

CHAOTIC TAX CONSULTATION – A COMPARATIVE STUDY AND SOME TENTATIVE CONCLUSIONS

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1. Introduction

This paper began, perhaps as many do, in blissful ignorance. The original proposal entailed undertaking a comparative study of tax law making processes with a view to scrutinising claims that an authoritarian approach produced more coherent, simpler taxation law than an open, consultative approach.¹ As my research progressed, I realised that the paper entailed consideration of the amorphous and tenuous concept of democracy as embodied in tax law making processes of ‘modern liberal democracies’. Dunn observes that to reject democracy today may be to write yourself out of politics, and it is certainly to write yourself out of polite political conversation.² Assuming that Dunn’s assessment is correct, the purpose of this paper is to undertake a critical comparative review of tax reform consultation processes in several countries with a view to elaborating upon the modern applied understanding of ‘democracy’. Such grounded theory³ might be undertaken with respect to all manner of regulatory realms, but I suggest that taxation law is an ideal domain for such work because of its historical and constitutional significance within what is often understood as the teleological march of liberal political theory.⁴

In particular, I am interested in exploring why it is that we as a community accept what appear to be undemocratic ‘institutions’ and actions while simultaneously proclaiming faith in democratic institutions. The Australian Treasury’s successful use of a conclusive certificate to deny access to an internal report,⁵ its refusal to release a report regarding community consultation upon tax reform,⁶ statements of the Secretary to the Treasury⁷

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¹ John Witte, *The Politics and Development of the Federal Income Tax*, Uni of Wisconsin Press, Madison, 1985.

² John Dunn, *Setting the People Free: The Story of Democracy*, Atlantic Books, London, 2005, 41.

³ Ian Shapiro, *The State of Democratic Theory*, Princeton University Press, Princeton, NJ, 1-3.

⁴ This teleological view of history may be discerned in the discussion of enhancing institutional capacity in developing and transitional countries – it is often assumed that ‘developed’ countries are ‘democratic’. This assumption of democracy may be discerned in the work of a number of political theorists and political scientists who readily accept that the United States of America is ‘democratic’ while simultaneously acknowledging that there are grave doubts about the operation of the democratic norm of equality in developed countries: Albert O Hirschman, *Exit, Voice and Loyalty*, Harvard University Press, Cambridge MA, 1970, 32; Shapiro, above n 3, 86.

⁵ *McKinnon v Secretary, Department of Treasury* [2006] HCA 45.

⁶ In early 2006 I requested from the Australian Treasury (as secretariat for the Board of Taxation) a copy of a report upon community consultation with respect to tax system design, prepared by KPMG on behalf of the Board of Taxation (Commonwealth of Australia, *Government Consultation with the Community on the Development of Taxation Legislation* Canberra, Board of Taxation, Canberra, 2002). By anonymous email I was refused access to the original report without any reason being given for the refusal. A brief summary of the report is available as an appendix to the Board’s report upon community consultation.

⁷ The Canberra Times, ‘Riding Treasury’s Roller coaster’, *The Canberra Times*, 23 January 2006, 11.

and of the Treasurer⁸ which indicate a preparedness to subvert the underlying object of the freedom of information legislation,⁹ the practice of creating costly legislative deals within Ministerial offices¹⁰ and the development of much tax legislation ‘behind closed doors’¹¹ are just some examples of current government practice which suggests that closer scrutiny of ‘democracy’ in action in the specific context of tax law is warranted. In particular, do these examples reflect a coherent understanding of modern, representative democratic government in the tax domain? Or are they part of a somewhat chaotic political realm in which democratic government, like a many-headed Hydra, comprises discordant interpretations of ‘democracy’? Regardless of the answers to these questions, is there evidence which suggests that such elitist practices shelter policy makers from interest group influence? Finally, depending upon the answers to the foregoing questions, is there a need for reform of Australia’s tax law making processes and, if so, is the concept of ‘democracy’ sufficiently finite to inform those reforms?

Abandoning all pretence to academic suspense in this paper, the argument presented here is that formal government institutions of tax consultation incorporate multiple consultative strategies. These strategies range from an autocratic denial of the need for any consultation other than limited technical consultation with government agencies, through limited (and often confidential) consultation between government and ‘key stakeholders’ to broad based community consultation which is at least largely in accord with the norms of deliberative decision making.¹² Nevertheless, it is also true to say that Australian tax law creation mechanisms exhibit an unduly close strategic alliance between government agencies and ‘key stakeholders’ (business and professional associations), to the exclusion of broader community engagement. I argue that this strategic alliance engenders defective legislative outcomes. To overcome this pathology I argue that a reorientation of Australia’s tax creation mechanisms towards a ‘thicker’ sense of democratic accountability, one which requires the provision of sufficient information regarding Australian tax policy embodied in legislative measures, is

⁸ The Hon Peter Costello, MP, ‘Economic Reform Directions and the Australian Public Service’, Address to the Australian Public Service Commission Ministerial Conversations Conference, Australian Parliament House, Canberra, 2 November 2005.

⁹ ‘The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth ...’: *Freedom of Information Act 1982* (Cth).

¹⁰ Explanatory memorandum accompanying *Tax Laws Amendment (2004 Measures No. 7) Act 2005*, para 1.63.

¹¹ Although the expression is not new, Linda McQuaig details the background to the 1987 Canadian federal tax reforms: Linda McQuaig, *Behind Closed Doors*, Penguin, Ontario, 1988. For discussion of the general practice in Australia of confidential consultation upon tax measures see below, section 4 C 1 below.

¹² The literature regarding ‘deliberative decision making’ is vast, however, for the purposes of this paper the principles of deliberative decision making embody a transformative vision of the political process whereby adequately informed participants assume control of the entire decision making process – from determining their agenda to evaluating their processes of decision making. The process of deliberation entails the pursuit of consensus through listening to, evaluating and responding to alternate viewpoints – through this process it is believed that consensus will emerge. For different approaches to deliberative decisionmaking see Philip Pettit, *Republicanism: A Theory of Freedom and Government*, Clarendon Press, Oxford, 1997; Amy Gutman and Dennis Thompson, *Democracy and Disagreement*, Harvard Uni Press, Cambridge, MA, 1996.

necessary. Although not requiring widespread public participation in the tax creation processes, this thicker concept of democracy would take the prospect of wider informed public participation seriously. The first step towards such reform is to demonstrate that the status quo is a pale form of ‘democracy’.

2. Preliminary aspects of this subject

A. *Why Does Process matter?*

(1) Voluntary compliance, legitimacy and perceived legitimacy

Legitimacy is an aggregate concept which records the extent to which an entire population is willing to allow itself to be governed.¹³ The usefulness of the concept of legitimacy is subject to limitations,¹⁴ but it is generally accepted that the legitimacy of law is closely associated with a community’s preparedness to voluntarily comply with that law.¹⁵

The sources of legitimacy are a community’s perceptions of the substantive merit of the law and also a community’s perception of the procedure by which the law was created and/or applied. With respect to procedural fairness, it is generally accepted that legitimacy and perceived legitimacy are enhanced through the adoption of good governance principles, including transparency and accountability.¹⁶ Tyler suggests that the general public ignores appraisal of the merits of policy underpinning legislation and instead accepts that procedural fairness – ‘the process by which allocations are made and disputes settled’ - is an appropriate proxy for substantive fairness.¹⁷ This would suggest that substantive fairness are largely irrelevant to procuring voluntary tax compliance. Certainly there is enough evidence to suggest that, in the main, individual taxpayers find tax matters confusing¹⁸ and also have little idea as to what proportion of their income they pay in tax.¹⁹ However, the applicability of Tyler’s work, which focused upon the

¹³ For a good discussion of the concept of legitimacy and sources of legitimacy see T R Tyler, *Why People Obey Laws*, Yale University Press, New Haven, 1990,

¹⁴ First, it does not reflect the fact that the legitimacy of laws within a particular jurisdiction may vary depending upon the subject matter – a population may accept the legitimacy of a traffic code but not the tax code. For this reason, it is far more useful to speak of the legitimacy of a particular law rather than the legitimacy of ‘government’. Second, it is doubtful that an entire population will ever perceive any particular law to be legitimate, but this matters little if those that consider the law illegitimate in any case have no option but to comply with that law. Third, for those for whom compliance with a law is discretionary, one factor driving their decision is the extent to which they perceive others to believe the law to be legitimate – peer pressure being one example of this.

¹⁵ Tyler, above n 13.

¹⁶ For consideration of the difficulty of defining ‘accountability’ see: Canada, *Final Report of the Royal Commission on Financial Management and Accountability*, Department of Supply and Services, Ottawa, 1979, 9. For present purposes suffice to say that accountability entails responsible government ministers facing the questions and scrutiny of elected members

¹⁷ Tyler, above n 13, 172-3.

¹⁸ Commonwealth of Australia, *Community Perceptions Survey 2005*, Australian Taxation Office, Canberra, 2005.

¹⁹ This confusion can only have been compounded as a result of the considerable ‘revenue churn’ of recent years, whereby taxpayers pay tax but receive offsetting cash transfers from government in the form of family payments.

legitimacy of laws protecting ‘community’ – criminal, traffic and noise restriction laws - in the taxation domain is open to question. The public might more readily ignore the process by which ‘community’ laws are enacted when deciding whether those laws are legitimate, whereas it might pay closer attention to perceptions regarding the origins of taxation laws when assessing the legitimacy of those laws.

At present in Australia it seems that there is a substantial section of the community which, rightly or wrongly, believes that the tax policy process favours special interests.²⁰ In the absence of more detailed data it is not possible to determine the basis of such beliefs. Further, in the absence of time series data it is difficult to know whether this perception is changing or not.²¹

(2) Good legislative policy/Tax simplification

One hallmark of post enlightenment philosophy is rationalist epistemology. Scientists place great faith upon their scientific method and the scrutiny of peer review in finding truth. Many lawyers place great faith in their legal method and the public statement of judicial reasoning in case decisions in finding ‘the law’. Although these subcommunities acknowledge that following the correct method does not guarantee right answers, in general we agree that a methodological approach minimises the risk of error. So, too, with the legislative process - it is generally accepted that good process at least heightens the prospect of good law making, and so the process of law making has attracted substantial attention.²²

B. Why a review of tax reform processes is timely

(1) Opacity and interest group politics

Perhaps in a mythical Fairyland tax law would focus solely upon raising revenue in accordance with finite, ‘scientific’²³ principles of public finance, and fairy politicians would have both the will and the popular support to enact such principles into legislation. The political economy of fairy public finance would revolve around the setting of tax rates necessary to fund what was perceived to be the appropriate level of public services. In the real world, however, the content of substantive principles of public finance are contested²⁴ and the proper deliberative process by which these hazy principles are considered and enacted into law by the community is itself open to debate.²⁵

²⁰ Valerie Braithwaite, *Perceptions of Who's Not Paying Their Fair Share*, Working Paper No 54, Centre for Tax System Integrity, Canberra, 2004.

²¹ The collection of such time series data would most appropriately be a function of government rather than, for example, relying upon ad hoc academic research in this field (which usually will comprise relatively short term projects). However, any government which is less than altruistic has little incentive to promote scrutiny of the legislative process which it has adopted.

²² Guy Peters, *The Politics of Taxation*, Blackwell, Oxford, 1991

²³ For discussion of the rhetoric of ‘science’ in the discourse of tax reform see: M Susan Murnane, ‘Selling Scientific Taxation: The Treasury Department’s Campaign for Tax Reform in the 1920s’ (2004) 29 *Law & Soc Inquiry* 819.

²⁴ See, for example, Nancy E Shurtz, ‘A Critical View of Traditional Tax Policy Theory: A Pragmatic Alternative’ (1986) 31 *Vill. L. Rev.* 1665, 1666ff.

²⁵ Frank Cunningham, *Theories of Democracy: A Critical Introduction*, Routledge,

In this indeterminate domain many citizens express the view that paying tax is a good thing because it finances public services²⁶ and it also seems that many taxpayers, acting from any of a range of postures including altruism, apathy, ignorance or cynical subjection to the dominant will of government, ignore opportunities to ‘play for the grey’ in tax matters.²⁷ Nevertheless, it is also clear that many perceive the payment of tax from a vastly different perspective. The ideology of private property, and the perceived illegitimacy of the substantive and procedural principles upon which taxation law relies for legitimacy, are combined in various ways in constructing alternate discourses of losers and winners – or taxpayers and tax players.²⁸ For example, the concept of private property underpins perceptions of taxation which range from theft of private property²⁹ to a theoretically dubious payment for the provision of public services.³⁰

Perhaps understandably, those who wish to be among the ‘winners’ will seek influence at every decision making node in the tax domain – from the inception of tax law to its execution.³¹ In the absence of processual and substantive bedrock, the tax law has proved to be an irresistible honeypot for those seeking to benefit from disguised government welfare. Lobbyists exercise considerable influence in winning concessions under the guise of ‘simplification’ of the law,³² the framing of ‘equity’ measures,³³ identification of the appropriate tax mix³⁴ and the nature of measures appropriate to achieving ‘neutrality’.³⁵ In the absence of finite principles there is inevitably wriggle room in the minutiae of decisions with respect to taxation’s litany of ‘wicked problems’³⁶ – problems upon which closure can only be achieved by what are ultimately the arbitrary bases of

²⁶ Richard Grant, *Less tax or more social spending: twenty years of opinion polling*, Research paper No 13 2003-04, Information and Research Services, Canberra: Commonwealth Parliamentary Library (available at <http://www.aph.gov.au/library>).

²⁷ For discussion of various taxpayer postures see: Valerie Braithwaite, ‘Dancing with Tax Authorities’, in Valerie Braithwaite (ed), *Taxing Democracy*, Ashgate Publishing, Ashenden, 2003, 17.

²⁸ Commonwealth of Australia, *Taxpayers or Taxplayers?* Report of the House of Representatives Committee on Finance and Public Administration, Canberra, AGPS, 1989.

²⁹ Liam Murphy and Thomas Nagel, *The Myth of Ownership*, Oxford University Press, Oxford, 2002.

³⁰ Justifying taxation upon the basis of it being a payment for services is problematic because there is no direct correlation between the tax ‘price’ and the value of the services received. Further, conceiving of taxation as an exchange contract undercuts the ethical foundation of taxation as a contribution to the common fund. Framing taxation as an exchange contract suggests that ‘purchasers’ of public services are legitimately entitled to minimise the price they pay by engaging in ‘tax avoidance’, making the inclusion of GAARs problematic. Either taxation is not an exchange contract (so GAARs have a legitimate role within a tax framework) or a GAAR must be conceived as a government’s effort to enforce its monopolistic rents (which jeopardises their legitimacy).

³¹ Thus, for example, see the discussion of the efforts of the Church of Scientology to win a favourable taxation ruling from the Inland Revenue Service in the United States of America in: Leonard Downie Jr and Robert G Kaiser, *The News about the News*, Vintage Books, New York, 2003, 30ff. These efforts included hiring private investigators to harass IRS agents.

³² Dan Roberts, ‘GE surges as tax breaks cut in’, *The Australian*, 24 January 2005, 28.

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³⁴ Thus, for example, see Eccleston’s portrayal of the key role that business lobby groups played in advancing the consumption tax agenda in Australia: Richard Eccleston, *The Thirty Year Problem*, Australian Tax Research Foundation, Sydney, 2004.

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³⁶ Horst Rittel and Melvin Webber (1973), ‘Dilemmas in a General Theory of Planning’ 4 *Policy Sciences* 155.

satisficing³⁷ and/or heuristics.³⁸ Although the theory of public choice³⁹ has its limitations,⁴⁰ its elaboration has served to highlight the extent to which some segments of the community will organise themselves into lobby groups with considerable resources and influence at all levels of government. The exercise of such influence to palpable effect, in terms of legislated tax policy⁴¹ and also administrative outcomes,⁴² demands that the tax legislative process be examined for the purpose of determining whether such influence should be moderated and, if so, how this might be achieved.

(2) Control of rentseekers by authoritarian tax reform – myth or reality?

A second reason for examining the legislative process is that within the legal process literature there is a substantial body of work which expressly or impliedly takes as axiomatic the proposition that close control over tax reform processes offers the best path to a simple tax system.⁴³ Such closely controlled reform processes are contrasted to ‘participatory’, ‘republican’ and ‘deliberative’ processes which generally countenance consultative strategies which seek broad community engagement upon tax policy design.⁴⁴ Such open and broad based consultation upon tax reform, it is often suggested, engenders myriad special interest concessions which complicate the tax law.⁴⁵ Good government, like good science, should adopt the institutional structure which allows meritworthy principles to rise to the top, and so democracy should take a back seat.

Often implicit within this dogma is the proposition that authoritarian government enables principled tax reform because, left to its own devices, government has the will and would have the institutional capacity to act in ‘the public interest.’ The ‘public interest’ is generally understood to entail adoption of a principled approach to tax system design, framed in terms of the well known lore of neutrality, equity and simplicity. Proof of this

³⁷ An expression coined by Herbert Simon to denote the posture of many decisionmakers that it is time to call an end to their inquiries and arrive at a finite conclusion: ‘A Behavioral Model of Rational Choice’ (1955) 69 *Q J Econ* 99.

³⁸ A heuristic is a means of simplifying an inquiry by accepting that one phenomenon can be substituted for another (ie ‘the happiness of a person is proportional to their height’). See, for example, Oliver E. Williamson, ‘Transaction Cost Economics Meets Posnerian Law and Economics’, (1993) 149 *Journal Institutional & Theoretical Economics* 99, 101ff; Jon Hanson and David Yosofin, ‘The Situational Character: A Critical Realist Perspective on the Human Animal’ (2004) 93 *Georgetown Law J* 1, 25ff; Korobkin and Ulen, ‘Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics’ (2000) 88 *Calif L Rev* 1051, 1076ff.

³⁹ Dennis C. Mueller, *Public Choice III*, Cambridge Uni Press, Cambridge, 2003: ‘Public choice can be defined as the economic study of non market decision making, or simply the application of economics to political science. The subject matter of public choice is the same as that of political science: the theory of the state, voting rules, voter behavior, party politics, the bureaucracy, and so on. The methodology of public choice is that of economics, however.’ (at 1).

⁴⁰ See, for example, Edward L Rubin, ‘Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, But Throw out the Baby’ (2002) 87 *Cornell L Rev* 309; Korobkin and Ulen, above n 38.

⁴¹ Jeffrey H Birnbaum and Alan S Murray, *Showdown at Gucci Gulch: Lawmakers, Lobbyists, and the unlikely Triumph of Tax Reform*, Random House, New York, 1987

⁴² John Witte, *The Politics and Development of the Federal Income Tax*, Uni of Wisconsin Press, Madison, 1985, 20, 380ff; Sheldon Pollack, ‘A New Dynamics of Tax Policy?’ (1995) 12 *Am J Tax Policy*

⁴⁴ See, for example, OECD, *Citizens as Partners*, OECD, Paris, 2001; Gutman and Thompson, above n 12.

⁴⁵ Witte, above n 1; Thomas Reese, *The Politics of Taxation*, Quorum Books, Westport, 1980.

dogma is, it is suggested, to be found in the experience of tax reform in the United States, particularly since the power of the House Ways and Means Committee was diminished in the mid-1970’s. Under the chairmanship of Wilbur Mills, the House Committee autocratically ruled the tax reform agenda and kept special interests in check.⁴⁶ With the decline of the Committee’s firm control of the tax reform agenda, it is suggested, there was a veritable explosion in tax expenditures won by lobbyists. This experience is posed as a salutary lesson to those who contemplate mass political engagement in tax reform. One need only review any of the alternate tax expenditure statements prepared by various arms of the US government to see that a significant contributor to the complexity of the US tax code is the plethora of special interest concessions won by lobbyists in open tax consultation processes.

What this dogma overlooks or downplays is the fact that autocratic control of the tax reform process can create a shroud behind which governments may confer favours upon selected influential groups.

(3) The dearth of Australian consideration of this issue

The third reason for undertaking this review of the legislative process is that the autocratic strand of political theory appears to be in the ascendancy in Australia, as is evident from the recent actions of the Australian government in the taxation domain.⁴⁷

(4) Relevance of institutional capacity in the developed world to institutional capacity measures in developing and transitional economies

Looking beyond the shores of Australia and other ‘developed’ countries where ‘democracy’ has a tenuous grip at best, understanding the grounded application of the concept of ‘democracy’ in framing tax law making institutions is clearly vital to building ‘institutional capacity’ in developing and transitional economies.⁴⁸ If the tax institutions of ‘developed’ countries exhibit autocratic features, one question which arises is whether those tax institutions should serve as a template for developing and transitional countries. This question entails consideration of whether ‘developed’ countries, which are often taken to be ‘democratic,’ truly are ‘democratic.’

C. What is community consultation?

Although the Board of Taxation released a report regarding government consultation with the community upon tax reform, the report does not explicitly adopt a definition of ‘consultation’ nor of ‘community’.

At its broadest signification, ‘consultation’ connotes communication between two parties and embraces receipt of any communication which offers advice or information. ‘Consultation’ therefore assumes the separation of government and ‘the community’. This assumption underpins much of the political science literature in the field of taxation law – as that literature focuses upon the relationship of government with ‘the community’

⁴⁶ Witte, above n 1, 333-4.

⁴⁷ See nn 5 - 9 above.

⁴⁸ Richard K Gordon and Victor Thuronyi, ‘Tax Legislative Process’ in Victor Thuronyi, *Tax Law Design and Drafting*, International Monetary Fund, Washington, D.C., 1996 vol 1.

(or some part thereof). However, this assumption is not necessarily apposite in an era where public policy formation has been ‘privatised’ – in some contexts it might be better to conceive of government and some sectors of the community as one, an assimilation reflected in the concept of regulatory capture.⁴⁹ The possibility of such assimilation is one aspect of tax consultation mechanisms which deserves further exploration and this is one path down which this paper takes some steps.

Elaboration upon the nature of consultation in a specific context entails consideration of the who, what, when, how, how much and evaluation questions of consultation – who should be consulted, upon what subject matter, when the consultation should take place in the policy development cycle, how the consultation should take place and how much consultation should be undertaken before it is accepted that accountable representatives of the public must make a decision and how the outcome of the policy process should be evaluated. In the context of government consultation with ‘the community’ there are various mechanisms by which consultation may occur. Consultation can be direct, as where a constituent writes to a Member of Parliament or where a member of the public appears before a parliamentary committee. Consultation might also take place by indirect means, as where a member of the public writes a letter to the editor of a public newspaper which is read by politicians and/or bureaucrats. Consultation might be invited or uninvited. From a procedural perspective, consultation is depicted as a logical loop which incorporates the elements of information provision, agenda setting, information gathering, critical appraisal of proposed measures, post implementation review of legislative measures and evaluation of the consultative process.⁵⁰ From a contextual perspective, consultation upon tax design can occur in a range of contexts. These contexts include the annual budget deliberations, as part of an ad hoc review initiated from within the executive government, as part of on-going interaction between executive government and the community and also as part of a parliamentary committee inquiry.

In its report the Board of Taxation appears to have concentrated upon consultative processes which comprise invited consultation initiated by the Treasury branch of the executive government. This therefore excludes consideration of a significant amount of community consultation regarding the ‘development’ of taxation legislation, including the ‘provision of information’ to government by lobbyists⁵¹ or by others acting under the guidance of lobby groups,⁵² consultation between the Commissioner of Taxation and the community with respect to the ‘unfolding’⁵³ of taxation law by the issuance of public rulings and also consultation regarding taxation legislation undertaken by various

⁴⁹ For early discussion of the concept of regulatory capture see: George Stigler, ‘The theory of economic regulation’ (1971) 2 *Bell Journal of Economics and Management Science* 3; Sam Peltzmann, ‘The growth of government’ (1980) 23 *Journal of Law and Economics* 209.

⁵⁰ OECD, *Citizens as Partners*, OECD, Paris, 2001.

⁵¹ Many lobbyists suggest that they do no more than provide the information to government which is necessary for the formation of good public policy: ????.

⁵² Thus, for example, Rechner details a campaign against the introduction of a broad based consumption tax, overseen by the Retail Traders’ Association, under which 45,000 letters were sent to Parliament in 1980: R Rechner, *Options for Tax Reform*, Economic Papers, No 62; cited in Eccleston, at 69.

⁵³ Australian Government, *Some information on Coherent principles – a new approach to tax law design*, Australian Treasury, Canberra, N.D.

parliamentary committees.⁵⁴ The exclusion of these additional forms of consultation from the Board of Taxation’s purview is unfortunate, as it has produced a partial account of community consultation upon the development of Australian taxation legislation. One subsidiary purpose of this study is to fill this lacuna in our understanding of the system by which tax legislation is produced in Australia.

A second aspect of the Board of Taxation report is its failure to expressly adopt a definition of ‘community’, and in particular to explain whether there is a difference between ‘community’ and ‘stakeholders’. At some points within the report it seems that the two terms are used interchangeably, suggesting that at least⁵⁵ all of the Australian community are ‘stakeholders’. However, at other points it seems that ‘stakeholders’ are those persons who will be immediately and directly affected by a legislative measure, as where primary producers are targeted under landcare measures. What this latter approach implies is that the broader Australian community has no direct interest in the operation of such measures and so might safely be excluded from any consultative process. This approach, of course, ignores the fact that any taxation measure affects all of the Australian community, however slightly. The decision to recognise another body as a charity means that the tax expenditure program is extended and therefore a cost to government arises – that cost, however slight, must be met by the broader community.

D. A word on methodology

As noted in the introduction, this paper attempts to offer critical understanding of the application of democratic political theory in the specific context of taxation law. At the least, this paper entails an interdisciplinary and comparative approach embracing political theory, political science and law. The interaction of democracy and tax reform processes has been the subject of a number of studies by political scientists and also by political theorists. Political scientists generally seek to explain political action by adopting any or all of the perspectives of ideas, interests and institutions. Political theorists generally seek to develop a normative theory of political society and in doing so generally disregard how their normative scheme might be implemented. On the odd occasion, an author such as Shapiro purports to combine the practical world of political ‘science’⁵⁶ with the ‘impractical’ world of political theory, and this paper is in this category. Unlike Shapiro, however, I put more emphasis upon the practical rather than the promulgation of a normative theory which leaves much to be explained in terms of practical implementation.⁵⁷

⁵⁴ These Committees most obviously include the Senate Finance Committee, but might also include other Committees such as that chaired by Dr Brendan Nelson regarding ESOPs.

⁵⁵ Persons who are not members of ‘the Australian community’, such as non-resident investors and prospective immigrants, might also have a legitimate interest in being heard upon Australian taxation reform.

⁵⁶ See Steinmo’s suggestion that political science is distinct from the natural sciences because political science does not entail the quest for universal truth because no such thing exists in politics – all that exists, according to Steinmo, are context specific explanations for political behaviour which are framed in socio-cultural terms: Sven Steinmo, *Taxation and Democracy*, Yale Uni Press, New Haven, 1993, 201ff.

⁵⁷ Drawing upon earlier political theory which conceives of democracy as a mechanism for mediating conflicting interests, and a mechanism with which government should interfere as little as possible. Shapiro does, however, acknowledge that social inequality impedes the effective and fair operation of the

Others have undertaken similar studies in the past, although all have encountered difficulty in conveying the complexity of the social process of tax reform and have developed simplifying assumptions which limit the scope of their work. Thus, for example, Steinmo assumes that powerful majoritarian governments can ignore interest groups. According to Steinmo, the concentration of legislative power in the executive arm of government meant that the government of the day did not need to engage in the compromises endemic within the United States lawmaking process.⁵⁸ Rather, successive majority governments were free to enact their proposals and did so, committing the United Kingdom to a series of substantial policy shifts from one government to the next.⁵⁹ Steinmo assumes that the absence of a committee system akin to that operating in the United States indicates that the government does not need to make compromises. What he ignores is the power of lobby groups to broker legislative deals ‘behind closed doors’⁶⁰ and for other interests to wield more subtle influence upon public policy.⁶¹ What is missing here is the Foucauldian recognition of the diffusion of power throughout a community, notwithstanding the concentration of formal power in the executive branch of government. Thus, because Steinmo adopts the dualistic paradigm of ‘government’ and ‘the people’, he ignores the process by which the majoritarian government in the United Kingdom arrives at its tax policy. His analysis takes *a priori* a government’s tax policy, rather than exploring the way in which that policy is generated. Had he undertaken such analysis, he may well have seen that ‘government’ and at least some segments of ‘the people’ are closely integrated. Within the executive arm of government there will almost always be a brokering of deals in shaping legislation – it may not take place within a formal committee system such as that of the United States, but it takes place nonetheless. Thus Eccleston describes an institutionally weak Australian government which must construct strategic alliances with different interest groups in building support for a legislative program.⁶²

When such phenomena are taken into account, Steinmo’s argument, that absence of political compromise is a feature of an institutional framework dominated by a two party system where there is strong party discipline and majoritarian government,⁶³ can be seen

democratic mechanism, and accepts that those who are ‘vulnerable’ to having their ‘basic interests’ threatened by democratic decision. Shapiro offers only vague definitions of these terms and this failure severely limits the capacity of commentators to engage in critical consideration of how Shapiro’s vision might be implemented.

⁵⁸ For his appraisal of the influence of the legal institutions of the United States upon tax reform outcomes, see, for example, Steinmo, above n 56, 160ff, 203-4

⁵⁹ ‘In Britain the growth of single-member districts led to powerful majoritarian governments. Strong majoritarian governments can be certain that their legislative agenda will be passed by its legislature.’: Steinmo, above n 56, 206.

⁶⁰ Linda McQuaig, above n 11 . I am grateful to Neil Brooks for bringing this work to my attention.

⁶¹ One area which deserves much more attention is the way in which interest groups and others shape public opinion and hence the way in which taxes are shaped. Some useful contributions in this field include: William Blatt, ‘The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy’ (1996) 51 *Tax Law Review* 287; Larry Patriquin, *Inventing Tax Rage: Misinformation in the National Post*, Fernwood Publishing, 2004.

⁶² Richard Eccleston, *The Thirty Year Problem*, Australian Tax Research Foundation, Sydney, 2004.

⁶³ See, for example, Steinmo, above n 56, 206.

to be a simplification. In the Australian context, although he endorses Steinmo’s dynamic institutionalism,⁶⁴ Eccleston’s ‘new institutional’ theory is somewhat more sensitive to the dynamic interplay of a variety of forces shaping a tax system: formal institutions such as the constitutional framework,⁶⁵ political pragmatism,⁶⁶ interest groups⁶⁷ and even the role of the media are acknowledged at various points in Eccleston’s work as he strives to explain the process by which government enhances its ‘relational capacity’ by engaging with ‘key stakeholders’. But once again the complexity of this task is daunting. Identifying who are the ‘key stakeholders’, how they are to be identified, explaining how they became key stakeholders in the first place and consideration of implications of this ‘new institutionalist’ depiction for normative democratic theory and institutional reform are matters left unresolved.

This is not to say that Steinmo and Eccleston offer insubstantial work as that is plainly not the case. However, it is to suggest that if we are to move toward the grounded theory of which Shapiro speaks, it requires a closer, holistic examination of specific aspects of the tax legislative process.

3. The ties that bind - forces shaping tax design institutions

The process by which a country’s taxation laws come into being is in many respects a vignette of a country’s political system more generally because Before considering the complex character of tax reform institutions it must be borne in mind that these institutions have developed over time in response to a number of often competing pressures. These pressures could be differently categorised and identified in varying degrees of specificity, however I have expanded upon political science’s ideas/interests/institutions by adopting a fourfold categorisation of ideological factors, institutional factors, the pressure of interest groups and material conditions. Within each of these factors there are competing forces which lend weight to different conceptions of what tax reform institutions might look like. For example, as discussed further below, within the ideological domain there is a tension between elitism and participatory strands of ‘democratic’ theory.⁶⁸

I do not wish to dwell at great length upon these factors, as they are not the focus of this paper. Nevertheless, a brief outline of these factors provides the context for the argument of this paper – that governments adopt multiple tax consultation mechanisms, which are often inconsistent with each other, because the process of lawmaking is polymorphous and, within different lawmaking sites, different government actors in different contexts have responded differently to the potentially infinite combinations of these pressures.

⁶⁴ Eccleston, 15

⁶⁵ Eccleston, 27-30.

⁶⁶ Eccleston, 52

⁶⁷ Eccleston, 69

⁶⁸ This tension is the central theme of Dunn, above n 2.

A. Ideological factors

Although ‘democracy’ literally means rule by the people, the understandings accorded to ‘rule’ and ‘people’ vary.⁶⁹ For example, the nature of ‘rule’ has been understood in terms of self-rule under consensus politics and also in terms of the imposition of rule by a democratically elected government. Within liberal democratic theory there are competing approaches to reconciling individual liberty with democratic government – the central questions being:

1. identification of the members of the polity and whether and how the interests of those members should be considered during the democratic process – the young, future generations and the infirm being problematic;
2. the normative significance of the democratic concept of equality (and in particular, whether it is enough for each member of the polity to have a theoretical opportunity to participate in decisionmaking, ignoring the reality of socio-economic inequality);⁷⁰
3. the status of individual rights within a democracy, and in particular how to prevent a bare majority from oppressing a minority;
4. whether democratic government is a power sharing mechanism based upon:
 - a. factions competing in a political marketplace for their policy preferences;
 - b. a consensus between individuals ‘taken as they are;’ or
 - c. a consensus of individuals transformed by virtue of their participation in the process of democratic decision making; and
5. whether democracy jeopardises the creation of meritworthy public policy. This elitist distrust of democracy has a long pedigree.

Dunn suggests that the power of the democratic concept has been its ability in recent history to represent quite different conceptions of government.⁷¹ Thus, liberal democratic theory is fractured upon various legitimations of state action:

1. Consensus – Tracing back to what is understood of Athenian democracy, one strand of democratic theory holds that government rule will be legitimate when it is founded upon the mutual consent of the polity. The libertarian strand of liberalism is grounded upon this concept of democracy.

Drawing upon Arrow’s theorem,⁷² libertarians argue that unfettered democratic decision making under bare majority rules, and where there is no majority for a particular policy option, means that the entity which determines the voting order can determine the outcome of the vote. This is anathema to the democratic norm of equality of citizens. If this conundrum is averted by ensuring that the same person will not determine the order of the vote on each occasion, democratic decision making would entail continuous vote cycling in which no outcome

⁶⁹ For discussion of which see: Anthony Birch, *The Concepts and Theories of Modern Democracy*, Routledge, London, 1993, ch 4.

⁷⁰ Bruce Heady, Gary Marks and Mark Wooden, *The Structure and Distribution of Household Wealth in Australia*, Melbourne Institute Working Paper No 12/04, Melbourne, 2004.

⁷¹ John Dunn, above n 2.

⁷² Kenneth J Arrow, *Social Choice and Individual Values*, Wiley, New York, 1951

would be pre-eminent. Given such irrationality, libertarians hold that the state should be minimised to the greatest possible extent.

However, deciding that the state ought be minimised does not resolve the issue of how the rules regarding the bare necessities of public infrastructure should be determined. Buchanan and Tullock proposed that different voting mechanisms should be adopted for different categories of rules, with those most susceptible to authoritarian exploitation being subject to a requirement that the rule obtain unanimous support.⁷³ By design, such a rule would limit the capacity for state action because every individual has a power of veto and so government will in most cases be hamstrung. Conferring a veto power upon subjects in today’s world grants them the choice of maintaining the status quo. Given that some individuals will benefit more from the status quo than others, and that the status quo has not necessarily been founded upon the consent of those subject to the status quo, it is not clear why veto rights should be allowed to the expropriators. Moreover, consensus based politics implicitly denies many a voice in the political process - future generations, the young, those with mental incapacity and, according to some, convicted criminals.

Nevertheless, aspirations to such consensus based models of government indicate that tax reform consultation should, as far as possible, reach out to the broader community;⁷⁴

2. Elitism - for much of the last 2000 years democracy was a term of derision, rather than the dominant political ideal, because of the fear that ignorant masses would adopt poor public policy which has short run benefits but long run detriment. From Plato’s preference for a governing class of philosopher/guardians⁷⁵ to Schumpeter’s observation that ‘the typical citizen drops down to a lower level of mental performance as soon as he enters the political field.’⁷⁶

In the field of taxation law this fear of massification is reflected in the median voter theorem - that the majority of a society would vote a punitive tax upon the wealthier minority - thereby destroying the economic vitality of the nation.⁷⁷ It was the median voter theorem which underpinned the creation of many upper houses of legislatures grounded upon a property franchise.⁷⁸ And it was the

⁷³ James M Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, University of Michigan Press, Ann Arbor, 1962.

⁷⁴ One example of such a program of broad based community consultation may be seen in Ontario, *Fair Taxation in a Changing World*, Ontario, 1993. Unfortunately, no consensus upon tax reform emerged from this process and, indeed, it seems that at least some participants in the process felt more alienated from government as a result of this failed effort to build consensus: see the dissenting finding of Professor Neil Brooks.

⁷⁵ *The Republic*, WW Norton Co, 1985, (Richard Sterling and William Scott, transl), 412a-b.

⁷⁶ Joseph A Schumpeter, *Capitalism, Socialism and Democracy*, Unwin University Books, London, (1954, 4th edn), 262.

⁷⁷ For discussion of this point see Shapiro, above n 3

⁷⁸ Id

median voter theorem which informed the array of checks and balances in the democratic constitutionalism of the United States.⁷⁹

However, aside from this more cynical or altruistic version of elitist theory, depending upon the perceived motivation, form of democratic theory. For those within the normative camp, this imperative may mean that it is better that public policy development takes place in an environment sheltered from the noise of the uneducated masses. Conversely, deliberative democrats emphasise the vast store of human capital in the broader community, capital which can only be accessed by adopting broad based community consultation;

3. Proceduralist theories – which define democracy in terms of procedural norms regarding the process by which decisions are made or the process by which decisionmakers are appointed. ‘Thin’ proceduralism might, for example, merely specify minimal standards for free and fair elections of decision makers without prescribing any substantive norms as to the nature of decisions made by those decision makers. ‘Thick’ proceduralism incorporates substantive principles regarding the nature of state/individual engagement in the legislative process. Thick proceduralism draws upon the deliberative democracy literature which draws upon some aspects of Greek democratic political philosophy in emphasising the integration of public and private life. More recently this theme was developed by Rousseau and more recently still authors such as Sunstein and Gutman.

Thus Gutman and Thompson argue for a normative democratic model in which citizens exhibit mutual concern and respect for each other while negotiating a path to mutual consent. By coming to know ‘the other’ we adopt the standpoint of civic virtue. Although both libertarians and deliberative democrats ultimately focus upon mutual consent as the legitimating foundation for democracy, the key difference is that libertarians accept that a political system should ‘take individuals as they are’ and merely aggregate their votes, while deliberative democrats adopt a thick, transformative vision of the political process.

B. Institutional factors

‘Institutions’ have been defined in various ways. North’s definition, that an institution is any form of constraint that human beings devise to shape action,⁸⁰ is perhaps unduly restrictive because it focuses upon constrictions upon human behaviour and also requires a purposive element. A phenomenon which could be described as ‘enabling’ human action and/or one for which the requisite purposive element cannot be identified. Institutions can also be defined so broadly as to incorporate ideological and economic factors.⁸¹ However, for the purposes of this discussion institutions are those formal and quasi-formal legal norms, such as the constitutional structure of government and

⁷⁹ Id

⁸⁰ D North, *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, Cambridge, 1990, 4.

⁸¹ P Hall and R Taylor, ‘Political Science and the three new institutionalisms’ (1996) 4 *Political Studies* (cited in Eccleston, 17).

constitutional conventions, informal norms such as the proposition that ‘Treasury has the role of confidential adviser to government’⁸² and the norms of public sector governance such as transparency and accountability and more tenuous conventions such as ‘freedom of the press’⁸³ which create the framework within which individual and social action is undertaken.

The danger of applying the terminology of ‘institution’ is that it risks resurrecting an unrealistic structuralist theory,⁸⁴ under which ‘institutions’ are conceived in terms of monolithic and enduring structures which shape human behaviour without themselves being shaped by human behaviour, material circumstances and ideas. Rather, the tension borne of the incommensurable standpoints within liberal political theory outlined in the preceding discussion, which engender myriad nuances of the concept of democracy, are reflected in these institutions. Each institution, then, is not monolithic but rather a descriptor for a field of discretionary endeavour. The concept of ‘transparency’, for example, is amenable to multiple interpretations which indicate quite different institutional structures and individual action.⁸⁵ Similarly, what passes for ‘a free press’ is open to discretionary manipulation of subtle forms of editorial control, as where a government minister utilises budget secrecy to heighten the media spectacle of ‘her’ or ‘his’ budget day or uses that secrecy to control the steady drip of leaked information to maintain a coterie of selected loyal journalists.⁸⁶ The conduct of a committee’s proceedings might be undertaken under ‘open’ or ‘closed’ processes,⁸⁷ and in any case lobbying of strategically significant decision makers might be undertaken behind closed doors, at the discretion of those decision makers. Every where one looks within these ‘institutions’, one finds not a monolithic structure but a field of discretionary capacity.

C. Socio-economic conditions

Socio-economic conditions refers to the factors which influence consultative practice – including the availability of technology such as communication technology, financial resources available to government in pursuing consultation, the capacity of the relevant community to engage in consultation and the size and dispersion of the relevant community. Myriad factors influence what is feasible and there is no calculus by which all of these factors can be aggregated in arriving at an objective measure of socio-economic capacity and nor is there an objective ranking of the relative importance of these factors such that a particular factor could be identified as a proxy for the remainder. As such, not only is there variance across different communities and with respect to different subject matter, there is also variance as to what variables are more important.

⁸² Australian Government, *T-Notes: Some Information on Feedback*, The Treasury, ND, Canberra.

⁸³ The nature of ‘freedom of the press’ is a topic worthy of further attention, as the free expression of ideas can be restricted by direct regulation, indirect regulation (such as imposing a tax upon newspapers) and also by private means as where commercial pressures lead to restrictions imposed from within a media outlet upon editorial content: Censorship ????.; see also the material at the website Journalists ????

⁸⁴ EP Thompson, *The Poverty of Theory*,

⁸⁵ Mark Burton ‘Towards Participatory Tax Transparency’ (2006) 4(3) *Tax Notes International* 333-357.

⁸⁶ Australian Press Council, (1994) 6 *Australian Press Council News* 1; Max Suich, ‘Mark Latham’s Bad Media Day’, *The Age*, 21 January 2005, 17.

⁸⁷ Discussed below in the context of the tax law making process of the United States of America: see ??? below.

D. Interest groups

Interest groups are adaptive social organisms which can, it seems, tailor their strategies for maximising influence to the social environment. Thus, where tax legislation is framed under a process of ‘open’ committee decisions, interest groups are able to wield influence over committee members by various licit and illicit means. Reese and Witte offer somewhat bleak descriptions of the United States political process of the 1970’s and 1980’s, although they offer different remedial prescriptions.⁸⁸ Later work suggests that little has changed.⁸⁹ Where tax legislation is framed under a process of ‘closed’ committee decisions, interest groups have found means to wield influence over committee members by doing deals behind closed doors.⁹⁰

What Witte’s analysis of the United States experience does suggest is that interest groups have an advantage in those institutional contexts where decision making power is diffused across a number of nodes and where there are multiple veto sites. Although it is true that conferring decision making power upon a sole decision maker would enable interest groups to concentrate their resources at that site, multiplying veto sites is favourable to interest groups because it does not make the odds of veto smaller as under a probability calculation ($1/2 \times 1/2 = 1/4$ chance of veto). Rather, multiplying veto sites means that an interest group has the opportunity to be a repeat player in a game in which the odds are always 50:50. Only needing one decisionmaker to exercise their veto, interest groups who are trying to kill a measure, such as treating trusts as companies, are only too happy to allow multiple decision making levels. On the other hand, if a measure is sought by interest groups, it is understandable that they will prefer a closed decision making process under which power is concentrated in one decisionmaker such as a powerful Treasurer who can win the agreement of Cabinet and hence of the lower house of Parliament.

Often these issues are considered at the aggregate level rather than at the local level, so nations are described as ‘democratic’⁹¹ while the same author might even acknowledge that there are many undemocratic institutions within the country without explaining why those departures from democratic principles do not threaten the ‘democratic’ categorisation of the country concerned.

⁸⁸ Reese is resigned to the fact that interest group politics will always exist, and looks forward to ‘public interest’ groups being sufficiently well resourced to compete on a level playing field. Given that the status quo is one in which some interest groups hold considerable political influence, it is not clear just how Reese proposes that such groups would allow such a major shift of influence to occur. Witte, on the other hand, suggests that there is too much change and that this might be remedied by reverting to a ‘closed rule’ process of tax law making. The Canadian experience, under which budget negotiations are undertaken effectively under a ‘closed rule’, suggests that this need not necessarily lead to government acting in the public interest: McQuaig, above n 11.

⁸⁹ See: Charles Lewis, *The Buying of the President 2004*, Centre for Public Integrity, Washington, 2005; United States of America, *Report of the Government Reform Committee*, 109th Congress, 29 September 2006; United States of America, “Gimme Five” – *Investigation of Tribal Lobbying Matters*, Final Report, Committee on Indian Affairs, 109th Congress (2nd Sess), 22 June 2006; Michael Gawenda, ‘Blatant and brazen, that’s Jack Abramoff,’ *The Age*, 7 January 2006, 14.

⁹⁰ Id.

⁹¹ Shapiro, for discussion of this point see Burton, ????

4. Tax consultation processes – a comparative review

A. Tax reform consultation in the United States

1. Parliamentary procedure

The hallmark of the tax law creation process in the United States is extreme division of formal legislative power of government with multiple sites of express or implied veto and also a deliberately weakened party political framework⁹² which allows individual representatives to cross the floor of their legislative house without the consequences experienced by such renegades in other political systems. From its inception, the systemisation of the US income tax has been constrained by this diffusion of power central to the United States political system. Even the process of obtaining support for the Sixteenth Amendment to the US constitution, which enabled the introduction of the progenitor of the current income tax, was achieved by granting the first US income tax expenditure (the exemption of local and state government bond interest).⁹³

More or less idealised outlines of the United States’ tax legislative process are readily available,⁹⁴ and so I will only briefly outline the nature of that process sufficient to ground the following discussion. Under the idealised model tax proposals are initiated by the executive government, individual representatives, interest groups and individuals. Those initiated by the executive government may be communicated to the general public by any of a number of ways, including the President’s State of the Union address. As Article 1 Section 7 of the Constitution requires that ‘all bills for raising revenue shall originate in the House of Representatives’, tax legislation at least theoretically begins its life in the House.⁹⁵

The House Ways and Means Committee comprises 35 members and uses six subcommittees, is responsible for developing the broad parameters of the executive tax plan into legislative form. The process begins with public hearings (often the first being the Secretary of the Treasury, with representatives of other key branches of the executive government such as the Office of Management and Budget, the Council of Economic Advisors and the Federal Reserve Board also often providing testimony). Lobbyists also provide testimony.

⁹² Walter Dean Burnham, *Critical Elections and the Mainstream of American Politics*, WW Norton, New York, 1970.

⁹³ For discussion of which see: Sven Steinmo, *Democracy and Taxation*, at 75-6; see also Jerold Waltman, *Political Origins of the U.S. Income Tax*, University of Mississippi Press, Jackson, 1985.

⁹⁴ See, for example, Joseph A Pechman, *Federal Tax Policy*, The Brookings Institution, Washington D.C, 1983 (4th edn), ch 3. By more or less idealised I mean that, for example, Pechman’s description of detailed analysis (see Pechman, 41) will not always be found in practice. See, for example, Witte’s observation that Wilbur Mills (the authoritarian chairman of the House Ways and Means Committee) oversaw a luncheon during 1969 budget negotiations at which it was decided to insert a further US \$2.5 billion of tax expenditures into a taxing measure, after it had been realised that lower income groups were not given any tax concession under the original tax proposal: Witte, above n 1, 168-9.

⁹⁵ Although Bittker and Lokken note that the *Tax Equity and Fiscal Responsibility Act* 1982 originated in the Senate, where its provisions were appended to a minor tax bill containing five miscellaneous provisions: Bittker and Lokken, para 116.2.

The Committee then undertakes the markup phase, drafting legislation for presentation to the House. The Committee draws upon congressional staffs, the Joint Committee of Taxation and members of the executive government such as the Treasury and the IRS in framing the legislation. The assistant secretary to the Treasury attends the markup sessions to provide the view of the administration, while the chief of staff of the Joint Committee of Taxation also participates in negotiations and supervises the secretariat engaged in framing the legislative outcome. Ultimate responsibility for framing the legislation rests upon the parliamentary counsel of the House of Representatives, but the staffs of the Ways and Means Committee, the Joint Committee on Taxation and the Treasury are also frequently called upon to assist. Until 1974, these markup sessions were conducted as closed sessions under the authoritarian control of Wilbur Mills. However, as a result of the passage of the *Budget Control and Impoundment Act 1974* these sessions were conducted as open sessions unless the Committee voted for a closed session. In more recent times closed sessions have become routine.⁹⁶ As the markup process continues the staff of the Joint Committee on Taxation prepare a report⁹⁷ which explains the nature of the proposed legislative measures. This report is an important source of extrinsic interpretative material subsequently used in applying any legislation which emerges from the legislative process.

With the Bill and report drafted it is submitted to the House Rules Committee for determination of whether debate upon the Bill in the House of Representatives will be closed (the Bill must be accepted in its entirety or not at all), open or modified closed (only amendments on specified matters will be allowed from the floor of the House).

Once a Bill has been voted upon and passed by the House, it is referred to the Senate as an Act of the House. The Senate Finance Committee then undertakes open public hearings upon the Act and forms a view as to whether any changes should be made. In the event of recommended changes being accepted by the Senate, the Joint Committee on Taxation will convene with a view to resolving differences and putting amended Bills back to each House respectively. The outcome of these negotiations is reported in a Joint Explanatory Statement which explains the nature of the compromises.

Assuming that the negotiated compromises are agreed to by both Houses, the enrolled Bill is passed to the President for his assent. The President does have a power of veto for the entire bill, but given the significant input of the administration into development of the tax bill, this is rarely exercised.

After enactment of the legislation a ‘bluebook’ may be prepared by the staff of the Joint Committee on Taxation. These bluebooks incorporate information regarding the nature and operation of the legislation which emerged during the course of floor debate, after the reports on the Bill had been written. The bluebooks are therefore a useful source of explanatory material regarding the operation of specific legislative measures. However, as the bluebooks were not available to the legislators prior to the votes on the measures, they are not an authoritative source regarding legislative intention. Rather, the reports

⁹⁶ Bittker and Lokken, para 116.2

⁹⁷ Congressional Budget Act 1974 Pub L No 93-304 s 308(a), 88 Stat 313.

prepared by the staffs of the House Ways and Means Committee and also the Joint Committee on Taxation are authoritative.

Significant aspects of the parliamentary process

There are a number of aspects of the United States legislative process with respect to taxation measures which should be amplified.

Control of tax expenditures

Most tax expenditures use the tax law to achieve other policy objectives such as promoting the manufacturing/mining sectors through accelerated depreciation. By categorising tax expenditures as ‘tax’ measures rather than spending measures which fall under the control of the relevant Committee, the House Ways and Means Committee and the Senate Finance Committee have steadfastly refused to cede control of such measures. Accordingly, the efficacy of each proposed tax expenditure in achieving the stated policy objective is not assessed by the Committee with appropriate expertise. Moreover, tax expenditures are not weighed against other public measures by a Committee charged with responsibility of best achieving stated policy outcomes with a stated budgetary allocation (including tax expenditures). Rent seekers who fail to procure government spending benefits are therefore free to seek effectively the same benefit from different decisionmakers by casting it in the form of a tax expenditure.

The absence of ‘dynamic scoring’⁹⁸

Dynamic scoring entails estimation of the macroeconomic effects of a proposed change to the taxation law, rather than merely adopting a ‘static’ approach which identifies the net cost/gain to revenue (and hence a net benefit/cost to particular taxpayers) of a proposed measure. The absence of dynamic scoring means that, for example, a proposal to cut a particular tax expenditure is appraised upon the basis that the cut would have no macroeconomic effects, such as enhancing efficiency. This means that anticipated increases in national income arising from efficiency gains are not taken into account. As a result, it is not possible to identify ‘winners’ who would benefit from the efficiency gains – it is only possible to identify the ‘losers’ who will lose the direct benefit of the particular tax expenditure. Once the appraisal of tax expenditure cuts is framed in terms of identifying the losers without identifying winners, the task of tax expenditure cuts is all the more difficult because they find it difficult to marshal interest group coalitions in favour of such cuts. The effect of not adopting dynamic scoring, in other words, is to effectively limit the ‘consultative’ aspects of the tax legislation process to consultation with the prospective ‘losers’.

The rationale for excluding dynamic scoring is that macroeconomic modelling is notoriously unreliable and could all too easily be used to ‘massage the numbers’ to

⁹⁸ Mausekopf and Reifschneider, ‘Dynamic Scoring, Fiscal Policy and the Short-run behaviour of the Macroeconomy’ (1997) 50 *National Journal of Tax Policy* 631

produce a ‘set of numbers’ favourable to the administration.⁹⁹ Such ‘massaging’ happens under current budget rules,¹⁰⁰ but that in itself is no reason to extend this opportunity.

Opacity of information about what emerges and why

In the description of the legislative process it was noted that various extrinsic materials are prepared in the course of, and after, the passage of legislation. These materials are not routinely prepared for all legislative measures and, in any case, present a confusing array of information from the viewpoint of a member of the public attempting to understand the nature of and justification for a specific measure. Such opacity impedes critical appraisal of legislation by the broader public and is therefore a significant barrier to broad participation in, or public accountability of, the legislative process.

Combination of closed/open deliberation

The preceding discussion of the legislative process illustrated the routine combination of open public deliberation with respect to taxation measures and also the process of decision making ‘behind closed doors’. This combination therefore creates the appearance of balanced democratic decision making. However, the absence of public responses by the Committees with respect to each submission made during the public sessions, the absence of transparency with respect to the identity of those within the House and Senate Committees who support a particular measure during the closed sessions and the absence of each Committee member’s stated justification for adopting a particular approach, means that the ‘closed’ legislative phase assumes greater significance. The open process of consultation is effectively relegated to a perfunctory ‘going through the motions’ showcase of participatory democracy, while the real decision making is performed behind closed doors and often in return for favours. This is only compounded by the fact that there are multiple sites of veto. Both Committees and also the President effectively control the nature of tax legislation and exercise formal powers in determining what is placed before the House or Senate. Such concentration of power is exacerbated by the fact that the Chair of each Committee has considerable resources in terms of support staff to ward off amendments from the floor of their respective chambers.

Relevance of Legislators’ Campaign Financing Regulation

In the United States the lax campaign financing laws, and the considerable cost of mounting an effective electoral campaign, are often identified as critical systemic factors mitigating towards the substantial power of well resourced lobby groups. In many cases such lobbying power can be concentrated upon a relatively small number of lawmakers

⁹⁹ Id.

¹⁰⁰ Rebecca M Kysar, ‘The Sun also rises: the Political Economy of Sunset Provisions in the Tax Code’ (2006) 40 *Ga. L. Rev.* 335; see also C. Eugene Steuerle, *Contemporary U.S. Tax Policy*, Urban Institute Press, Washington D.C., 2004, 91-3. The Office of Tax Analysis within Treasury prepares budget-wide revenue estimates based upon macroeconomic assumptions determined by the Office of Management and Budget, the Council of Economic Advisers and the Office of Economic Policy in Treasury. When the resulting budget deficit/surplus figure is considered unfavourable, pressure may be exerted upon the Office of Tax Analysis to be a ‘team player’. If such suasion fails, new macroeconomic assumption figures can be conveyed to the Office of Tax Analysis with the approval of the chairman of the Council of Economic Advisers and the Assistant Secretary of the Treasury for economic policy.

who fill critical roles in the lawmaking process. Systemic factors which facilitate this are the complexity of the taxation law which enables better resourced participants in the lawmaking process to wield considerable power over those with lesser resources available,¹⁰¹ lesser party discipline exercised in the US and the multiple legislative phases at which lobbyists might influence the legislative outcome by buying the votes of legislators.

2. Executive Procedure (under development)

Treasury Rulings

IRS

Taxpayer advocate

B. Tax reform consultation in Canada¹⁰²

Given the similarity of constitutional structure between Australia and Canada the process of tax reform consultation in Canada is broadly similar to that adopted in Australia (see below). Proposed legislative measures are agreed upon by Cabinet and prepared within the executive branch, and subsequently ushered through both houses of parliament. However, there are two aspects of the Canadian approach which deserve special mention:

1. In anticipation of the commencement of the budget process, the House of Commons Standing Committee on Finance undertakes pre-budget consultations during Autumn and prepares a report for tabling in the House by early December. This report is the subject of a ‘take note’ debate and is used by the Government in preparing the budget during the early part of the following year. Subsequently, the Minister releases a pre-budget advisory statement detailing broad macroeconomic factors and trends which serve as the context within which budget negotiations are to take place. The Finance Minister also formally calls upon members of the public to make pre-budget submissions, asking those making submissions to take into account how additional spending might be funded.

The budget papers do not incorporate specific responses to the recommendations of the pre-budget consultation report and nor to the submissions made to the Department of Finance; and

2. the introduction of new lobbyist registration and reporting procedures which are designed to enhance transparency of dealings between senior public officials and

¹⁰¹ Pechman, 52 (noting that the chairpersons of the House Ways and Means Committee and also of the Senate Finance Committee exercise considerable power during House and Senate floor debates respectively owing to the fact that both can draw upon the expertise of their respective Committee’s staffs.

¹⁰² For history of the Carter reform process see M Bucovetsky and RM Bird, ‘Tax Reform in Canada: A Progress Report’ (1972) 25 *National Tax Journal* 15 who argue for a permanent tax reform commission; the March issue of the 1969 *National Tax Journal* and Special Supplement Number 1, February 1969, *Canadian Journal of Economics*. For the effects of the Carter reforms are described in WR Thirsk and J Whalley, *The Economic Impact of Tax Reform*, Canadian Tax Foundation, Toronto, 1982 and the process of reform is considered in F. St. Hilaire and J Whalley, ‘Reforming Taxes: Some Problems of Implementation’ in D Laidler (ed) *Approaches to Well-Being*, Uni of Toronto Press, Toronto, 1985; see also RM Bird, ‘The Tax Kaleidoscope: Perspectives on Tax Reform in Canada’ (1970) 18 *Canadian Tax Journal* 444; RM bird and JM Mintz, ‘Future Developments in Tax Policy’ (1994) *Federal Law Review*

lobbyists.¹⁰³ The success of these measures will need to be assessed in one or two year’s time.

C. Tax reform consultation processes in Australia

(1) Parliamentary Procedure

By contrast to the United States, the Australian legislative institutions exhibit a far greater formal or apparent concentration of power in the executive, not dissimilar to the legal institutions of the United Kingdom considered by Steinmo.¹⁰⁴ Under this formal depiction of tax law making, Cabinet is at the head of the Executive government and determines government policy and the Parliamentary Business Committee of Cabinet determines the priority of bills to be tabled before Parliament.¹⁰⁵ In accordance with constitutional convention, tax bills are introduced into the lower house which is controlled by the government. With strong party unity the government generally controls the lower house of the Commonwealth Parliament, while in the recent past the government has not ordinarily controlled the Senate. Absence of government control in the Senate has seen substantial modification of tax legislation, as with the substantial exclusions from the GST tax base negotiated with the Democrats in order to have the GST passed into law.¹⁰⁶

This power of veto in the upper house creates an opportunity for wider public scrutiny. In the past five years the Senate has referred a substantial number¹⁰⁷ of tax bills to the Senate Economics Committee, which conducts a public inquiry with respect to the impact of the proposed legislation. However, there are significant barriers to participation in this process. There is limited readily accessible¹⁰⁸ information regarding tax policy which might enable members of the public to self inform themselves sufficiently such that they may actively engage in tax policy deliberation. There is no ‘charter of taxation principles’ which might set a broad context for specific tax policy deliberation,¹⁰⁹ and nor does the current practice with respect to Regulation Impact Statements require detailed critical appraisal of the tax policy underpinning a proposed legislative measure.¹¹⁰ Moreover, time frames for submissions are generally compressed and, given the difficulty of accessing relevant material sufficient to engage in critical appraisal of the underlying policy of the tax law, thereby advantage those from within government and those who have been party to negotiations with the government regarding the tax policy

¹⁰³ *Federal Accountability Act 2006* (Can).

¹⁰⁴ Steinmo, above n

¹⁰⁵ Australian Government, *Legislation Handbook*, Department of the Prime Minister and Cabinet, Canberra, 2000, 7.

¹⁰⁶ For discussion of which see Eccleston, above n, ch 7.

¹⁰⁷ In the period 1 March 2002 to 1 November 2006 33 tax bills were reported upon by the Senate Economics Committee, while in the same period 81 taxation related Acts of Parliament were passed into law.

¹⁰⁸ Pauline Poland, *Online Consultation in GOL-IN Countries – Initiatives to Foster e-democracy*, A joint project of the Government On-line International Network, 2001.

¹⁰⁹ Although such a Charter was proposed by the Review of Business Taxation: Commonwealth, *A Tax System Redesigned*, Treasury, Canberra, 1999, ch 1.

¹¹⁰ Commonwealth of Australia, *Guide to Regulation*, Office of Regulation Review, Canberra, 1998 (2nd edn), pp B10-B13.

underpinning the Bill from an early phase. The development of tax legislative policy and also tax legislation in Australia is routinely undertaken with no open consultation with the broader public, but rather with either no consultation or with consultation only being undertaken with selected parties and often under conditions of confidentiality.¹¹¹

It is therefore not surprising that public inquiries conducted by the Senate Finance Committee generally attract few submissions, and submissions emanate predominantly from interest groups and professional associations.¹¹² Where submissions are received from a substantial number of individuals, it may well be that a number of those submissions have been prompted by a particular interest group.¹¹³

Budget Process

The budget process is a discrete aspect of the parliamentary process by which taxation law is created. The most significant aspect of the budget process for present purposes is the secrecy surrounding budget negotiations. Although interest groups make pre-budget submissions to government, unlike the Canadian budget process which incorporates a pre-budget consultation phase there is no formal process under which these submissions are publicly invited and responded to. Further, there is no post-budget consultation report.

Doern reviews the rationale for budget secrecy,¹¹⁴ noting that it is generally justified upon the basis that it:

1. protects the Treasurer in particular, and government more generally, from undue lobbying pressure in the course of framing the budget;
2. it ensures that there is no prospect of those involved in the preparation of the budget are not in a position to use budget information to obtain unfair advantage in private markets; and
3. it centralises control of the budget within the inner sanctum of government, thereby preserving the appearance of Ministerial responsibility for budget leaks.

From a pragmatic perspective, budget secrecy facilitates control of the dissemination of budget information, as with the presentation of the budget as media spectacle¹¹⁵ and also the strategic ‘leaking’ of budget information to ensure that the budget is portrayed in the most favourable light. Further, this control of budget information also gives the Treasurer a lever by which he can ingratiate himself with selected members of the press corps who provide favourable coverage.¹¹⁶

¹¹¹ See Table 1 at Appendix A.

¹¹² See Appendix B.

¹¹³ Thus, for example, there appears to be a degree of similarity between a number of the individual submissions received by the Senate Economics Committee with respect to the *Tax Laws Amendment (Improvements to Self Assessment) Bill (No 1)* 2005.

¹¹⁴ G Bruce Doern, ‘Fairness, Budget Secrecy, and Pre-Budget Consultation in Ontario’ in Allan M. Maslove, *Taxing and Spending: Issues of Process*, Uni of Toronto Press, Toronto, 1994, 3 at 20-22.

¹¹⁵ Allan Maslove, Michael Prince and G Bruce Doern, *Federal and Provincial Budgeting*, Uni of Toronto Press, Toronto, 1985, ch 2.

¹¹⁶ Australian Press Council, (1994) 6 *Australian Press Council News* 1; Max Suich, ‘Mark Latham’s Bad Media Day’, *The Age*, 21 January 2005, 17.

(2) Tax system scrutiny

Although the legislative process itself generally operates under a ‘modified closed’ rule in which broad public participation is actually or effectively excluded, there are other executive processes which facilitate engagement with the public.

(a) Board of Taxation

The Board of Taxation was originally conceived as an independent standing commission on taxation matters which would scrutinise the performance of the Australian taxation system as measured against a charter of taxation.¹¹⁷ However, the Board of Taxation as implemented has the lesser status of a non-statutory advisory body, consisting largely of members appointed by the Commonwealth Treasurer,¹¹⁸ and it fulfils a far more limited function. Given that the Board of Taxation is merely an advisory body, and is largely controlled by the Treasurer, it is not clear that the Board of Taxation performs any function dissimilar from functions that might otherwise have been performed by the Treasury.

The Charter of the Board is expressed in broad terms, indicating that it has the capacity to advise the Treasurer with respect to ‘the quality and effectiveness of tax legislation’ and ‘improvements to the general integrity and functioning of the taxation system’.¹¹⁹ However, in practice the Board has restricted the scope of its inquiries by not expressly adopting a charter of framework principles against which to critically assess the taxation system and also by restricting its inquiries to specific issues such as the recent post implementation review of the small business capital gains concessions. Further, in undertaking such specific post implementation reviews, the Board expressly excludes consideration of the policy underlying the legislative measure. Instead, the Board purports to focus upon examining whether the legislation achieves its stated purpose (although that purpose may be expressed in vague terms).¹²⁰ The circumscribed scope of the Board’s inquiries is reinforced by the fact that it does not appear to proactively encourage broad community input into its agenda of inquiries. Rather, the process by which the Board determines its forward work plan is opaque. However, in this regard the Board does identify the ‘stakeholders’ with which it has consulted, and over the past five years the preponderance of these stakeholder meetings have been with business entities and business or professional lobby groups.¹²¹ The last recorded meetings between the Board and ‘community welfare’ organisations such as the Australian Council of Social Service and Anglicare, and with the Australian Council of Trade Unions, took place in

¹¹⁷ Commonwealth, above n 109.

¹¹⁸ There are three ex-officio members of the Board (Commissioner of Taxation, Secretary to the Treasury and First Parliamentary Counsel) and seven members appointed by the Treasurer. All of the ex-officio members of the Board are effectively appointed by the Executive Government.

¹¹⁹ <http://www.taxboard.gov.au/content/charter.asp>

¹²⁰ Australian Government, *A Post-implementation Review of the Quality and Effectiveness of the Small Business Capital Gains Tax Concessions in Division 152 of the Income Tax Assessment Act 1997*, Board of Taxation, Canberra, 2006, 23.

¹²¹ See <http://www.taxboard.gov.au/content/externals/index.asp> A breakdown of the types of entities consulted with may be found at Appendix C.

2001.¹²² Moreover, there is no record of the nature of the discussions at these meetings with stakeholders and of the nature of any action taken as a result of these consultations.

Despite the limitations of the work undertaken by the Board of Taxation outlined in the preceding two paragraphs, there are features of the Board’s work which are consistent with participatory democracy. The Board does adopt an open process when it commissions an inquiry. With respect to two inquiries commissioned on 10 October 2006, the Board proposes to release a discussion paper before calling for submissions from the general public. Moreover, the Board has conducted feedback sessions with respect to past inquiries, providing feedback to those who made submissions¹²³ as well as releasing a final report of the inquiry which incorporates specific references and responses to many submissions.¹²⁴ However, in the context of the factors outlined in the preceding paragraphs, it appears that fostering broad community input is not accorded a high priority by the Board. The Board does not engage in participatory agenda setting and nor has it actively fostered community input by publishing educative material upon framework principles which might inform community input into tax system design. Rather, the question might quite validly be asked whether the Board does serve any function which might not be performed by the Australian Treasury. Further, even if a discrete function can be identified, a second question is whether the Board truly does reach beyond being the conduit for business and professional lobbyists.

(b) Inspector General of Taxation

The statutory office of the Inspector-General of Taxation emerged from the Prime Minister’s response¹²⁵ to perceptions promoted by business lobby groups and professional bodies that the Australian Taxation Office was not adhering to the ‘partnership’ ethos of the cooperative compliance model.¹²⁶

The *Inspector-General of Taxation Act* 2003 (Cth) authorises the Inspector-General to conduct investigations into systems of the Australian Taxation Office for the administration of the taxation law.¹²⁷ The Act does not authorise the Inspector –General to conduct inquiries with respect to the policy embodied in the legislation governing the administration of taxation law and nor is the Inspector-General authorised to investigate substantive tax policy. Nevertheless, as the literature of legal realism emphasised, implementation is critical to defining the real meaning of any policy¹²⁸ and so community consultation by the Inspector-General is a significant aspect of community consultation upon taxation reform.

¹²² <http://www.taxboard.gov.au/content/externals/index.asp>

¹²³ Australian Government, above n 120.

¹²⁴ Australian Government, above n 120.

¹²⁵ Hon John Howard, ‘Securing Australia’s Prosperity’, 2001.

¹²⁶ For discussion of the genesis of the cooperative compliance model see: V Braithwaite and J Braithwaite, ‘Managing taxation compliance: the evolution of the Australian Taxation Office compliance model’ in M Walpole and C Evans (eds), *Tax Administration in the 21st Century*, Prospect, Sydney, 2001.

¹²⁷ *Inspector-General of Taxation Act* 2003 (Cth) s 7.

¹²⁸ J.L. Pressmand and A Wildavsky, *Implementation*, University of California Press, Berkeley, 1973.

In pursuit of this mandate, in 2003 the Inspector-General undertook consultation with a broad range of community groups,¹²⁹ however more recently it seems that a narrower range of groups were consulted in developing the forward work program.¹³⁰ Despite this indication that the Inspector-General may be slipping toward an elitist approach to his work program, other aspects of his work are consistent with participatory principles. For example, his Issues Paper Number 2 identifies framework principles of tax administration,¹³¹ which go some way towards informing public consideration of tax administration. However, the accessibility of these principles might be enhanced by incorporating them in a standalone document which is clearly visible to the general public. Those intending to make a submission to the Inspector-General might be referred to this tax administration policy charter. Moreover, the inclusiveness of this approach might be extended by releasing an issues paper for each review undertaken by the Inspector-General.¹³² Such an issues paper, ideally, would identify the questions which arise out of consideration of the framework principles in relation to the subject matter in hand. Further, he adopts an inclusive approach to seeking input into his inquiries by calling for submissions from the general public.¹³³

(c) *Ad hoc reviews*

The consultative mechanisms adopted in various ad hoc reviews of the Australian taxation system also reflect the uneasy discourse within democratic theory regarding the extent to which the wider public should be actively engaged in the process of tax reform. In Australia’s most recent review of taxation, there was no prospect of public consultation upon the terms of reference – the Government announcing that it was to be a review of *business* taxation. Moreover, the Committee adopted a narrow interpretation of its terms of reference. Thus, although the comparable review of business taxation undertaken in Canada had considered environmental taxes and charges,¹³⁴ the Australian review did not reach to this subject matter. Another elitist aspect of the Australian review included the fact that targeted confidential consultation was undertaken concurrently with open public consultations.¹³⁵ Further, the government constructed legislative outcomes which were not necessarily consistent with the recommendations emerging from the review process, but nevertheless claimed that there was no need for further community consultation upon the basis that this had been undertaken as part of the review.¹³⁶ The result was that legislation was adopted without the opportunity for community input and

¹²⁹ Australian Government, *Issues Paper Number 1: Context for Scoping Review*, Sydney, 2003, Appendix A. For a breakdown of the types of groups consulted see Appendix D of this paper below.

¹³⁰ ‘On 20 February 2006, the Inspector-General consulted representatives from selected industry, business, accounting, legal practitioner and tax organisations about the prioritisation of his work program for the 2006 year’: Australian Government, *Updated Work Program for 2006*, Inspector-General of Taxation, Sydney, 2006, 1.

¹³¹ Australian Government, *Issues Paper Number 2: Policy Framework for Review Selection*, Inspector-General of Taxation, Sydney, 2003, 1-5.

¹³² As noted above, the release of an issues paper is the practice of the Board of Taxation.

¹³³ Australian Government, *Review into the Tax Office’s Administration of GST Audits*, Inspector-General of Taxation, Sydney, 2006: http://www.igt.gov.au/content/work_program/20061030.asp

¹³⁴ Canada, *Technical Committee on Business Taxation Report*, Ottawa, 1998, ch 9.

¹³⁵

¹³⁶ Thus, for example, the small business capital gains concessions within ITAA97 Div 152 incorporate significant extensions to those recommended by the Review of Business Taxation.

this may have contributed to the need to revise that legislation to overcome a significant number of technical shortcomings.¹³⁷

5. What does the comparative study disclose?

A. Chaotic consultation – conflicting mechanisms within government tax law making

The most striking aspect of tax consultation mechanisms in the countries reviewed is that within any one jurisdiction there is a broad range of mechanisms which incorporate the manifold approaches to consultation indicated by the diverse ideological, institutional, materialistic and interest group pressures.

In the context of tax legislation, a government which possesses a range of lawmaking strategies which incorporate varying approaches to community consultation can be seen to be all things to all people. Government can self-describe itself as ‘transparent’,¹³⁸ while simultaneously brokering deals for special interests behind closed doors.¹³⁹ Policy elitists would take comfort from the fact that the vast preponderance of Australian tax legislation is created with no consultation or with targeted (and often confidential) consultation. Although they might be troubled by the insistent presence of lobby groups, they might optimistically hope that the policy elites within government would maintain the floodgates holding back the flood of special interest concessions. From a pragmatic perspective, such a multiplicity is beneficial to those in government (politicians in the governing parties as well as servants within the executive arm of government) because it allows them a discretion as to which path to choose. As control of the agenda and forceful implementation of policy is essential to ‘getting things done’, it is understandable that politicians and bureaucrats alike will prefer an autocratic approach. However, this will not always be possible because, for example, strong ‘community’ opposition may dictate that at least lipservice be paid to consulting with the community. In such cases, a broader approach to consultation might be adopted even if an elitist approach is ultimately adopted. To the lobby groups there is enough evidence to suggest that they have enough success under the existing institutional structures as to warrant their continuation.¹⁴⁰

Further, multiple consultative channels allows government to deflect criticism from those who adopt a different approach to this central question of democratic theory. Thus, Government might convene an open, public inquiry which incorporates cloistered consultative processes and decision making such that disillusioned ‘open government’

¹³⁷ Australian Government, Post Implementation Review of Small Business, above n 120.

¹³⁸ Commonwealth of Australia, *Making Transparency Transparent*, AGPS, Canberra, 1999.

¹³⁹ ‘The Department of Prime Minister and Cabinet and the ATO have been consulted on this issue. In view of the requirement to introduce legislation on 9 December 2004, there is not sufficient time to consult more widely’: Explanatory Memorandum accompanying *Tax Laws Amendment (2004 Measures No. 7) Act 2005* para 1.63.

¹⁴⁰ McQuaig, above n 11; United States of America, *Staff Report of the Government Reform Committee*, U.S. House of Representatives Committee on Government Reform, 109th Congress, Washington, 2006; Mark Burton, ‘The Australian small business tax concessions – public choice, public interest or public folly?’ (2006) 21 *Australian Tax Forum* 91.

critics have a hard task of making the case of opaque decision making in a way which will gain real traction in the public media.

B. The prominence of business lobbyists and professional association lobbyists in all forms of consultation

There may have been a time during the 1980’s and early 1990’s when the influence of business lobbyists in the United States waned as the star of broader ‘public interest’ groups ascended.¹⁴¹ However, a more realistic appraisal of that era suggests that the business lobby of that era fractured as the rise of abusive tax shelters in an era of rising budget deficits saw a coalition form between business groups unable to utilise those tax shelters, ‘low tax’ conservatives concerned about the rising deficit and ‘public interest’ groups.¹⁴² This strategic alliance was born of the perceived crisis and the long term status quo of business lobby influence has returned.¹⁴³

The experience in Australia also suggests that the role of broader ‘public interest’ groups in the process of tax law creation is minimal – they appear to have fallen off the tax consultation cart as business lobbyists have gained routine access to the inner sanctum of tax policy making in Australia.¹⁴⁴ Business lobbyists appear to have the resources to adapt to the demands of the different consultative mechanisms – whether they be obtaining direct personal access to Government Ministers, gathering data and making submissions to public inquiries or engaging in confidential consultation with Treasury.

C. Absence of comprehensive, systemic account of tax law consultation within any jurisdiction

The preceding discussion of the various consultative processes with respect to tax law highlights the fact that there is a dearth of literature which provides an overview of those consultative mechanisms in any particular country. Although there is a considerable body of literature within any particular jurisdiction with respect to the processes by which tax law is made, that literature is fragmented. Thus, for example, some literature focuses upon the budget process.¹⁴⁵ Similarly, other literature focuses upon the formal mechanisms which are ideally adopted in developing tax legislation while ignoring the fact that much legislation emerges from truncated law making processes and with perhaps minimal deliberation and/or consultation.¹⁴⁶

¹⁴¹ B Guy Peters, *The Politics of Taxation*, Blackwell, Cambridge, 1991, 13-14.

¹⁴² C. Eugene Steuerle, *Contemporary U.S. Tax Policy*, Urban Institute Press, Washington D.C., 2004, chs 6-9, pp 252ff.

¹⁴³ Even conservative commentators have been moved to suggest that the parliamentary institutions of the U.S. are in need of reform: Thomas E Mann and Norman Ornstein, *The Broken Branch*, Oxford University Press, New York, 2006.

¹⁴⁴ See the discussion of the diminishing role of such groups in Australian tax consultations in Section 4 C 2 above.

¹⁴⁵ G Bruce Doern et al, *Public budgeting in Canada: politics, economics and management*, Carleton Uni Press, Ottawa, 1988.

¹⁴⁶ Steinmo, above n 56.

Moreover, if it exists at all, the official literature with respect to tax consultation mechanisms is scattered across various policy documents¹⁴⁷ and offers only a partial account of the tax consultation process. To the extent that the official literature describes tax consultation, it focuses upon a mythical process of deliberative consultation combined with elitist protection of the public interest which distracts the public gaze from what is often (but not always) the reality of close collaboration between government and business lobbyists in particular. As such, the official account may serve a legitimating function – creating a veil of procedural legitimacy behind which government can choose if and when it will collaborate with special interests.

D. Need for literature which recognises the diffusion of law making power

This comparative study also highlights the fact that the existing literature focuses upon the formal concentration of lawmaking power within parliamentary institutions, often ignoring the multiplicity of other sites at which power with respect to taxation law is wielded. Thus Steinmo¹⁴⁸ accepts that the federal process of law creation adopted in the United States of America reflects the deliberate efforts of the ‘Founding Fathers’ to entrench an extreme diffusion of power across multiple actors in the lawmaking process.¹⁴⁹ Steinmo compares this diffusion of power to the authoritarian concentration of power in the executive arm of government in the United Kingdom.¹⁵⁰ By focusing upon the formal concentration of power in the executive government,¹⁵¹ Steinmo ignores the multiple sites of power which influence government lawmaking even where power is formally concentrated.¹⁵²

Although he purports to adopt Steinmo’s approach to his examination of Australian tax reform,¹⁵³ Eccleston demonstrates that formal concentration of power means little – what is far more important is the capacity of ‘stakeholders’ to create and react to the political mood of at least some significant sectors of the general community.¹⁵⁴ However, Eccleston does not tease out the suite of different reform strategies simultaneously maintained by government in its management of ‘mundane’ tax law creation. Rather, Eccleston’s focus upon ‘big bang events’ lead him to concentrate upon the specific consultative strategy adopted in respect of each event respectively, ignoring consideration of the range of measures which was plausibly open to government. Where Eccleston does

¹⁴⁷ For example, in Australia the Board of Taxation report (above n 6) and the truncated regulation impact statement process with respect to tax legislation outlined in the *Legislation Handbook* and the Treasury T Notes.

¹⁴⁸ Sven Steinmo, *Taxation and Democracy*, Yale Uni Press, New Haven, 1993.

¹⁴⁹ Steinmo, 68ff.

¹⁵⁰ Steinmo, 52ff.

¹⁵¹ ‘In Britain the growth of single-member districts led to powerful majoritarian governments. Strong majoritarian governments can be certain that their legislative agenda will be passed by its legislature. Thus, there has been little incentive to compromise and cooperate with the political opposition or with hostile interest groups.’ Steinmo, 206. This vision of centralised state power is consistent with Max Weber’s approach to state power.

¹⁵² The view that power is decentralised was promoted by Foucault

¹⁵³ Richard Eccleston, *The Thirty Year Problem: The Politics of Australian Tax Reform*, Australian Tax Research Foundation, Sydney, 2004, 10.

¹⁵⁴ Eccleston, 174-5.

consider the selection of consultative strategy adopted by government, he does not acknowledge that government may be ‘consultative’ and ‘autocratic’ at the same time.

E. Disaggregating the concept of democracy - applying democratic political theory at the micro-level

The diffusion of power across multiple consultative mechanisms and of the significant role of business lobby groups within those mechanisms such that the ‘democratic’ character of the functioning of these mechanisms is at least open to question. This highlights the fact that many political theorists perhaps too readily assume that at least some ‘developed’ countries are ‘democratic’, without defining the necessary and sufficient conditions to warrant the ‘democratic’ tag. Thus, at some points in his work Shapiro implies that the United States of America is a democracy¹⁵⁵ while at other points he appears to accept that his country does not fall within his normative vision of democratic government.¹⁵⁶

What this study suggests is that there is a need to examine the institutions of government at the micro level in assessing whether or not they comply with democratic norms and whether those norms are valid. A thin proceduralist might object that they are only concerned with the conditions for free and fair elections, and therefore there is no need to determine whether tax law making mechanisms comply with some democratic norm. However, such an objection demands a defence of the concept of ‘free and fair’ elections - if members of the polity are ignorant of the basis upon which their tax law has been made, can it be said that elections are free and fair?

The point is that specific actions of government may be consistent or inconsistent with a particular normative theory of democratic government. Where there are both democratic and undemocratic actions of a specific government, labelling government as ‘democratic’ entails value judgements regarding the relative significance of undemocratic institutions. To be valid, such value judgements must accord with the normative theory which is purportedly being applied. Focusing upon the consultative institutions regarding taxation law is a useful way of bringing this point to the fore. How much authoritarianism in government actions with respect to tax law making can be tolerated before the government should be labelled ‘undemocratic’?

F. Chaos theory, democratic political theory and the rhetoric of state legitimacy

Chaos theory plucks order from what appears to be chaos, and the same might be achieved with respect to the apparent chaos of tax consultation mechanisms. The diversity of tax consultation mechanisms could be perceived to be chaotic in the sense that the consultative mechanism adopted in one context offers no basis for predicting

¹⁵⁵ Shapiro, above n 3, 86.

¹⁵⁶ Thus, for example, Shapiro devotes chapter 5 to a grim portrayal of the realpolitik of American ‘democracy’, in which the poor are governed by the propaganda of ‘the American Dream’ fed to them by a media in which ownership is concentrated in the hands of the extremely wealthy: Shapiro, above n 3, ch 5. Sorel might well be right, ‘democracy’, he observed, ‘is the paradise of which unscrupulous financiers dream.’ Georges Sorel, *Reflexions on Violence*, tr T.E. Hulme and J Roth, Collier Books, New York, 1961, 222; cited in Dunn, above n 2, 166.

consultative behaviour in the future. Confronted with such apparent chaos the social scientist might seek order by attributing such disorder to the constant frailty of the human psyche – ‘policy entrepreneurs’ actively build support for a particular consultative approach in a particular context and garner sufficient support for their ‘enterprise’.

However such chaos may perform a legitimating function. An alternative approach might be to argue that this ‘institutionally weak’ form of government is actually extremely resilient because it incorporates overt competitive fora as well as ‘closed’ decision making processes – it embodies the tension within democratic political theory without giving either the dominant position.

7. Conclusion

The concept of democracy is open to various interpretations and therefore to multiple institutional norms – from libertarianism to representative government formed upon the basis of free and fair elections to deliberative democracy. Dunn suggests that it is the ‘egoist’ strand of democratic theory which has reigned supreme for the past two centuries,¹⁵⁷ and this is borne out by the preceding review of tax law creation mechanisms in the countries surveyed. In each jurisdiction a ‘tax policy elite’ comprising key legislators such as the Treasurer, business lobbyists and key members of the executive branch of government negotiate the terms of the tax legislation which will govern us all. However, it is also clear from this study that, despite the prevalence of the egoist model of democracy, participatory models of democracy have not been ignored. The egoist institutions are legitimated by a thin mantle of participatory institutions behind which the real business of government is undertaken in collaboration with key interest groups. Further, the government literature talks the talk of open consultation and transparency despite the very different walk of government.

It might be that both the egoist strand of democratic theory and the duplicity of government in purporting to adopt participatory democracy while riding a very different beast can be defended. From a pragmatic perspective it might be that broad open consultation with the community at large would be a waste of limited government resources which might be better directed towards the development of strong, principled taxation law. The experience of the Ontario Fair Tax Commission, in which vast sums of public money were expended upon a community outreach program intended to implement deliberative democracy but which failed to procure a consensus, might be taken to support that conclusion. In view of such failures, it might be that Witte is right – that autocratic control of the tax expenditure purse strings is preferable to open processes of consultation upon matters which defy consensus and in which legislators can be picked off one by one with offers of campaign financing or other favours in return for their publicly verifiable vote in favour of a particular special concession.

All of this may be true, but it is also true that it is difficult to find too many disinterested observers who argue for maintenance of the status quo. This is a status quo in which government and special interests negotiate taxation welfare ‘behind closed doors’ for some segments of the community. Thus, for example, the entrepreneurs tax offset was

¹⁵⁷ Dunn, above n 2. 179.

passed into law without any effective public scrutiny prior to its implementation and without any statement of performance measures against which this \$125 million spending program might be assessed. Moreover, this legislation was passed in the knowledge that there is no government institution which routinely examines the policy effectiveness of such measures under post implementation reviews. This is a very thin concept of accountability indeed.

Given that there are legitimate concerns regarding the practicality of deliberative democracy and the sordid nature of the status quo, what is to be done? The short answer is to enhance accountability through transparency as if deliberative democracy or accountable representative government mattered. Both deliberative democracy and the accountability of representative government rely upon the provision of sufficient information to the general public so that the public may actively engage in public policy making or so that the public may make informed choices at election time. At present neither is possible, at least with respect to taxation matters, because of veil of secrecy sponsored by the Australian Treasury and the current Government. This paper suggests that the countries reviewed already have law making institutions which might be developed with a view to enhancing the accountability of elected representatives. The incipient, extended lobbyist registration and reporting mechanism of Canada¹⁵⁸ might be adopted in Australia with a view to bringing more dealings between government and interest groups into the open. Leaving aside the confidential consultations undertaken as part of the Australian Review of Business Taxation, the participatory conduct of that review would serve as a useful guide in adopting the Review recommendation for a Board of Taxation which would, akin to a standing Commission, review the policy embodied in Australian taxation law. The broad inclusiveness of the Inspector-General in his initial consultations, and the web-based consultative processes of the United States’ Taxpayer Advocate also suggest that it is possible to undertake and facilitate broad consultation with the community. These institutional phenomena suggest that commitment to accountability-enhancing institutions is ad hoc, but nevertheless the flame of accountability flickers in the current government.

¹⁵⁸ *Federal Accountability Act 2006 (Can)*