

# REWRITING TAX LEGISLATION – CAN POLISHING SILVER REALLY TURN IT INTO GOLD?

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*With increasing levels of complexity, bulging statute books and pleas for simplification, the 1990s saw three Commonwealth jurisdictions pursue similar, yet deceptively different, paths towards the intended outcome of tax law simplification. Retaining the underlying core concepts and with minimal critical examination of tax policy processes, Australia, New Zealand and the United Kingdom embarked upon three journeys towards their (arguably) utopian goals of tax law simplification through rewriting their tax legislation. New Zealand and the United Kingdom have 'finished' their 'marathon' projects (receiving, in the Olympian parlance, the 'gold' and 'silver', respectively), while Australia is closing in on the 'bronze' with an aspirational (but now unachievable) target of completing their project in 2013. This paper will build upon prior research by examining the journeys of these three countries, focussing on the 'flaws', inherent to varying degrees, in their roadmaps for their respective marathon journeys. It also highlights a number of the memorable milestones, with the view of offering perspectives on their various 'successes' and 'failures'. Furthermore, the paper will contemplate the question*

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*'Where to from here?' for each country. While it would be unfair to suggest that the manner in which the three rewrite projects were structured could only at best produce something akin to 'fool's gold' without working towards effective simplification, the act of seeking to turn silver into gold is usually tax alchemy, even if the result may glisten that little bit more!*

## 1. INTRODUCTION

In the beginning there were taxes and they were simple (no, this cannot be true unless this paper is to be a fairy tale!). Moving on, the early 1990s were a time when increased complexity in tax legislation received heightened attention by policymakers in numerous jurisdictions. Tax advisers 'successfully' convinced politicians of the need for action to stem this complexity, at least to the degree of simplifying the language of the statutes and employing plain English drafting techniques. Australia, New Zealand (NZ) and the United Kingdom (UK) are examples of three jurisdictions that responded to the calls for simplification. Each jurisdiction attempted to simplify their legislation through rewriting it in a manner that would make it more comprehensible, but without any significant change to underlying policies and concepts.

Other countries, such as the United States (US), have debated the issue of simplification, but the US has not taken any concerted action in this regard (and does not appear to be moving in this direction either). Canada has also embarked upon extensive legislative simplification by way of plain English drafting at the provincial level (as well as at the federal level through, for example, the *Employment Insurance Act*). However, a review of these developments is beyond the scope of this paper. The South African Government announced in 2009 that it would be rewriting its income tax legislation, which

at that time was nearly 50 years old.<sup>1</sup> A review of this project, once substantial progress has been made, is worthy of analysis.

Unsurprisingly, with major rewriting programmes undertaken in Australia, NZ and the UK, there has been extensive discourse. Academics, members of each country's rewrite teams and tax practitioners have publicly debated, argued, defended and offered their opinions on the successes and inherent value of their respective countries rewrite projects. Indeed, a number have offered some comparative observations between the three countries' projects along their journeys. However, the literature comparing the themes and lessons from all three of these projects to date is sparse. To be fair, the delays of the Australian policymakers through putting to one side their rewrite project while pursuing other major policy changes, only returning to the rewrite project in the last two to three years, has hampered meaningful comparison being made. In comparison, NZ, the first to finish, completed its 'race' with full implementation of its rewritten income tax legislation in 2008. The UK, as first runner up, completed its journey in 2010-11. Australia, in choosing to change its focus, in 2009 sought to complete its project by late 2013, although completion is clearly now unachievable by this date.

Consequently, the motivation for this paper is to contribute to this 'gap' in the literature through providing a high-level comparative analysis of the three tax rewrite projects. An overarching focus is to confirm whether prior assertions that any attempt to reduce complexity and enhance simplicity through rewriting and reorganising text, while working within the constraints of existing inherently complex concepts and policy, cannot possibly succeed. To purport otherwise is an example of tax alchemy. Alchemy is the ancient practice of attempting to

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<sup>1</sup> See <<http://www.taxtalkblog.com/?p=2252>>.

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turn base metals into gold. In a tax context, an example is seeking to turn capital expenditure into deductible expenditure. More pertinently, this may be likened to turning inherently complex tax legislation into beautifully written prose that is less complex and enables taxpayers' tax liabilities to be ascertained with less difficulty and expense.

Nevertheless, it is not intended that this paper will find that the three rewrite projects were 'complete failures' in terms of addressing complexity. However, with the benefit of hindsight, it is questionable whether these projects should have carried on in the manner that they did. Significant refocusing should have occurred when doubt arose over their potential to succeed in achieving their aims. More importantly, this paper seeks to caution other jurisdictions that may be contemplating reducing complexity and enhancing simplicity through rewriting their tax legislation. One should not expect any significant reduction in complexity through undertaking such a process. Rather, legislators should instead address complex concepts and substantial policy issues in conjunction with any rewriting of the legislation.

The remainder of this paper is as follows. Section 2 provides an overview of the journeys taken by each of the three countries, based on order of 'completion', namely: NZ, the UK and Australia.<sup>2</sup> Following this overview, a number of common themes and lessons are drawn and presented in section 3. This then leads to the question, 'Where to from here?' the subject of section 4. Section 5 contains the concluding comments, limitations and areas for future research.

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<sup>2</sup> Completion was over optimistically announced by the (then) Assistant Treasurer in 2009 to be by the end of 2013 but clearly now this timeframe is unachievable; see Bowen, below n 37.

## 2. AN OVERVIEW OF THE JOURNEYS TAKEN BY THE THREE REWRITE PROJECTS

### 2.1 New Zealand

#### 2.1.1 *An overview of the rewrite project*

One consequence of NZ being the first to complete its journey is that the rewrite experience has received extensive discussion. New Zealand was also the first to start and used as a (potential) benchmark by Australia and the UK with their rewrite projects. The NZ rewrite project also employed a novel approach (a reorganisation step before any rewriting) as well as having a very influential overseer, namely the Rewrite Advisory Panel (RAP), chaired by Sir Ivor Richardson.<sup>3</sup> Arguably, NZ's rewrite project met with a reasonable degree of success. The major drivers for the rewrite include the 1994 Organisational Review of Inland Revenue, also led by Sir Ivor Richardson.<sup>4</sup> The Consultative Committee on the Taxation of Income from Capital (known as the Valabh Committee) was influential through an earlier tax simplification review.<sup>5</sup>

This led to the Working Party on the Reorganisation of the ITA 1976-1993 (Working Party) commencing the first phase of

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<sup>3</sup> Adrian Sawyer, 'RAP(ping) in Taxation: A Review of New Zealand's Rewrite Advisory Panel and its Potential for Adaptation to Other Jurisdictions' (2008) 37 *Australian Tax Review* 148.

<sup>4</sup> Organisational Review Committee, New Zealand Government, *Organisational Review of the Inland Revenue Department: Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance) from the Organisational Review Committee* (1994).

<sup>5</sup> Consultative Committee on the Taxation of Income from Capital (Valabh Committee), New Zealand Government, *Final Report* (1992).

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the project.<sup>6</sup> Importantly, the only statute rewritten was the *Income Tax Act 1976*. The other revenue statutes, the *Tax Administration Act 1994* (TAA) and *Taxation Review Authorities Act 1994* (TRAA), were to remain in their original format (as created through the reorganisation phase of the NZ rewrite project). The *Goods and Services Tax Act 1985* (GSTA) was not on the rewrite agenda. The NZ project comprised four main stages, commencing with an initial reorganisation into three new statutes (ITA 1994, TAA and TRAA). Next, the core provisions, followed by the major income, deduction and timing provisions (plus the definitions), were rewritten. Finally, the rewrite addressed the remaining parts. Nixon provides an ‘insider’s’ perspective, being a member of the rewrite team from 1999 to 2004.<sup>7</sup> Her contribution focuses on the way the rewrite progressed and the drafting style employed, highlighting the ‘successes’ of the project.

As part of NZ’s project a schedule of intended policy changes (and their associated sections) was included as part of each iteration of the Income Tax Act. This made it easier to ascertain when previous case law, rulings and analysis could not be utilised in conjunction with interpreting the rewritten legislation.

One important benefit of the NZ rewrite is that the new structure of the ITA 2007 has made it simpler to teach taxation concepts and law to students. Being an academic for over twenty years, and prior to that a student of taxation, the ITA 2007 is immensely preferable to the ITA 1976 for teaching purposes. Nevertheless, with disputes and ensuing case law

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<sup>6</sup> Working Party on the Reorganisation of the Income Tax Act 1976-1993, New Zealand Government, *Second Report of the Working Party on the Reorganisation of the Income Tax Act* (1993).

<sup>7</sup> Margaret Nixon, ‘Rewriting the Income Tax Act’ (2004) 52 (November) *Clarity* 22.

coming some years after each version of the ITA, one still needs to be reasonably familiar with the applicable version of the ITA that applied to the relevant income years.

### 2.1.2 *Analysis of the NZ project*

Sawyer offers perhaps the leading academic contributions to analysing the New Zealand rewrite project.<sup>8</sup> Sawyer, writing at the time that the *Income Tax Act 2007* was going through the process of enactment, concluded that the rewrite had made, at best, marginal progress in moving towards greater simplicity in the legislation.<sup>9</sup> Frequent amending legislation and new policy initiatives have taken the focus off the rewrite.

While it would have been premature at that time to assess the rewrite project, writing some three years later, Sawyer concluded that there was ‘evidence of improvements in readability’ which should ‘enable taxpayers and their advisors to more readily determine their tax obligations’.<sup>10</sup>

Readability is one aspect of assessing the impact of legislative simplification; however, it does not embrace the more complex issues, such as underlying concepts and the policy process. Often readability as a concept is utilised interchangeably with understandability. While readability may be used as a proxy for understandability, there is much more to legislation being understandable than the extent to which it is

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<sup>8</sup> Adrian Sawyer, ‘New Zealand’s Tax Rewrite Program – In Pursuit of the (Elusive) Goal of Simplicity’ [2007] *British Tax Review* 405; Adrian Sawyer, ‘Enhancing Compliance Through Improved Readability: Evidence from New Zealand’s Rewrite “Experiment”’ in Martha Eller Gangi and Alan Plumley. (eds), *Recent Research on Tax Administration and Compliance: Selected Papers Given at the 2010 IRS Research Conference* (IRS, 2011) 221.

<sup>9</sup> Sawyer (2007), above n 8, 427.

<sup>10</sup> Sawyer (2011), above n 8, 247.

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readable. Other factors include underlying concepts, layout, legibility and length.<sup>11</sup>

New Zealand was fortunate to have Sir Ivor Richardson who, as the architect of the Generic Tax Policy Process (GTPP), proposed a policy process that has received support both from within NZ and overseas.<sup>12</sup> The GTPP is a dynamic model for tax policy development, with neither Australia nor the UK having a similar approach (and both jurisdictions have received criticism for their less than fully transparent tax policy development).<sup>13</sup> In a recent comparative review of the NZ and UK rewrite projects, Sawyer<sup>14</sup> traverses the prior literature as well as the role of the RAP in addressing minor policy issues.

From an insider's perspective, Sir Ivor Richardson offers insights into the success of the NZ project, placing emphasis on several factors, including the collaborative nature of the rewrite.<sup>15</sup> He also highlights the response to the exposure of the first phase of the rewrite in 2004, the extensive attention to quality control, and the setting of goals. Finally, he acknowledges the commitment of the small groups of experts

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<sup>11</sup> For a summary of what makes a document readable, see Richard Castle, 'What Makes a Document Readable?' (2007) 58 (November) *Clarity* 12.

<sup>12</sup> See, eg, Michael Dirkis and Brett Bondfield, 'At the Extremes of a "Good Tax Policy Process": A Case Study Contrasting the Role Accorded to Consultation in Tax Policy Development in Australia and New Zealand' (2005) 11 *New Zealand Journal of Taxation Law and Policy* 250.

<sup>13</sup> See further, Adrian Sawyer, 'Reviewing Tax Policy Development in New Zealand: Lessons from a Delicate Balancing of 'Law and Politics'' (2013) 28 *Australian Tax Forum* 401.

<sup>14</sup> Adrian Sawyer, 'Simplification through Rewriting Tax Legislation: A Comparison of the New Zealand and United Kingdom Approaches' (Working Paper, University of Canterbury, 2012).

<sup>15</sup> Sir Ivor Richardson, 'Simplicity in Legislative Drafting and Rewriting Tax Legislation' (2012) 43 *Victoria University of Wellington Law Review* 517.



and officials who were collectively crucial to the success of the NZ project.

## 2.2 United Kingdom

### 2.2.1 *An overview of the rewrite project*

The UK Tax Law Rewrite Project (TLRP) was announced in 1995 by the then Chancellor of the Exchequer, Kenneth Clarke. This would be a project to rewrite 6,000 pages of tax law into plainer English, virtually all of the primary legislation for the UK Inland Revenue (now known as HM Revenue and Customs). This was a much broader project than NZ's, covering only the income tax legislation.<sup>16</sup> A pre-parliamentary consultative process took a 'user's perspective'. Sullivan comments favourably on this approach, stating that this indicates that the 'government is serious about communicating with the persons whose interests are affected by a statute—or in any event with their professional representatives'.<sup>17</sup> The approach, Sullivan observes, also takes into account the reader's perspective.

In the UK, although there has been much debate about both structural reform and reduction of complexity, the only real progress was with respect to greater clarification in some areas. However, even though the TLRP's major political advocate (Lord Howe) admitted that the TLRP may have improved the quality of the UK's tax legislation, it did not reduce its quantity. For instance, the annual *Finance Act* continues to add an enormous and uncontrollable number of pages of tax

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<sup>16</sup> Martin Cutts, *Lucid Law* (Plain Language Commission, 2<sup>nd</sup> ed, 2000).

<sup>17</sup> Ruth Sullivan, 'Some Implications of Plain Language Drafting' (2001) 22 *Statute Law Review* 145,162 (emphasis added).

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legislation.<sup>18</sup> Length does not necessarily correlate with complexity; longer text may in fact be more simple to understand through the layout, choice of words and explanations. However, if there is more to read and understand, this is likely to increase the level of comprehension and potentially complexity.

As Williams observes, the UK's TLRP acknowledged its debt to both the Australian and NZ projects, which were at the time two to three years ahead of the UK, providing the UK with valuable insights. However, Williams comments:

The [TLRP] has observed, however, that it has been 'impossible to quantify the likely benefits' of rewriting tax legislation and that neither Australia nor New Zealand, although further advanced with their rewrite projects, have yet been able to establish any better information on these aspects.<sup>19</sup>

### 2.2.2 Analysis of the UK Project

Like NZ, the UK rewrite project has been the subject of considerable analysis and, rather than repeat this here, evaluations by Salter,<sup>20</sup> and a comparative evaluation by Sawyer,<sup>21</sup> provide further details. To provide a flavour of the

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<sup>18</sup> Lord Howe, 'Why we must change the way tax law is made', *Financial Times* (online), 2 July 2008 <<http://www.ft.com/cms/s/0/898e6da2-484c-11dd-a851-000077b07658.html#axzz2WKwGk3D5>>.

<sup>19</sup> Christopher Williams, 'Crossovers in legal cultures in Westminster and Edinburgh: some recent changes in the language of the law' (Working Paper 2008) 3 <[http://www.scienzepolitiche.uniba.it/area\\_docenti/documenti\\_docente/materi\\_ali\\_didattici/116\\_Williams\\_ESPAC\\_4.pdf](http://www.scienzepolitiche.uniba.it/area_docenti/documenti_docente/materi_ali_didattici/116_Williams_ESPAC_4.pdf)>. Williams is referring to the following publication by HMRC; HMRC, *Tax Law Rewrite: plans for 1999/2000*, (March 1999) 17.

<sup>20</sup> David Salter, 'The Tax Law Rewrite in the United Kingdom; plus Ca Change Plus C'est La Meme Chose?' [2010] *British Tax Review* 671.

<sup>21</sup> Sawyer, above n 14.

analysis provided in these two studies, the following highlights key findings from each of these studies. Salter observes that the rewrite in the UK has highlighted the importance of the consultation between HMRC and others interested in tax policy in seeking to improve the tax law.<sup>22</sup> Salter also comments on the innovative approaches and techniques that were used in drafting the rewritten legislation, including incorporating parliamentary scrutiny of the Bills prior to their enactment. In contrast, Salter acknowledges the view of some that little has really changed other than to make the underlying problems more obvious. Sawyer observes, when comparing the NZ and UK rewrite projects, that ‘... both the NZ and UK projects did not tackle the real issues contributing to underlying complexity (the UK more so), and the rewritten legislation has added to taxpayers’ compliance costs and the administrative costs of the revenue authority.’<sup>23</sup>

Skinner observes that the TLRP displays some of the important features of codification.<sup>24</sup> It exceeds mere consolidation but does not go as far as addressing issues of a fiscal policy nature. She draws attention to the pre-parliamentary process (involving the project team, consultative committee and steering committee, each with their public and private sector experts) and special parliamentary procedures devised to enable effective enactment of the bills. Skinner comments favourably on the TLRP, perhaps without the benefit of understanding tax complexity and compliance costs.<sup>25</sup> Skinner suggests that the style is aimed at ‘improving the clarity

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<sup>22</sup> Salter, above n 20, 687.

<sup>23</sup> Sawyer, above n 14, 38.

<sup>24</sup> Catherine Skinner, ‘Codification and the Common Law’ (2009) 11 *European Journal of Law Reform* 225.

<sup>25</sup> *Ibid* 235 (emphasis added).

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and simplicity of tax legislation' and that it goes well beyond a consolidation of the law.<sup>26</sup>

### 2.3 Australia

#### 2.3.1 *Overview of the rewrite project (to date)*

Extensive discussion on the Australian tax rewrite project (known as the Tax Law Improvement Project (TLIP)), is included in this paper. This is largely a result of the absence of any comprehensive analysis of the project to date, although arguably the literature on TLIP is more extensive than either the NZ or the UK rewrite projects.

Established in the mid 1990s, the TLIP commenced with the aim of rewriting the income tax law to make it easier to understand. In 1990, the Australian Treasury and Australian Taxation Office (ATO) had set up a Tax Simplification Task Force; however, its report to the Treasurer never saw the light of day.<sup>27</sup> Specifically the TLIP was a project to restructure, renumber and rewrite in plain language Australia's income tax law. It aimed to improve taxpayer compliance, and reduce compliance costs, by making the law easier to understand for taxpayers (including understanding their rights under the tax law). It would also seek to improve discussion on tax policy. The TLIP, envisaged to be a three-year project, would cost AUD 10 million. However, like the NZ and UK rewrite projects, it would eventually take longer and cost much more than anticipated from the outset. This led to an extension of the TLIP for a further two years until June 1999. Tran-Nam observes that, based on the 1992 proposal, an early estimate of savings in

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<sup>26</sup> Ibid.

<sup>27</sup> See Binh Tran-Nam, 'Tax Reform and Tax Simplification: Some Conceptual Issues and a Preliminary Assessment' (1999) 21 *Sydney Law Review* 500.

administrative costs of the ATO was AUD 30 million per annum and AUD 150 million per annum in compliance costs.<sup>28</sup> This would potentially be achievable, with both drafting and policy simplification to make the law more coherent. Unfortunately, the government rejected the recommendation for policy reform, thereby rendering any such potential cost saving irrelevant.

The TLIP project created the *Income Tax Assessment Act 1997* (the 1997 Act). The 1997 Act contains the rewritten parts of the *Income Tax Assessment Act 1936* (the 1936 Act) that were removed from the 1936 Act. Unlike the NZ rewrite project, the non-rewritten parts remained in the 1936 Act. This necessitates that two statutes must be referred to in order to ascertain the relevant tax law in Australia.

Picciotto observes that the TLIP's first project was new legislation to simplify the 'substantiation' rules for claiming expenses as deductions from salary income.<sup>29</sup> The result was a reduction in the number of words from 19,000 to 11,000. Nevertheless, the initial evaluation seems uncertain as to whether the rewritten legislation was easier to understand. The new drafting style, while clearer, better structured and shorter, did not involve any significant policy simplification.

Less than halfway through the process, TLIP was subsumed into a review of business taxation and (until the announcement in 2009) was never officially revived. Specifically, a more radical approach, proposed in the paper: *Tax Reform – Not a New Tax, a New Tax System* (ANTS),<sup>30</sup> called for an integrated tax code. As Cooper observes, the expertise developed during drafting under TLIP transferred to developing the new

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<sup>28</sup> Ibid.

<sup>29</sup> Sol Picciotto, 'Constructing Compliance: Game-Playing, Tax Law and the State' (2007) 29 *Law and Policy* 11, 24-25.

<sup>30</sup> Peter Costello, 'Tax Reform – Not a New Tax, a New Tax System' (Government Plan, August 1998).

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integrated tax code through the various reforms.<sup>31</sup> However, the debates generated by the structural reform proposals, notably the controversial General Sales Tax, overtook the impetus for legislative simplification. The focus of the changes was on making substantial changes to the tax base rather than focus on the issues associated with drafting. The most recent major rewrite of 1936 Act provisions was the *Tax Laws Amendment (Transfer of Provisions) Act 2010*. Nevertheless, the TLIP style continues to apply to reforms with provisions in the 1936 Act gradually rewritten and included in the 1997 Act but at a much slower rate than under TLIP itself.

In 2003, the Board of Taxation (BoT) began to scope a possible project for rationalising the 1936 and 1997 Acts.<sup>32</sup> The BoT's purpose, as the Institute of Chartered Accountants of Australia (ICAA) observes, is to:

see whether there may be relatively straightforward options for reducing the volume of tax legislation and making it easier to use for taxpayers and their advisers - both in the short-term and by providing a better platform for longer-term improvement.<sup>33</sup>

The Australian government decided to remove more than 4,100 pages of 'inoperative provisions' (redundant legislation) from Australia's income tax legislation in 2006. In the Bills

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<sup>31</sup> Graeme Cooper, 'Five Reflections on the RBT's Vision for the Business Tax Base' (Legal Studies Research Paper No 07/27, University of Sydney, 2007).

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=986242](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=986242)<http://sydney.edu.au/law/about/staff/GraemeCooper/>.

<sup>32</sup> See Richard F E Warburton, 'Address by the Chairman of the Board of Taxation' (Speech delivered at the Second Annual Australian Taxation Summit, Sydney, 10 February 2004) [http://www.taxboard.gov.au/content/content.aspx?doc=publications\\_and\\_media/speeches/2nd Annual Australian Taxation Summit.htm&pageid=008](http://www.taxboard.gov.au/content/content.aspx?doc=publications_and_media/speeches/2nd%20Annual%20Australian%20Taxation%20Summit.htm&pageid=008).

<sup>33</sup> Institute of Chartered Accountants in Australia (ICAA), 'Improving the self assessment system submission', (2010) 4.

Digest accompanying the *Tax Laws Amendment (Repeal of Inoperative Provisions) Bill 2006*, Pulle backgrounds the TLIP, outlines some of the concerns over the project and comments on the likely approach to completing the TLIP's aims now that ANTS had subsumed it.<sup>34</sup> This led to the conclusion of improved readability of the tax legislation, a positive outcome. Such an exercise should occur on a regular basis, notwithstanding whether it comes within the umbrella of a rewrite project. Nevertheless, the assessment was that the reduction in complexity was not commensurate with the reduction in the size of the law, as it did not reduce the number of operative rules or their complexity. The TLIP was also indebted to, and influenced by, the NZ rewrite project, which was already well into the process of rewriting the tax law in 1995.<sup>35</sup>

The ICAA is on point when it states that it 'doubt[s] that it was contemplated that we would still have concurrent Acts some 14 years after the new ITAA 1997 was introduced.'<sup>36</sup> The ICAA recommends development of a blueprint for integrating the two Acts such that they have consistent structure, language and definitions.

This request for tangible progress started to see the light of day in 2009 with the announcement of a rejuvenation of the TLIP. On March 13, 2009, the Assistant Treasurer, Chris Bowen, announced in a speech to the Taxation Institute of

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<sup>34</sup> Bernard Pulle, *Tax Laws Amendment (Repeal of Inoperative Provisions) Bill 2006*, No 14 of 2006-07, 14 August 2006. <[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd0607/07bd014](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0607/07bd014)>.

<sup>35</sup> See Williams, above n 19, 2.

<sup>36</sup> ICAA, above n 33, 4.

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Australia that TLIP would be back in focus.<sup>37</sup> While the Assistant Treasurer acknowledged that this would be a sizeable task with over 1900 pages in the 1926 Act, the approach would be piecemeal as part of an ongoing reform process. Bowen was not prepared to set a definite timetable, based on prior experience that these tend to lead to disappointment, but stated ‘I believe that 2013 is an ambitious, but achievable, target for Australia to have one tax act.’<sup>38</sup>

With little evidence of progress, in August 2010, Nick Sherry, the new Assistant Treasurer, in a speech to the Australian Economic Forum, argued that there has been progress, and ‘if we are re-elected I commit that this work will continue as a high-priority.’<sup>39</sup>

At the time of writing this paper, we are well into 2013. There is no sign of any further formal draft legislation for rewriting the remainder of the 1936 Act (although the general anti-avoidance provision is proposed to be amended to restore its effectiveness – see *Tax Laws Amendment (2013 Measures No 1) Bill 2013: General anti-avoidance* in the public domain. In addition, with a forthcoming federal election in September 2013, there are only a couple of Parliamentary sitting days before then and no legislative proposal to accommodate the completion of this project is apparent. However, through reforming a number of regimes, rewriting of some of the remaining parts of the 1936 Act is continuing, with the new provisions inserted into the 1997 Act. Nevertheless, this indicates that we are yet to see a close to the TLIP, suggesting that 2013, as the year in which the TLIP is

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<sup>37</sup> Chris Bowen, ‘Speech to the Taxation Institute of Australia Annual Conference’ (Speech delivered at the Taxation Institute of Australia Annual Conference, Sydney, 13 March 2009).

<sup>38</sup> *Ibid.*

<sup>39</sup> Nick Sherry, ‘Speech delivered to the Australian Economic Forum’ (Speech delivered at the Australian Economic Forum, Sydney, 5 August 2010).



‘completed’, will not be achievable. Indeed, there is speculation that until each remaining part of the ITAA 1936 become part of the legislative agenda, there is no foreseeable end in sight for ‘completion’ of TLIP.

### 2.3.2 *Analysis of the Australian project*

The following discussion is rather more extensive than that for NZ or the UK. Primarily this is a consequence of more diverse contributions to the analysis, without extensive summative examination drawing together the themes and observations of various commentators and researchers.

The early views on the TLIPs’ approach are mixed. Nolan and Reid, with their close involvement in the TLIP, set the scene, outline the scope of the TLIP, the alternative approaches to delivering the final product and how to achieve the vision of the rewritten law.<sup>40</sup> Not surprisingly, they are very positive and enthusiastic about the project.

Durack did not expect that non-experts would be able to understand the legislation.<sup>41</sup> He suggested that the implementation should be delayed pending rewriting of all of the legislation, rather than a progressive approach to its introduction. With hindsight, a delayed enactment would probably have avoided Australia’s problem of needing to work with two statutes for the best part of 20 years. Slater doubted that the TLIP could produce a ‘thing of beauty and simplicity’.<sup>42</sup> The passage of time has certainly confirmed a failure on this

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<sup>40</sup> Brian Nolan and Tom Reid, ‘Re-writing the Tax Act’ (1994) 22 *Federal Law Review* 448.

<sup>41</sup> John W Durack, ‘Tax Law Improvement: Are we on the Right Track?: An Examination of the Rewritten Provisions in Light of the Limited Objective they are Capable of Serving’ (1995) 12 *Australian Tax Forum* 157.

<sup>42</sup> Anthony H Slater, ‘TLIP: An Assessment of Objectives’ (1995) 12 *Australian Tax Forum* 175.

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account. Vann offers a perspective that draws upon the early NZ experience, along with suggestions for the drafters.<sup>43</sup> Turnbull, from a lawyer's perspective, concludes that while the drafters may do a great job with the task they are given, they will fail with the ultimate aim of reducing complexity.<sup>44</sup> This is a consequence of the government not permitting major policy issues to be part of the TLIP. To be fair, this is a fault common to all three rewrite projects.

In an early feature in *Taxation in Australia* in 1995,<sup>45</sup> concern over the non-inclusion of tax policy issues was a major focus, with Cowdroy asking whether the TLIP can turn 'leaden legislation into golden prose'.<sup>46</sup> He concludes that TLIP has the potential to improve the quality of drafting, but with widespread concern, meaningful consultation was necessary to restore confidence to the process. Evans comments on the Tax Research Foundation's Seminar entitled *Tax Law Improvement*.<sup>47</sup> Carey emphasises the strong opposition to having two separate statutes, a decision that would come back to 'haunt' the Australian tax environment for many years to come.<sup>48</sup>

Focussing on a theme of consultation, the Office of Regulation Review (ORR) recommended that the TLIP provide more information in the area of compliance costs to facilitate

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<sup>43</sup> Richard J Vann, 'Improving Tax Law Improvement: An International Perspective' (1995) 12 *Australian Tax Forum* 193.

<sup>44</sup> Ian Turnbull, 'Drafting Simple Legislation' (1995) 12 *Australian Tax Forum* 247.

<sup>45</sup> *Taxation in Australia*, 'Current Topic: Tarting up the Tax Law' (1995) 30 *Taxation in Australia* 172.

<sup>46</sup> Peter Cowdroy, 'Tax in Review: Tax Act Alchemy: Dross into Gloss?' (1995) 30 *Taxation in Australia* 186.

<sup>47</sup> David Evans, 'The Emperor's New Clothes' (1995) 30 *Taxation in Australia* 192.

<sup>48</sup> Annamaria Carey, 'The Big Veto' (1995) 30 *Taxation in Australia* 195.

consultation.<sup>49</sup> The ORR observed that that the TLIP could take one of three approaches, namely the NZ approach, a specialist approach and a modular approach.<sup>50</sup> The choice, however, was a combination, creating ‘the pyramid’. Here, the top level reflects the core provisions, followed by the general provisions as the middle level and the specialist groupings at the bottom. Importantly, the ORR recognised implicitly what may be termed the risk of ‘type 1’ and ‘type 2’ errors occurring.<sup>51</sup> The first was insufficient resources allocated to the main sources of compliance costs. The second, too much time and resources allocated to those areas that create little in the way of compliance costs. The premise for this outcome is that a reduction in compliance costs is the key driver to achieving simplification.

Importantly for Australia, the government accepted the recommendation to investigate compliance and administrative costs. The Australian School of Taxation (Atax), at the University of New South Wales (UNSW), has been instrumental in developing Australian-focussed compliance cost research.<sup>52</sup> Notwithstanding this goal, the ORR (1995) correctly observes that the narrow scope of the TLIP means that it cannot address many of the issues associated with compliance costs.

Further concern over the TLIP appears in a special feature in *Taxation in Australia* in 1995<sup>53</sup> with a pot pourri of views, including proponents and opponents of the TLIP process. An

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<sup>49</sup> Office of Regulation Review, *Tax Law Improvement Project Submission*, (August 1995).

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> For an example of this work, see Binh Tran-Nam, Chris Evans, Michael Walpole and Katherine Ritchie, ‘Tax Compliance Costs: Research Methodology and Empirical Evidence from Australia’ (2000) 53 *National Tax Journal* 229.

<sup>53</sup> *Taxation in Australia*, above n 45.

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emerging issue is the additional forms of complexity that the new drafting style was introducing. However, the contributors anticipated that the TLIP would reveal areas of underlying inconsistency in tax policy that, with time, the government would address.

Burton and Dirkis, in an early academic assessment of the TLIP, aptly observe that a major flaw in the TLIP was the uncertainty over the type of complexity under review, and the audience of the legislation (taxpayers or the actual readers).<sup>54</sup> The authors develop criteria to assess complexity and apply this to the TLIP. Burton and Dirkis identify a major flaw, the exclusion of tax policy, being the result of a decision made by the government and not a choice exercised by those directly involved with the TLIP.<sup>55</sup> This was a missed chance to complete something fundamental and, arguably, the TLIP needed to adopt more modest objectives. In the parlance of this paper, such an approach may have ‘restored some of the shine to the leaden legislation’ but certainly could not deliver some form of ‘chemical reactions necessary to transform the leaden legislation into gold’. This could only be possible if attention focuses on both underlying concepts and policies, thereby creating an entirely new tax statute.

Mann<sup>56</sup> supports Burton and Dirkis’ view,<sup>57</sup> suggesting that to deal with issues of complexity one needs to ‘go back to the basics’ first before drafting. This would involve focussing on the activity to be taxed through conceptualising it, making any design changes and modelling its application.

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<sup>54</sup> Mark Burton and Michael Dirkis, ‘Defining Legislative Complexity – A Case Study: the Tax Law Improvement Project’ (1995) 14 *University of Tasmania Law Review* 198.

<sup>55</sup> *Ibid.*

<sup>56</sup> Jeff Mann, ‘Revenue Laws: The Stamp Duty Rewrite’ (1997) 32 *Taxation in Australia* 42, 42-43.

<sup>57</sup> Burton and Dirkis, above n 54.

In a hard-hitting editorial, Pagone suggests that part of the problem may ‘stem from what many feel to be a lack of engagement by, or enthusiasm of, government (present and immediate past) in the process of tax improvement.’<sup>58</sup> Pagone calls for the government to enable departments and professional bodies to work more closely to enable effective tax law improvement in Australia.<sup>59</sup>

The Australian Productivity Commission (APC) expressed its concern over the TLIP’s focus, suggesting that many of the issues associated with compliance costs would remain.<sup>60</sup> The APC acknowledged that poorly structured and written law is one source of excessive compliance costs but may not be the most important. Even if TLIP provided some worthwhile gains, it could result in legislation that is more complex.

Commenting when the TLIP was well underway, Ilbery is on point when he notes that even a number of ‘small p’ policy issues may not be resolved (‘big P’ policy issues were off the agenda).<sup>61</sup> Furthermore, there was a real danger that once the TLIP was complete, the government would consider the job done, without the ‘big P’ issues addressed. Interestingly, from 1998, the TLIP was on hold indefinitely as some ‘big P’ issues emerged through the Ralph Review of Business Taxation and subsequent tax policy reviews. In *Taxation in Australia*, editorial staff, when commenting on an earlier Joint Committee of Public Accounts’ (JCPA’s) report, highlight that Australian governments had chosen to interpret simplification in a narrow

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<sup>58</sup> G Tony Pagone, ‘Editorial’ (1996) 25 *Australian Tax Review* 159.

<sup>59</sup> Ibid.

<sup>60</sup> Australian Productivity Commission, ‘Compliance Costs of Taxation in Australia: Staff Information Papers’ (Staff Information Paper, 1996), 21.

<sup>61</sup> Jonathan Ilbery, ‘TLIP: down the track and up the creek’ (1997) 31 *Taxation in Australia* 283.

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sense, leaving major tax policy off the agenda.<sup>62</sup> Again, this is an example of a failure to recognise what is needed if one is to realistically have a chance to convert ‘dross into gloss’. Lehmann is also on point when he recommends that TLIP should take stock, be permitted to take on a broad range of ‘small p’ policy issues (as a minimum) and not seek to preserve existing complexity.<sup>63</sup> Rather, Lehmann suggests it should ‘carry out comparative studies to determine what would be an international best practice Tax Act.’<sup>64</sup>

In a provocatively entitled paper, one of the major proponents of the TLIP, Brian Nolan, takes solace from the rewriting projects underway in NZ and the UK, commenting that the rewrite teams share his optimism that there will be efficiency gains through some cost savings by the rewrites.<sup>65</sup> Nolan is of the view that the 1997 Act’s structure and methodology is robust and practitioners will be working with it for a long time.<sup>66</sup> What Nolan neglects to add at that time is that they will also be working with the 1936 Act for many years to come. ‘Burying the 1936 Act’ is something that he has yet failed to achieve. Admittedly, it was not his decision to put the TLIP on hold indefinitely in 1998, and thus see the 1936 Act continue to exist well beyond 2013.

In 1996, then Assistant Commissioner of Taxation Michael D’Ascenzo commented in a speech that the TLIP would be working towards a more streamlined version of the income tax

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<sup>62</sup> Taxation in Australia, ‘Tax in Review: Move to Improve’ (1997) 31 *Taxation in Australia* 452.

<sup>63</sup> Geoffrey Lehmann, ‘Tax in Review: Old Dog, New Tricks’ (1997) 31 *Taxation in Australia* 516.

<sup>64</sup> *Ibid* 520.

<sup>65</sup> Brian Nolan, ‘On the Record: Brian Nolan “I Come to Bury the 1936 Act”’ (1997) 31 *Taxation in Australia* 570.

<sup>66</sup> *Ibid*.

legislation. D'Ascenzo notes that it 'contains the same law but it exists in a new improved form - stripped of its excess and tailored to encourage its use.'<sup>67</sup> Furthermore, D'Ascenzo cautions 'it is the form and not the law or the policy behind the law which will change – it will just be more easily digested.'<sup>68</sup> The main goal was to reduce compliance costs, thereby suggesting that this should be a key measure of evaluation of the success or otherwise of the TLIP. If successful, this could become the basis for all Commonwealth of Australia legislation drafting. Importantly, the JCPA had recommended that a committee of the Australian Parliament have a role in addressing the substantial number of *minor* policy simplification issues highlighted by the TLIP but outside its ambit.

By 1997, the Commissioner of Taxation Michael Carmody, in launching the 1997 Act, described in his speech the process as one of *renovation* of income tax legislation.<sup>69</sup> At best, this was an attempt to restore the 1936 Act to its 'former glory' via the 1997 Act through 'polishing'. Specifically Carmody suggested that TLIP's brief was to renovate the tax legislation, and that through clarifying what the law is, TLIP will be of assistance in ongoing tax reform.<sup>70</sup>

Tran-Nam, in commenting on the end of the TLIP, suggests that the TLIP has left an impression, namely that 'poor drafting has made the tax law difficult to comprehend' and that 'without tax policy changes, the project's simplification impact has been

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<sup>67</sup> Michael D'Ascenzo, 'Opportunities and Challenges: A New Act and New Technology' (Speech delivered for the launch of the New Tax Act: An Interactive Multimedia Guide, Canberra, 2 September 1997).

<sup>68</sup> Ibid.

<sup>69</sup> Michael Carmody, (Speech delivered for the launch of the New Tax Act: An Interactive Multimedia Guide, September 2, 1997).

<sup>70</sup> Ibid.

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limited'.<sup>71</sup> Consequently, with the completion of TLIP it will have little effect on reducing the complexity of the tax system.

Krever provides a persuasive summary of the Australian rewrite 'experiment', as it stood in the early 2000s.<sup>72</sup> He concludes that TLIP and the change in fundamental concepts of the tax law (eg, ANTS) have both failed to reduce the cause of underlying complexity.

Pinder, a member of the Tax Design Team in the Australian Treasury, suggests that a coherent principles approach holds promise as one means for addressing concerns about the sustainability of Australia's tax laws.<sup>73</sup> Samarkovski and Freudenberg undertake an assessment of this approach.<sup>74</sup> The authors present a comprehensive analysis of the work of the TLIP and debate the meaning of 'simplification', examining the role of the rule of law and evaluating whether the drafting principles employed continued to be utilised with new legislative provisions (notwithstanding the suspension of the TLIP). The authors also comment on the role of the BoT in reviewing tax policy. They found that the drafting principles remain evident and that the level of readability is such that it is arguably of an acceptable standard for professional users.

Cooper further observes in relation to ANTS and other policy changes that the radical changes to drafting style are not evident, such that it was not 'apparent that there was a shift to

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<sup>71</sup> Binh Tran-Nam, 'Tax Reform and Tax Simplicity: A New and "Simpler" Tax System?' (2000) 23 *University of New South Wales Law Journal* 241, 249

<sup>72</sup> Rick Krever, 'Taming Complexity in Australian Income Tax' (2003) 25(4) *Sydney Law Review* 467, 505.

<sup>73</sup> Greg Pinder, 'The Coherent Principles Approach to Tax Law Design' (Australian Treasury Economic Roundup, Autumn 2005).

<sup>74</sup> Lisa Samarkovski and Brett Freudenberg, 'TLIP: Lip Service or in Service?: A review of the non-commercial loss and STS measures against the TLIP principles' (2006) 21 *Australian Tax Forum* 387.



using “general principles in preference to long and detailed provisions”<sup>75</sup>.

Thus, while there has been considerable analysis of the TLIP, given that at the time of writing it is yet to be completed, there remains scope for further analysis once the last remaining parts of the 1936 Act have been rewritten and incorporated into the 1997 Act. At this time, to borrow from the (in)famous words of Brian Nolan, the 1936 Act ‘can be buried’. Just when this ‘burial’ will occur is anyone’s guess.

### 3. AN ASSESSMENT OF COMMON THEMES AND LESSONS

James, Sawyer and Wallschutzky undertake an early comparative analysis of the three rewrite projects.<sup>76</sup> The authors conclude that the way forward is ‘to incorporate simplification into tax policy itself in a rather more determined way than appears to have been done in the past.’<sup>77</sup> A critical step would be to establish what simplicity means and develop a set of guidelines for incorporating simplicity in tax policy.

What simplification means is a critical issue, as Tran-Nam observes.<sup>78</sup> Tran-Nam suggests that there is both legal simplicity (how difficult is a tax law to read and understand) and effective simplicity (how easy is it to determine the correct tax liability).<sup>79</sup> The tax rewrites in all three countries focused on the former and

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<sup>75</sup> Graeme Cooper, ‘Text, Style, Presentation – Assessing the Drafting Experiment in Australian Tax Laws’ in Graeme Cooper (ed), *Executing the Income Tax* (Australian Tax Research Foundation, 2008) 125, 131.

<sup>76</sup> Simon James, Adrian Sawyer and Ian Wallschutzky, ‘The Complexities of Tax Simplification: Progress in Australia, New Zealand and the United Kingdom’ (1998) 14 *Australian Tax Forum* 29.

<sup>77</sup> *Ibid* 63.

<sup>78</sup> Tran-Nam, above n 27.

<sup>79</sup> *Ibid*.

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largely neglected the latter. Tran-Nam concludes that even the ensuing tax reform packages in Australia are likely to be negative in terms of their impact on simplification and may lead to an increase in the ratio of operating costs to GDP.<sup>80</sup>

Also in an Australian context, Krever observes that it did not take tax advisers long to discover that the complexity remained.<sup>81</sup> Furthermore, Krever observes that the rewrite revealed that the real major cause of the former law's complexity was its 'wholly irrational and inconsistent policy base.'<sup>82</sup>

Hill reinforces the negative outcome of retaining two statutes in Australia.<sup>83</sup> This approach frequently requires taxpayers and their advisers to consult both the 1936 Act and the 1997 Act, converting what possibly could have been a case for simplicity into a negative of additional complexity. In this regard, the NZ approach of enacting a new Act with each major rewrite phase is preferable.

Comments made by the Ministerial Panel on Business Compliance Costs suggest that there has been minimal impact on reducing complexity or compliance costs with tax policy developments during the period 1989 to 2001 in NZ.<sup>84</sup> However, to be fair, this is not a direct reflection on the NZ rewrite project's efforts since it overlapped other major tax reforms. Owens and Hamilton observe that these rewrite projects have

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<sup>80</sup> Ibid.

<sup>81</sup> Krever, above n 72, 493.

<sup>82</sup> Ibid.

<sup>83</sup> Graham Hill, 'Tax Reform: A Tower of Babel: Distinguishing Tax Reform from Tax Change' (2005) 1 *Journal of the Australasian Tax Teachers Association* 1.

<sup>84</sup> Ministerial Panel on Business Compliance Costs, New Zealand Government, 'Finding the Balance – Maximising Compliance at Minimum Cost' (2001) <<http://taxpolicy.ird.govt.nz/news/2001-07-11-business-compliance-cost-report-released>>.

failed to reduce the length of the tax codes or complexity with regard to complying with obligations.<sup>85</sup> However, they observe that Australia and the UK have removed a sizeable number of redundant provisions in their key tax statutes.

Post the TLIP and the *Review of Business Taxation* in Australia, a focus on principles began to emerge. Cooper argues that the logic of the pyramid is attractive but flawed.<sup>86</sup> Specifically it does not clearly separate the common questions and transactions from the rare and specialised. Furthermore, it does not explain or reconcile conflicts in measures, and leads to rules dealing with the same subject appearing in more than one chapter. Cooper also suggests that as the legislation has become more elaborate the process of housekeeping takes more time and effort by drafters and Parliament.<sup>87</sup> Furthermore, with time, successive generations of drafters will not necessarily continue with the policies of the past, something that the 15 years period of the TLIP (at the time of Cooper's analysis) has revealed. Cooper concludes that the key for success in the future is retaining the parts of the new drafting style that are beneficial and put aside those that are not. He also observes that

the language used is clearer but meaning is often still opaque; legislative structures are more evident but they are not always logical; tables and lists may be easy to follow but they lack conceptual coherence; new approaches are not sustained suggesting their trumpeted merits are not indisputable.<sup>88</sup>

Sir Ivor Richardson, a major proponent of the NZ rewrite project, comments on the importance of simplicity in legislative

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<sup>85</sup> Jeffrey Owens and Stuart Hamilton, 'The Crisis in Tax Administration: The Problem of Complexity' in Henry J Arnold and Joel Slemrod (eds), *The Crisis in Tax Administration* (Brookings Institute, 2004) 347.

<sup>86</sup> Cooper, above n 75.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid 178-179.

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drafting.<sup>89</sup> In this regard, he provides an excellent overview of the Australia, NZ and the UK rewrite projects' efforts to simplify their respective statutes. Sir Ivor compares the original drivers for the three projects, and reflects upon insights provided by a number of commentators on each of the three countries' rewrite exercises. In relation to NZ's rewrite, he supports the comment made by Sawyer<sup>90</sup> on the positive role of the RAP. Sir Ivor goes further to emphasise that the collaborative nature of the rewrite, the response to the exposure of the first phase of the rewrite in 2004, the extensive attention to quality control and the setting of goals were critical. Last, but not least, he draws attention to the commitment of the small groups of experts and officials involved who were collectively crucial to the success of the NZ project.

The UK suffered from the almost complete absence of such a body as the RAP and, furthermore, was perhaps even less inclined to raise issues of a tax policy nature. The decision in 2008 to establish the Office of Tax Simplification (OTS), a new Joint Parliamentary Select Committee on Taxation and an earlier announcement of technical law changes (to be no later than the Pre-Budget Report) are welcome. However, James suggests these are unlikely to address any of the real issues behind the complexity of the law, no matter 'how eloquently they might allow the case for it to be made.'<sup>91</sup>

Sawyer offers a comparative analysis of the NZ and UK rewrite projects.<sup>92</sup> Drawing upon the contributions of earlier commentators, he reflects upon what lessons there may be because of these two 'completed' exercises, observing that NZ

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<sup>89</sup> Richardson, above n 15.

<sup>90</sup> Sawyer, above n 3.

<sup>91</sup> Malcolm James, 'Tax Simplification: The Impossible Dream?' [2008] *British Tax Review* 392, 412.

<sup>92</sup> Sawyer, above n 14.

and the UK, with the benefit of hindsight, may still have undertaken their rewrite projects, but with less expectation of the outcomes and with greater effort put into early planning.<sup>93</sup>

James, in relation to the Australian and UK rewrite projects, observes that rewriting legislation may lead to inadvertent changes in the meanings of words and concepts as established by the courts.<sup>94</sup> Furthermore, since taxpayers do not usually read primary legislation, in an Australian context there was no need to direct the legislation at taxpayers.

While there was an expectation early on that tax rewrite projects were a solution to the problem of excessive complexity, the benefit of hindsight reinforces that this expectation was misguided, at best. Evidence that emerged early on, and reinforced during the rewriting processes, has made it clear that on their own, a rewrite of legislation is not a solution to the problem of complexity.<sup>95</sup> As James observes, it requires that the underlying complexity be addressed, which is something that cannot be achieved by merely rewriting the language.<sup>96</sup> Furthermore, he suggests that the process of tax reform causes much of this complexity.

Cooper comments in relation to the three rewrite projects.<sup>97</sup> He suggests that the Australian project was a ‘housekeeping project designed to re-phrase, but not change, the existing legislation’, a feature common to the NZ and UK projects. The

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<sup>93</sup> Ibid 39-40.

<sup>94</sup> Simon James, ‘Tax Simplification is Not a Simple Issue: The Reasons for Difficulty and a Possible Strategy’ (Working Paper, University of Exeter, 2007) 12.

<sup>95</sup> Ibid 7.

<sup>96</sup> Simon James, ‘The Complexity of Tax Simplification and Reforming the Process of Tax Reform’ (Paper presented at the 2008 BAA Annual Conference, Blackpool, 1-3 April 2008) 7-8.

<sup>97</sup> Graeme Cooper, ‘Legislating Principles as a Remedy for Tax Complexity’ [2010] *British Tax Review* 334, 337.

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main contributions were in ‘innovations in language and presentation, [namely] the “use of plain language to make the legislation simpler, clearer and more user-friendly.”’<sup>98</sup>

Later on, Cooper reflects upon the enthusiasm for the new principles-based style, observing that the early fervour for the projects was not challenged at the time or since the projects were completed.<sup>99</sup> Cooper outlines the key concerns, which include the assumption that while there may be clear policy intent, the principles will not be clear to the readers and that excessive detail tends to obscure rather than make the law clear. Furthermore, Cooper states that these concerns also involve an assumption that simple statements of policy enable a reduction in the level of detail, and that it is necessary to provide other means, such as administrative guidance.<sup>100</sup>

A further question of interest concerns the breadth of the rewrites. Should the three jurisdictions expand beyond their income tax legislation to other statutes, such as Value Added Tax (VAT) or GST? From the perspective of ‘completeness’ of the intention behind the rewrites, the answer should be a tentative ‘yes’, but with extreme caution. From the lessons learned, the answer should probably be ‘no’, or at least with either a more comprehensive approach that takes into account major policy issues, or on a much reduced scale that employs the ‘benefits’ of the new drafting styles.

The three rewrite projects have a number of features in common, in addition to their focus on the language used rather than addressing issues of policy. All three have taken much longer than the original periods, which were unrealistically set at three to five years. New Zealand, the first to start (and finish),

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<sup>98</sup> Ibid.

<sup>99</sup> Ibid 340-341.

<sup>100</sup> Ibid.

took around 15 years. The UK, the second to finish, took around 16 years. Australia, yet to complete, will take at least 20 years. However, during that time the Australian focus turned to other matters of substantive policy, leaving a partially constructed 1997 Act and a partially deconstructed 1936 Act. Furthermore, from the limited available data, all three projects incurred much greater administrative expense than originally expected. In absolute terms, the NZ project appears to be the least expensive, with the UK and Australia consuming much more in terms of resources and time. The scope of NZ's rewrite is significantly less than that of the UK, but similar to that of Australia. Comprehensive estimates of compliance costs are not available and, if available, would be unreliable given the inter-related nature of the rewrite activities with other tax policy developments.

All three projects decided to undertake the task in a piecemeal fashion and not through a 'big bang'. That said, NZ's approach differed by commencing with an initial reorganisation and then rewriting by specific parts, not regimes. The result was a new statute on each occasion. The UK and Australia both focussed on particular regimes, although Australia was the only one to work with two Acts. New Zealand was potentially the narrowest in scope, in that while it initially created three statutes, it did nothing to rewrite the TAA or TRAA. None of the three countries has rewritten non-income tax legislation, such as VAT/GST legislation or other revenue-related statutes. Notwithstanding the degree of success with the NZ rewrite, the complex GST Act, it appears, is not to on the rewrite agenda.

Consultation was a feature of all three of the rewrite projects, with draft legislation made available for submissions from interested parties such as tax advisors. Discussion papers also featured from time to time. Unique to the NZ approach was use of the RAP to provide technical assistance and resolve

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issues over unplanned changes throughout the rewrite process and beyond.<sup>101</sup>

Collectively the three approaches to tax simplification has been narrow, in that primarily legislative simplification was sought through rewriting legislation in a manner to improve its readability and understandability by expert users. None of the projects tackled the wider issue of effective simplicity of making compliance easier (and thereby reducing compliance costs for taxpayers), as noted by Tran-Nam.<sup>102</sup> Indeed, with the constant change of other aspects of the tax legislation, the decisions not to address issues of a ‘big P’ policy nature (but only limited ‘small p’ policy issues), meant that underlying complexity was not addressed.<sup>103</sup> Australia’s attempts to address some of the ‘big P’ policy issues through business tax reform and the tax value method have not proved successful. Furthermore, in the view of many commentators, these have added further complexity to the tax system.

In their analysis of the relative success of the tax simplification initiatives in Australia, NZ and the UK, McKerchar, Meyer and Karlinsky suggest that reductions in legal complexity and compliance costs have proven generally elusive.<sup>104</sup> Therefore, the focus has turned to administrators and policymakers seeking to simplify processes and procedures. Furthermore, Evans and Kerr observe that ‘the focus has shifted to managing tax system complexity; making it easier for taxpayers to comply while conceding the system remains

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<sup>101</sup> Sawyer, above n 3.

<sup>102</sup> Tran-Nam, above n 27.

<sup>103</sup> See Ilbery, above n 61.

<sup>104</sup> Margaret McKerchar, Kristen Meyer and Stewart Karlinsky, ‘Making Progress in Tax Simplification: A Comparison of the United States, Australia, New Zealand and the United Kingdom’ in Margaret McKerchar and Michael Walpole (eds), *Further Global Challenges in Tax Administration* (Fiscal Publications, 2006).



complex.<sup>105</sup> The authors also suggest that to achieve genuine simplification may require following the advice and approach taken by the NZ Labour Government in the 1980s under Sir Roger Douglas. Rather than a process of a long hard slog of tackling one reform after another (the recommendation presented at the 2011 Tax Forum in Australia by Wayne Swann), it should involve implementation ‘in quantum leaps, using large packages.’<sup>106</sup> This will involve clearly defining the objectives and, by moving forward in quantum leaps, this will reduce the amount of time interest groups have to mobilise and ‘drag you down’.<sup>107</sup>

#### 4. WHERE TO FROM HERE?

The path forward for the three countries would appear to be dependent upon, at least in part, where their rewrite project left them and how they plan to address issues of major tax policy complexity. Australia has yet to complete the TLIP, so in a sense its direction for 2013 and beyond is to ensure rewriting of the remaining operative portions of the 1936 Act into the 1997 Act, thereby enabling repeal of the 1936 Act. Once drafts of all the remaining provisions in the 1936 Act become available, a closer examination of the TLIP should be undertaken. Furthermore, it would not be a bold prediction to make that, once this is complete, there will be no appetite to rewrite other tax statutes in Australia. Concurrently, while there are no other similar tax reforms in progress, there is the critical issue of whether the benefits of the drafting style of TLIP will continue to be experienced. On the other hand, will there be a return to

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<sup>105</sup> Chris Evans and Jason Kerr, ‘Tax Reform and ‘Rough Justice’: Is it Time for Simplicity to Shine?’ (2012) 27 *Australian Tax Forum* 385, 393.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid* 410, referring to comments made by Sir Roger Douglas.

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the former styles of drafting, potentially leading to more legislative complexity?

In NZ, apart from the ITA 2007, the other tax statutes follow the traditional non-plain English drafting style and therefore experience the associated complexity of that style. Amendments to the ITA 2007 have used the rewrite team's drafting style, layout and section numbering approach. However, this in itself is no guarantee that the resulting text will be understandable when it is assessed using various forms of 'readability' testing.

There is published analysis of the 'successes' of the Australian and NZ rewrite projects in terms of improvements in the readability of the new legislation.<sup>108</sup> As far as the author is aware, there is no similar published work on the UK rewrite project. The reader is encouraged to explore the findings of

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<sup>108</sup> Examples of studies that have tested the readability of rewritten tax statutes include:

**New Zealand:** Lin-Mei Tan and Greg Tower, 'The Readability of Tax Laws: An Empirical Study in New Zealand' (1992) 9 *Australian Tax Forum* 355; Maryann Richardson and Adrian Sawyer, 'Complexity in the Expression of New Zealand Tax Laws: An Empirical Analysis' (1998) 14 *Australian Tax Forum* 325; Julie Harrison, Submission to Inland Revenue, *The Readability of the Income Tax Act 2004: A Report to Inland Revenue for the Rewrite Advisory Panel* (2006); Caroline Pau, Adrian Sawyer and Andrew Maples, 'Complexity of the New Zealand's Tax Laws: An Empirical Study' (2007) 22 *Australian Tax Forum* 59; Katherine Saw and Adrian Sawyer, 'Complexity of New Zealand's Income Tax Legislation: The Final Installment' (2010) 25 *Australian Tax Forum* 213; Sawyer (2011), above n 8.

**Australia:** David Smith and Grant Richardson, 'The Readability of Australia's Taxation Laws and Supplementary Materials: An Empirical Investigation' (1999) 20 *Fiscal Studies* 321; Grant Richardson and David Smith, 'The Readability of Australia's Goods and Services Tax Legislation: An Empirical Investigation' (2002) 30 *Federal Law Review* 475; Robin Woellner, Cynthia Coleman, Margaret McKerchar, Michael Walpole and Julie Zetler, 'Can Simplified Legal Drafting Reduce the Psychological Costs of Tax Compliance? An Australian Perspective' [2007] *British Tax Review* 717.

these studies to ascertain the degree of ‘improvement’, along with the strengths and weaknesses of the various methods used. In summary, the NZ literature, which predominantly incorporates readability formulae, reveals that the rewrite project has led to an improvement in readability as measured by various readability indices. The Australian evidence, based on studies utilising readability formulae and analysis of psychological costs, also suggests some improvement in readability.

In NZ, there remains no appetite to expand the rewrite to other tax statutes, such as the GSTA or TAA, notwithstanding encouragement from a member of the NZ Supreme Court to address legislative complexity brought about by the GSTA.<sup>109</sup> The tax policy process (GTPP) in NZ remains in place, and as Sawyer would suggest,<sup>110</sup> is worthy of close examination by other jurisdictions, including Australia and the UK.

For the UK, the focus is clearly now on the tax policy process, with the OTS a major new player in the process.<sup>111</sup> Like NZ, there appears to be no appetite in the UK to rewrite any other statutes at this time. Given the enormity of the task to make the tax policy process more transparent and coherent in the UK, this approach is understandable.

Overall, the three projects are in part a reflection of the environment in the early 1990s, including the close sharing of personnel and ideas between the revenue authorities in each jurisdiction. Arguably, the projects also reflect a response by the legislators to criticisms from taxpayers and tax professionals that nothing tangible was evident in terms of efforts to address growing complexity and compliance costs. Unfortunately, it is

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<sup>109</sup> See Sawyer (2007), above n 8, 427.

<sup>110</sup> Sawyer, above n 13.

<sup>111</sup> See Salter, above n 20 and Sawyer, above n 14.

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not overly cynical to suggest that even with these three projects, there has been little in the way of tangible reduction in complexity and compliance costs. Indeed, it is arguable that there has been an increase in such costs, especially with the approach taken in Australia of having two statutes. The sooner there is one income tax statute the better for all concerned.

### **5. CONCLUDING OBSERVATIONS – AN EXERCISE IN ‘TAX ALCHEMY’?**

This paper has sought to review three massive exercises in redrafting tax laws in three jurisdictions, namely Australia, NZ and the UK. With the benefit of hindsight, the observations of numerous commentators and experts (who in many instances were much closer to the developments in their respective jurisdiction), and applying some common sense, this paper puts forward a number of observations.

In terms of the rewrite projects themselves, NZ and the UK have ‘finished’ their ‘marathon’ projects (receiving, in the Olympian parlance, the ‘gold’ and ‘silver’ medals, respectively). Meanwhile, Australia is drawing closer to the ‘bronze’ medal, with an aspirational (but now unachievable) target of completing their project by the end of 2013.

The premise of all three projects that, through redrafting legislation to give an appearance of more readable and understandable prose, real simplification would be possible and compliance costs reduced is a fallacy. This fallacy became clearer with time and was apparent to a number of commentators from soon after the commencement of the various rewrite projects. Without addressing the issues of substantive policy (‘big P’ issues) and underlying conceptual complexity, this is close to an exercise in futility in terms of the goals sought. That said, the desire to make the legislation more understandable, in the context of expert users, is laudable. The

preliminary assessment of the three projects would suggest that each has been successful in this regard, especially in revealing additional complexity in the underlying concepts. This finding is perhaps analogous to removing the outer cladding of a building to be able to make a more accurate assessment of the underlying issues in need of remediation and/or replacement. The projects have also highlighted the need for enhanced transparency and consultation in the design of tax policy, something that NZ has utilised with considerable success.

At what cost, in terms of resources consumed and time spent, has this come? Will the need to address policy and conceptual issues lead to further rewriting and, to some degree, negate the ‘gains’ of the rewrite projects? Would the three countries have gone about their rewrite projects differently with the benefit of hindsight and the research undertaken to date? At a minimum, if the drafters and governments were true to themselves they would accept changes to the rewrite process. A further improvement, if they could start again, would be to address tax policy issues in conjunction with rewriting the legislation.

Even with the early vigour of the projects to achieve the challenging goal of reduced complexity through simplification of legislation, these are exercises in tax alchemy. Nolan’s comments in 1997 are indicative of this early enthusiasm, at least from an Australian perspective. It is just not possible, when using the analogy, for example, of a motor vehicle, to suggest that one can convert a family station wagon into a ‘top of the line’ sports car by polishing the exterior, changing the paintwork and rearranging some of the parts. How will some form of ‘mechanical magic’ overcome the underlying differences and complexities of a family station wagon versus a top of the line sports car? Such a conversion requires much more than outward appearances and some limited form of reordering of the

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component parts. It necessitates something closer to a complete strip down to the basic parts, some major structural changes and a finishing that reflects a clear blueprint or design. Some may even suggest abandoning the former structure and commencing afresh. Notwithstanding the analogy, it is not suggested that the station wagon is the equivalent of 'legislative dross' and the top of the line sports car that of 'legislative gloss'!

Furthermore, following the rewrite projects, even if we accept that these are examples of highly polished statutes (the silver) which cannot be turned into legislative gold, if they are not well maintained (both through regular attention and review), the 'polished finish' will fade. Furthermore, the statutes run the risk of returning to their former state, removing all traces of the 'benefits' of the rewrite projects. These 'benefits' are also illusory if they are expected to show reduced compliance costs for taxpayers. The tangible and enduring benefits of the rewrite projects are having an understanding of the real causes of complexity and the ways to go about effective simplification. This includes making compliance easier for taxpayers and reducing the administrative costs of revenue authorities (and perhaps even the number and length of disputes).

This study has a number of limitations. First, it considers only three jurisdictions, all of which are common law based. It does not incorporate developments in other countries, such as Canada, South Africa and the US. Second, the Australian rewrite project is not yet complete, so any observations are preliminary and will need to be reassessed once the TLIP is complete (now unachievable before the end of 2013 as advised by the Assistant Treasurer in 2009). Third, this study is from an 'outsider's' perspective, although by someone that has experienced the NZ developments first hand, and those in Australia and the UK indirectly. Those involved in the various

rewrite projects are likely to have particular insights and perspectives that this study cannot provide.

In terms of future research, one obvious area is to complete a review of the Australian TLIP following its completion. A further study could also focus on areas of major tax policy that should be addressed (the big Ps), which could incorporate developments of the OTS in the UK, and various government initiatives concerning tax policy in Australia and NZ.

The experiments in Australia, NZ and the UK are instructive; we can learn more from our mistakes than from what we do right (although we should not forget that mistakes might be costly). However, not everything about the rewrite projects was a failure. Rather, it is more a case of their goals being unrealistic, their timing misplaced and their breadth too narrow. While it is much easier to make suggestions after the event, if each jurisdiction was able to address significant (big P) policy and conceptual issues, and redraft their legislation in conjunction with these reviews, the outcomes would have been different. Potentially they might have delivered some real and effective simplification. Given that this approach is no longer an option (unless there is an admission the rewrite projects were a complete failure and each jurisdiction should start over), the trick will be to build upon what has been achieved and see if by taking another path each jurisdiction can achieve effective simplification. These journeys have yet to start (at most there has been some ‘dabbling around the edges’ with major tax policy and conceptual issues), and the tale of where they may lead is perhaps best left for another day.