

REDRAFTING THE INCOME TAX ASSESSMENT ACT 1936 IN CLEAR LANGUAGE



Christopher J Balmford

BA LLB (Hons)

Executive Assistant

Law Reform Commission of Victoria

The Law Reform Commission of Victoria has recently redrafted a Division of the Income Tax Assessment Act 1936 in simple language. The redraft is 75 percent shorter than the original. A corresponding increase in clarity has been achieved. The Commission's rewrite is not connected in any way with the Australian Taxation Office's rewrite of s 23AD of the Act. This article discusses the Commission's project and the potential for clear and simple tax legislation.

Introduction

The importance of clear legislative drafting

Legislation should be written in understandable language and structured in a user-friendly style. As the Law Reform Commission of Victoria said in its report on plain English:¹

The measure of success for legal writing is not how well drafters manage to *sound like lawyers* but how well they achieve accuracy of content combined with plainness of expression.

The efficient administration of, and compliance with, the law depends upon the law being easily accessible and understandable. The training of government officers to apply and advise on the law is greatly simplified if the relevant law is readily comprehensible. The law must be both understandable and certain for individuals and corporations to receive their entitlements under it, to avoid breaking it and to plan for the future.

1 "Plain English and the Law", Appendix 1, *Drafting Manual*, November 1987, 5.

Taxpayers will always require professional advice on the law but the current cost of obtaining that advice is increased because the law is overlaid with complicated language and artificially created concepts (such as "eligible notional accrual period" and "notional accrual amount"²) which bear little relation to reality. This overlay, which is unjustifiable, can and should be removed in the case of existing legislation and must be avoided in future legislation.

The importance of the Income Tax Assessment Act 1936

Nowhere is clarity of language and simplicity of structure more important than in the Income Tax Assessment Act 1936. That Act directly affects the approximately 8 million individual and company taxpayers in Australia and indirectly affects every member of the community. In the tax year 1989-1990 approximately \$65,413 million was collected under the Act. According to a survey of the 1986-1987 tax year, individuals spend between \$2,780 and \$3,809 million a year in complying with the Act. A further \$1,341 million is spent on compliance by public companies. This amounts to between 7.9 and 10.8 per cent of the income tax raised on personal income and 23.7 per cent of the income tax raised on public companies. In addition, the government spends a little over one percent of all tax raised on administration costs.³

The unintelligibility of the Income Tax Assessment Act 1936

Despite the importance of plain legislative drafting and the Income Tax Assessment Act 1936, that Act is almost unintelligible. The Law Institute of Victoria has recently stated that:⁴

The Commonwealth taxation legislation is now in language which bears, at best, only a passing reference to English. Nevertheless individuals are severely penalised for innocent failure to sufficiently comprehend how this "tax speak" dialect affects their individual circumstances. It is not true that difficult legal concepts can only be expressed in convoluted language. With care and skill, those concepts can be expressed simply.

The Law Council of Australia apparently shares that view. Mahla Pearlman has stated:⁵

Simplification of our tax laws obviously can have an important beneficial effect on the cost of justice, as well as having many other advantages.

2 See s 159GP(1) of the Income Tax Assessment Act 1936.

3 All figures for 1986-1987 financial year from Pope, Fayle and Duncanson, *The Compliance Costs of Personal Income Taxation in Australia 1986/1987* and Pope, Fayle and Chen, *The Compliance Costs of Public Companies' Income Taxation in Australia 1986/1987*, both reports prepared for the Australian Tax Research Foundation. Figures for 1989-1990 from the Commissioner of Taxation, *Annual Report 1989-1990 the Year of Service*.

4 Law Institute of Victoria, *Access to Justice, Community Access to Public Data Bases: a Highway for Reform* (October 1990) 5.

5 Australian Law News, "President's Page" (May 1990) 4.

These views reflect the views of individual lawyers. Mark Leibler AO, one of Australia's leading tax experts, recently said that our tax system is in danger of complete breakdown because of its "complexity, obscurity, and uncertainty of drafting".

Views like these are not restricted to lawyers. They are widespread in the community. The Australian Taxpayers' Association has itself written to the Treasurer urging that the Act be rewritten in the context of the Treasurer's review which is aimed at modernising and simplifying the taxation system.

Rewriting the Tax Act

The aim

Mark Leibler AO was so concerned at the problems with the legislation that he asked the Law Reform Commission of Victoria to redraft a portion of the Act so as to demonstrate:

- that the Act does not have to be unintelligible to virtually everyone;
- that it could be written in a much simpler style to make it much easier to administer and comply with;
- that the adoption of that style would not involve any change in the amount of revenue collected; and
- that necessary legal concepts do not have to be abandoned. These concepts can be described, and their effect prescribed, in simple language.

The ultimate aim of the redraft is to encourage the Government to arrange for the entire Act to be rewritten in plain English. This would drastically reduce the cost of administering and complying with the Act. Those costs, as shown above, are substantial. A five per cent reduction in administrative costs is the least one could reasonably expect. But \$30 million annually, putting aside reductions in compliance costs, would not be a bad start! The Act should be looked at not just as a "legal" document but also and more importantly as a "managing tool" to be used by the Australian Taxation Office, taxpayers and their advisers. The more difficult the Act is to understand, the greater the costs of administering and complying with it. An artificial market is created for "expert" advice and costs are incurred needlessly.

The vehicle

Division 16E of Part 3 of the Income Tax Assessment Act 1936 was chosen as the vehicle for the demonstration because it is exceptionally complicated and obscure. In addition, the Division is self contained and deals exclusively with one kind of transaction. This meant that the redraft itself could be a stand-alone document with a readily understandable theme. This simplifies the process of determining whether or not the translation of the Division, and thus the usefulness of the project, has been successful.

The Division was enacted to remove some of the taxation advantages available to people who dealt with a highly artificial tax deferment and tax avoidance scheme known as "dingo bonds". This scheme involved selling the capital and interest components of Commonwealth Bonds to different parties. The Division also aimed to implement government policy that the inflation adjustments of indexed securities should be subject to taxation.

The process

The most difficult part of any legislative redrafting process is gaining a sufficient understanding of the original Act and making sure that the redraft is an accurate translation. The Commission always consults experts in the relevant field when redrafting legislation. In the redraft of Division 16E of Part 3 of the Income Tax Assessment Act 1936 the Commission has received invaluable assistance from Mr Nick Renton, an actuarial consultant, and Mr Robert Grimm, a taxation lawyer. The process of redrafting is slow and difficult. Once the drafters have an overall picture of the effect of the legislation they must begin from first principles to structure the material in a logical order and only then start to write the legislation.

In the course of the redraft it became apparent that the existing method used to attribute gains and losses to a particular year is too rough. The Act assumes the "dingo bond" method of six monthly interest rests and is inaccurate for bonds which have any other period. In the redraft the Commission has generalised the method of attribution so it applies fairly to bonds with any method of interest calculation. The redraft deals with all payments made in relation to the transaction. However, under the current Act, rather confusingly, some payments are dealt with outside the Division.

What is the improvement?

Language, structure and layout

The redraft is written and structured in accordance with:

- the principles of legislative drafting set out in the Commission's Report *Plain English and the Law*, reprint May 1990, and
- the principles of the structure and format of legislation proposed in the Commission's Report *Access to the Law; the Structure and Format of Legislation*, May 1990.

Adopting these principles when writing the redraft has meant that:

- matters are dealt with in order of importance, both within the Division and within sections. This means that the first section of the Division states what types of transactions are dealt with in the Division. This approach is revolutionary;
- changes in type face are used to highlight important material;
- the first time a defined word is used it appears in italics and is marked with an "*" and the definition appears at the end of the

section. Each subsequent time a defined word is used it appears in normal print but is marked with a "+". There is a corresponding footnote which refers to the location of the definition of the word;

- definitions do not contain detailed law, deeming provisions or artificial concepts. Words are not defined to mean something which they do not naturally mean;
- simple language and short sentences are used;
- headings, indexes and cross references are used to make it easier to find material;
- examples are included beside sections to show how they are to be applied.

Length

Division 16E of Part 3 of the Act contains approximately 7,500 words. The redraft⁶ is approximately 1,200 words long. The redraft is at least 75 per cent shorter than the existing Division.

The original contains 24 definitions, one of which numbers approximately 180 words and several of which exceed 80 words. The redraft has 17 definitions none of which is longer than 80 words and only one of which is longer than 35 words.

Comprehensibility tests

Of course, brief writing can be obscure. So a better measure of comprehensibility lies in applying technical comprehensibility tests to the original and the redraft and subjecting them to Right-Writer. Right-Writer is a computer intelligibility measuring program based on complicated formulae derived from practical studies. The program "scores" a passage by reference to the number of years of formal education that a person would need in order to understand it. Two sections from the Act were put into the program. They scored 27 years. The Commission's entire redraft scored 11. According to Right-Writer a person in his or her second last year of secondary school could understand the Commission's redraft.

Accuracy

A shorter, simpler and more intelligible Act is of no use unless it is accurate and precise. There are people who say that simple legislation cannot be written about complicated matters. This is true to the extent that the concepts will always be complicated. But those concepts do not have to be overlaid with unnecessarily difficult language and structure which effectively hide the concept and are the major obstacle to comprehension. Simple language can also be precise. Two of Australia's leading taxation

6 Ignoring the examples, which do not appear in the Act, and the definition section - which contains a full set of the definitions which are also set out elsewhere in the redraft, and is therefore repetition.

lawyers, Mark Leibler AO and Neil Forsyth QC, have read several versions of the redraft. They believe that the current version is close to one hundred per cent accurate. More importantly they believe that with the help of the Australian Taxation Office one hundred per cent accuracy can be achieved.

Where to from here?

The process of redrafting Division 16E is incomplete at the time of writing. The Commission is planning to ask the Australian Taxation Office to assess the accuracy of the current version. The redraft may not be absolutely 100 per cent accurate, indeed some changes of substance have been deliberately made in order to distribute gains and losses in a more accurate manner than that used in the Act. However, there may also be inadvertent changes which have crept in as a result of difficulty in understanding the detailed prescriptions of Division 16E. Any inadvertent changes could easily be corrected without departing from the redraft's simpler style and without affecting its comprehensibility.

When the Australian Taxation Office has completed its review and any necessary alterations have been made the redraft will be sent to the Treasurer for his consideration. In the meantime, copies are available from the Commission (telephone (03) 602 4566).

Conclusion

The redraft clearly demonstrates that the Income Tax Assessment Act 1936 could be written in plain English. If the Act were rewritten the savings to Government and to taxpayers would be immense. The time and effort spent by taxpayers, tax officers and tax advisers in reading, comprehending and applying the existing, and each new development in, the law would be greatly reduced. Businesses would be better able to operate and to plan for the future in an environment in which their tax liability was more certain.

If the Income Tax Assessment Act 1936 can be written in clear and simple language anything can.