007' (2007).

¹³⁹ Cf ITAA97 ss 40-630 and 40-540.

¹⁴⁰ Cf ITAA97 ss 40-630(1)(b) and 40-525(1).

¹⁴¹ Mues et al, above n 80.

million. For those with a landcare issue but not making any landcare investment, the reason was inadequate cash available. This is highlighted by an analysis covering the 2000-01 income year that found that 26 per cent of all farms made no farm cash income while 23 per cent made less than \$25,000, totalling 49 per cent.¹⁴²

The 1997 ABARE inquiry also raised concern about the low level of uptake of the provisions. This resulted in the introduction of the tax offset which, as noted above, was short-lived. In a survey of primary producers it was suggested that a tax deduction of 150 per cent to 200 per cent would be a greater incentive to invest in measures to combat land degradation.¹⁴³ The current deduction was considered inadequate considering the time spent on the landcare work and the fact that direct tax deductions could be gained from other activities that more directly increased farm income. In recommending a deduction of 120 per cent, a report for the Rural Industries Research and Development Corporation it was held that the 'extra deduction must be high enough to encourage and identify natural resource management expenditure ... [but] be viewed against the cost to tax revenue'.¹⁴⁴ It was considered that this would have a dual benefit: additional expenditure on landcare activities and, being separately disclosed, easier for policy-makers to measure.

Estimates of the impact on land degradation vary widely. During the 1970s and 1980s there were four large-scale studies that focused of the extent and impacts of land degradation. These provided a perspective of the extent of the financial problem posed by land degradation. The first, organised by the Australian Standing Committee on Soil Conservation in 1971, estimated that the cost of controlling soil erosion with structural measures in non-arid regions was \$350 million.¹⁴⁵ This was followed by a three-year study (1975-78) known as the Commonwealth and State Government Collaborative Soil

¹⁴² Ashby and Polkinghorne, above n 128.

¹⁴³ Suzanne Jenkins, 'Native Vegetation on Farms Survey 1996' (Resource Management Technical Report No 164, Department of Agriculture, Western Australia, 1997).

¹⁴⁴ Ashby and Polkinghorne, above n 128, 47.

¹⁴⁵ Michael Blyth and Andrew McCallum, 'On-site costs of land degradation in agriculture and forestry' in Anthony Chrisholm and Robert Dumsday (eds) *Land degradation: Problems and policies* (Cambridge University Press, 1987) 79-98; Ian Hannam, 'Soil Conservation in Australia' (2003) 58(6) *Journal of Soil and Water Conservation* 112A.

Conservation Study.¹⁴⁶ Published in 1978 by the Department of Environment, Housing and Community Development, it consisted of 12 separate reports. It was estimated that the cost of treating all the degraded land in Australia was \$675 million.

The other two large-scale studies focused on measuring the costs of salinity degradation. In 1982 The Working Party on Dryland Salting in Australia reported that scalding (the major form of dryland salting in Australia) affected 3.78 million hectares, resulting in \$5.4 million in annual productivity losses to agriculture and would cost \$18.1 million to repair.¹⁴⁷ A consultant's report, however, put productivity losses at \$22 million per year with abatement costs of land salinisation at \$10 million per year.¹⁴⁸

What the above discussion shows is that there is little semblance between estimated costs of abatement and the costs incurred by primary producers, whether or not the tax deduction is taken.

Land degradation is a complex problem and demands a comprehensive approach. The problems of land degradation, the divergence between private and social objectives in land use and the lack of private resources makes some intervention by the government inevitable. Nevertheless, it is thought that the environment is increasingly being used as a justification to financially support farmers.¹⁴⁹

Notwithstanding the tax concession as an incentive, over the period 1990 to 2000, Australia had the sixth highest annual rate of land clearing in the world.¹⁵⁰ It is also the only developed nation in the top 20 land-clearing nations.¹⁵¹ This raises questions over the effectiveness of the tax exemption, at least as currently drafted. A broader application and/or an increased rate should be considered.

¹⁴⁶ Department of Environment, Housing and community Development, *Commonwealth and State Government Collaborative Soil Conservation Study report* (AGPS, 1978).

¹⁴⁷ Working Party on Dryland Salting in Australia (Report on salting of non-irrigated land in Australia, Soil Conservation Authority, Victoria for Standing Committee on Soil Conservation, 1982).

¹⁴⁸ A Peck, J Thomas and D Williamson, 'Water 2000: Consultant's Report No. 8: Salinity Issues Effects of Man on Salinity in Australia' (AGPS, 1983).

¹⁴⁹ Eric Bignal, 'Using an ecological understanding of farmland to reconcile nature conservation requirements, EU agricultural policy and world trade agreements' (1998) 35(6) *Journal of Applied Ecology* 949.

¹⁵⁰ D Lindenmayer and M Burgman, *Practical Conservation Biology* (CSIRO, 2005).

¹⁵¹ *Ibid.*

V COMPARATIVE ANALYSIS

Capital expenditure is not normally deductible unless a particular provision makes it so. Those that do usually allow deductions to be claimed over a period approximately corresponding to the consumption of the benefit from the expenditure. However, a few provisions allow for capital expenditure to be fully deducted in a single income year notwithstanding that the benefits will be consumed over a longer period. These provisions serve particular policy objectives, usually to encourage certain activities.¹⁵² Two such provisions are mine site rehabilitation and land degradation (or landcare). A comparison of their features is contained in table 1.

| | Mine site rehabilitation | Land degradation |
|----------------------|---------------------------------|---|
| Policy driver | Commercial | Environmental |
| Environmental driver | Actual damage | Preventative and actual damage |
| Constraint | Industry | Industry/activity |
| Scope (applicant) | Mining and quarrying | Primary producers, water irrigators and eligible rural businesses |
| Scope (application) | On-site | On-site |
| Deductions | Capital and non-capital | Capital only |
| Test | None | Primarily and principally |

Table 1: Comparative analysis

¹⁵² Explanatory Memorandum, New Business Tax System (Consolidated and Other Measures) Act (No. 1) 2002.

VI CONCLUSION

The income tax system influences the way taxpayers invest in environmental projects. Using the tax system to encourage investment in natural resource management is both wise and desirable.¹⁵³ While policy makers are generally loathe to use the tax system to encourage one form of investment over another, encouraging private investment in natural resource management is desirable if it provides both a public and private benefit and links the environmental project work to the direct investment made by governments.¹⁵⁴ In this case the government investment is the revenue foregone.

As evident from the discussion on the introduction of the mine rehabilitation and land degradation tax expenditures, any expected cost has been severely underestimated. This is often an outcome of the tax legislative process as there is no outlay of funds (as with direct payments or grants) and the real cost will only be incurred at some future date in the form of reduced tax collections.¹⁵⁵

Once established, the tax expenditure is administered as part of the tax system and therefore not monitored to the same extent as spending programs.¹⁵⁶ A report by the National Commission of Audit also noted that tax expenditures were not accurately costed nor within direct ministerial control of spending in relevant portfolios and concluded that 'tax concessions are a largely non-transparent form of assistance' which 'reduces accountability' and 'increases the likelihood that poorly targeted concessions will remain on offer'.¹⁵⁷

Nevertheless, once implemented tax expenditures become entrenched and difficult to abolish. From an environmental perspective, this is an advantage especially as taxation-based measures provide additional support for environmental management projects where the private benefits are less than the overall cost of the project.¹⁵⁸

¹⁵³ Ashby and Polkinghorne, above n 128.

¹⁵⁴ Ibid.

¹⁵⁵ Wayne Gumley, 'A case for reform of tax expenditures applicable to agriculture in Australia' (2006) 2(4) *International Journal of Environment, Workplace and Employment* 303.

¹⁵⁶ Julie Smith, 'Tax expenditures: the \$30 billion twilight zone of government spending' (Information and Research Services Research Paper, No 8, 2003).

¹⁵⁷ National Commission of Audit, 'Report to the Commonwealth Government' (June 1996) [11.2].

¹⁵⁸ Douglas, above n 8.

What emanates from the above discussion is that Australian tax policy is subject to the influence of various groups at any point in time and that influence is dependent, to some extent, on which political party is in government. A criticism of Australian tax policy is that it 'is subject to frequent change, is very complex and is lacking in clear direction. Much publicised policy announcements tend to be watered down at the implementation stage and their availability and appeal is severely restricted.'¹⁵⁹

This then raises the question: income tax and environmental provisions – green gold or lead weight?

Further research is required to ascertain the effect these tax expenditures have had on encouraging rehabilitation of mine sites and the prevention and rectification of land degradation and whether the environmental benefits justify subsidisation by taxpayers. A good starting point would be reliable data with respect to anticipated costs, actual expenditure and tax expenditure claims.

¹⁵⁹ Margaret McKerchar and Cynthia Coleman, 'The Australian Income Tax System: Has it helped or hindered primary producers address the issue of environmental sustainability?' (2003) 6(2) *Journal of Australian Taxation* 201.