REWRITING TAX LEGISLATION – CAN POLISHING SILVER REALLY TURN IT INTO GOLD? OR
‘TAX ACT ALCHEMY: TURNING DROSS INTO GLOSS?’

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Abstract

With increasing levels of complexity, bulging statutes books and pleas for simplification, the 1990s saw three Commonwealth jurisdictions pursue similar, yet deceptively different, paths towards the intended outcome of tax law simplification. Retaining the underlying core concepts and with minimal critical examination of tax policy processes, Australia, New Zealand and the United Kingdom embarked upon three journeys towards their (arguably) utopian goals of tax law simplification through rewriting their tax legislation. New Zealand and the United Kingdom have ‘finished’ their ‘marathon’ projects (receiving, in the Olympian parlance, the ‘gold’ and ‘silver’, respectively), while Australia is closing in on the ‘bronze’ with an aspirational target of completing their project in 2013. This paper will build upon prior research to examine the journeys of these three countries, focussing on the ‘flaws’, inherent to varying degrees, in their roadmaps for their respective marathon journeys, highlighting a number of the memorable milestones, with the view of offering perspectives on their various ‘successes’ and ‘failures’. Furthermore, the paper will contemplate the question: “Where to from here?” for each country. While it would be unfair to suggest that the manner in which the three rewrite projects were structured could only at best produce something akin to ‘fool’s gold’, without working towards effective simplification, the act of seeking to turn silver into gold is usually tax alchemy, even if the result may glisten that little bit more!

Key words: Australia, New Zealand, rewrite, tax policy, tax simplification, United Kingdom

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1.0 INTRODUCTION

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

Other countries, such as the United States (US), have debated the issue of simplification, but the US has not taken any concerted action in this regard (and does not appear to be moving in this direction either). Canada has also embarked upon extensive legislative simplification by way of plain English drafting at provincial level (as well as at the federal level through, for example, the Employment Insurance Act). However, a review of these developments is beyond the scope of this paper. The South African Government announced in 2009 that it would be rewriting its income tax legislation, which at that time was nearly 50 years old. A review of this project, once substantial progress has been made, is worthy of analysis.

Unsurprisingly, with major rewriting programmes undertaken in Australia, NZ and the UK, there has been extensive discourse. Academics, members of each country’s rewrite teams, and tax practitioners, have publicly debated, argued, defended and offered their opinions on the successes and inherent value of their respective countries rewrite projects. Indeed, a number have offered some comparative observations between the three projects along their journeys. However, the literature comparing the themes and lessons from all three of these projects to date is sparse. To be fair, the delays of the Australian policymakers through putting to one side their rewrite project while pursuing other major policy changes, only returning to the rewrite project in the last two to three years, has hampered comparison. In comparison, NZ, the first to finish, completed its ‘race’ with full implementation of its rewritten income tax legislation in 2008. The UK, as first runner up, completed its journey in 2010-11. Australia, in choosing to change its focus, now intends to complete its project, possibly by late 2013.
Consequently, the motivation for this paper is to contribute to this ‘gap’ through providing a high-level comparative analysis of the three tax rewrite projects. An overarching focus is to confirm whether prior assertions that any attempt to reduce complexity and enhance simplicity through rewriting and reorganising text, while working within the constraints of existing inherently complex concepts and policy, cannot possibly succeed. To purport otherwise is an example of tax alchemy. Alchemy is the ancient practice of attempting to turn base metals into gold. In a tax parlance, an example is seeking to turn capital expenditure into deductible expenditure. More pertinently, this may be likened to turning inherently complex tax legislation into beautifully written prose that is less complex and enables taxpayers’ tax liabilities to be ascertained with less difficulty and expense.

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

The remainder of this paper is as follows. Section 2 provides an overview of the journeys taken by each of the three countries, based on order of ‘completion’, namely: NZ, the UK, and perhaps optimistically in 2013, Australia. Following this overview, a number of common themes and lessons are drawn and presented in section 3. This then leads to the question, “Where to from here?” the subject of section 4. Section 5 contains the concluding comments, limitations and areas for future research.

2.0 AN OVERVIEW OF THE JOURNEYS TAKEN BY THE THREE REWRITE PROJECTS IN ‘ORDER OF THEIR COMPLETION’

2.1 New Zealand

2.1.1 An overview of the rewrite project

One consequence of NZ’ being the first to complete its journey is that the rewrite experience has been extensively discussed. New Zealand was also the first to start and used as a (potential)
benchmark by Australia and the UK with their rewrite projects. The NZ rewrite project also employed a novel approach (a reorganisation step before any rewriting), as well as having a very influential overseer, namely the Rewrite Advisory Panel (RAP), chaired by Sir Ivor Richardson (Sawyer, 2008). Arguably, NZ’s rewrite project also met with a reasonable degree of success. The major drivers for the rewrite include the 1994 Organisational Review of Inland Revenue, led by Sir Ivor Richardson (Organisational Review, 1994). The Consultative Committee on the Taxation of Income from Capital, (known as the Valabh Committee), was influential through an earlier tax simplification review (Valabh Committee, 1992).

This led to the Working Party on the Reorganisation of the ITA 1976-1993 (Working Party) (1993) commencing the first phase of the project. Importantly, the only statute rewritten was the Income Tax Act. The other revenue statutes, Tax Administration Act 1994 (TAA) and Taxation Review Authorities Act 1994 (TRAA), were to remain in their original format (as created through the reorganisation phase of the NZ rewrite project). The Goods and Services Tax Act 1985 (GSTA) was not on the rewrite agenda. The NZ project comprised four main stages, commencing with an initial reorganisation into three new statutes (ITA 1994, TAA and TRAA). Next, the core provisions, followed by the major income, deduction, and timing provisions (plus the definitions), were rewritten. Finally, the rewrite addressed the remaining parts. Nixon (2004) provides an ‘insider’s’ perspective, being a member of the rewrite team from 1999 to 2004. Her contribution focuses on the way the rewrite progressed and the drafting style employed, highlighting the ‘successes’ of the project.

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

2.1.2 Analysis of the NZ project

Sawyer (2007; 2011) offers perhaps the leading academic contributions to analysing the New Zealand rewrite project. Sawyer (2007, p 427), writing at the time that the Income Tax Act 2007 was going through the process of enactment, concluded:

“…that the rewrite has made marginal (but important) progress in taking the tax system closer to the (elusive) goal of simplicity in tax legislation, but cannot be termed a conclusive success or failure since we have yet to experience the ‘‘benefits’’ of clearer legislation. Constant
change and other major tax developments have focused attention to other areas as the long
and drawn out rewrite project ‘plods along’ to (an incomplete) ‘completion.’”

While it would have been premature at that time to assess the rewrite project, writing some three
years later, Sawyer (2011, p 247, emphasis added) concludes:

“The collective results of readability research on the NZ tax rewrite project provide evidence
of improvements in readability (and to a lesser degree suggest improvements in
understandability) through the process of simplifying the text of the ITA. Such an outcome
should enable taxpayers and their advisors to more readily determine their tax obligations,
thereby facilitating an environment that is conducive to improvements in the level of tax
compliance.”

Readability is one aspect of assessing the impact of legislative simplification; however, it does not
embrace the more complex issues, such as underlying concepts and the policy process. Often
readability as a concept is utilised interchangeably with understandability. While readability may
be used as a proxy for understandability, there is much more to legislation being understandable
than the extent to which it is readable. Other factors include underlying concepts, layout, legibility
and length (for a summary of what makes a document readable, see Castle, 2007).

New Zealand is fortunate in having Sir Ivor Richardson, namely the Generic Tax Policy Process
(GTPP), which has received support both from within NZ and overseas (see for example, Dirkis and
Bondfield, 2005). The GTPP is a dynamic model for tax policy development, with neither Australia
nor the UK having a similar approach (and both jurisdictions have received criticism for their less
than fully transparent tax policy development; see further Sawyer, 2013). In a recent comparative
review of the NZ and UK rewrite projects, Sawyer (2012) traverses the prior literature, as well as
the role of the RAP in addressing minor policy issues.

From an insider’s perspective, Sir Ivor Richardson (Richardson, 2012) offers insights into the
success of the NZ project, placing emphasis on several factors, including the collaborative nature of
the rewrite. He also highlights the response to the exposure of the first phase of the rewrite in 2004,
the extensive attention to quality control, and the setting of goals. Finally, he acknowledges the
commitment of the small groups of experts and officials who were collectively crucial to the
success of the NZ project.
2.2 United Kingdom

2.2.1 An overview of the rewrite project

The UK Tax Law Rewrite Project (TLRP) was announced in 1995 by the then Chancellor of the Exchequer, Kenneth Clarke. This would be a project to rewrite 6000 pages of tax law into plainer English, virtually all of the primary legislation for the UK Inland Revenue (now known as HM Revenue and Customs). This was a much broader project than NZ’s, which covered the income tax legislation only; see Cutts (2000). A pre-parliamentary consultative process took a ‘user’s perspective’. Sullivan (2001, p 162, emphasis added) comments favourably on this approach, stating:

“This sort of consultation indicates that the government is serious about communicating with the persons whose interests are affected by a statute—or in any event with their professional representatives. It also acknowledges the importance of taking into account the reader’s perspective—her context—in any serious attempt to communicate with her. Finally, it shows the tendency of plain language drafting to give a functional twist to formal concepts like democracy and rule of law.”

In the UK, although there has been much debate about both structural reform and reduction of complexity, the only real progress was with respect to greater clarification in some areas. However, even the TLRP’s major political advocate (Lord Howe), admitted that the TLRP may have improved the quality of the UK’s tax legislation, it did not reduce its quantity. For instance, since the annual Finance Act continues to add an enormous and uncontrollable number of pages of tax legislation (Howe, 2001). Length does not necessarily correlate with complexity; longer text may in fact be more simply to understand through the layout, choice of words and explanations. However, if there is more to read and understand, this is likely to increase the level of comprehension and potentially complexity.

As Williams (2008, p 2), observes, the UK’s TLRP acknowledged its debt to both the Australian and NZ projects, which were at the time two to three years ahead of the UK, providing the UK with valuable insights. However, Williams (2008, p 3) comments:

“The [TLRP] has observed, however, that it has been “impossible to quantify the likely benefits” of rewriting tax legislation and that “neither Australia nor New Zealand, although
further advanced with their rewrite projects, have yet been able to establish any better information on these aspects” (‘Plans for 1999/2000’ in HM Revenue & Customs 2007).”

2.2.2 Analysis of the UK Project

Like NZ, the UK rewrite project has been the subject of considerable analysis, and rather than repeat this here, evaluations by Salter (2010), and a comparative evaluation by Sawyer (2012), provide further details. To provide a flavour of the analysis provided in these two studies, the following highlights key findings from each of these studies. Salter (2010, p 687, emphasis added) observes:

“Undoubtedly, the Rewrite has changed the face of much of the primary legislation relating to direct taxation in the UK. In doing so, it has fostered an appreciation of the value to be attributed to consultation between HMRC and outside interests in the quest to improve tax law; employed innovative approaches and techniques in the drafting of the seven Rewrite Bills; and encompassed effective parliamentary scrutiny of those Bills ahead of their enactment. Its premature end, however, has left significant areas of direct tax law unwritten. There are doubts about the sustainability of the Rewrite way in the longer term and jurisprudence on rewritten provisions will take time to develop. ...

However, it is apparent that, and certainly in one influential quarter there may be a perception that, notwithstanding the best efforts of those involved in the Rewrite, little has changed. Thus, the Law Society ... opined that tax law in the UK is “unclear and complex”, that much of it “still lacks simplicity and clarity”, and that, arguably, the Rewrite has made more obvious the underlying problems of tax legislation, namely “its volume, frequency of change and sheer complexity”; words that provide a timely reminder of John Avery Jones’s early misgivings about a rewrite.”

Sawyer (2012, p 38, emphasis added) observes, when comparing the NZ and UK rewrite projects:

“So perhaps in NZ and the UK we have made some small but tangible progress towards simplification; we now have a much clearer picture of just how complex tax legislation actually is! However, on one level the answer must be “no” in that both the NZ and UK projects did not tackle the real issues contributing to underlying complexity (the UK more so), and the rewritten legislation has added to taxpayers’ compliance costs and the administrative costs of the revenue authority. … That said within their limited capability, the successes must
also be balanced against the huge cost in resources from bureaucrats, politicians and tax practitioners that have work tirelessly over the fifteen plus years of each project.”

Skinner (2009) observes that the TLRP displays some of the important features of codification. It exceeds mere consolidation but does not go as far as addressing issues of a fiscal policy nature. She draws attention to the pre-parliamentary process (involving the project team, consultative committee and steering committee, each with their public and private sector experts) and special parliamentary procedures devised to enable effective enactment of the bills. Skinner (2009, p 235, emphasis added) comments favourably on the TLRP, perhaps without the benefit of understanding tax complexity and compliance costs, that:

“In their style, the Rewrite Acts are clearly aimed at improving the clarity and simplicity of tax legislation. They are drafted in plain language, use headings extensively and contain general overviews of the legislation and of specific parts. They also go beyond consolidation, and attempt to recast all of the main rules governing the discrete areas of tax law in which they operate.”

2.3 Australia

2.3.1 Overview of the rewrite project (to date)

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

Established in the mid 1990s, the TLIP commenced with the aim of rewriting the income tax law to make it easier to understand. In 1990, the Australian Treasury and Australian Taxation Office (ATO) had set up a Tax Simplification Task Force; however, its report to the Treasurer never saw the light of day (see Tran-Nam, 1999). Specifically the TLIP was a project to restructure, renumber and rewrite in plain language Australia’s income tax law. It aimed to improve taxpayer compliance, and reduce compliance costs, by making the law easier to understand for taxpayers (including understanding their rights under the tax law). It would also seek to improve discussion on tax policy. The TLIP, envisaged to be a three-year project, would cost $A10 million. However, like the NZ and UK rewrite projects, it would take longer and cost much more than anticipated from the outset. This led to an extension of the TLIP for a further two years until June 1999. Tran-Nam
(1999) observes that, based on the 1992 proposal, an early estimate of savings in administrative costs of the ATO was $A30 million pa, and $A150 million pa in compliance costs. This would potentially be achievable, with both drafting and policy simplification to make the law more coherent. Unfortunately, the government rejected the recommendation for policy reform, thereby rendering any such potential cost saving irrelevant.

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

Picciotto (2007, pp. 24-25) observes that the TLIP’s first project was new legislation to simplify the ‘substantiation’ rules for claiming expenses as deductions from salary income. The result was a reduction in the number of words from 19,000 to 11,000. Nevertheless, the initial evaluation seems uncertain as to whether the rewritten legislation was easier to understand. The new drafting style, while clearer, better structured and shorter, did not involve any significant policy simplification.

Less than halfway through the process, TLIP was subsumed into a review of business taxation, and (until the announcement in 2009) was never officially revived. Specifically, a more radical approach, proposed in the paper: Tax Reform – Not a new Tax, a New Tax System (ANTS, Australian Government 1998), called for an integrated tax code. As Cooper (2007) observes the expertise developed during drafting under TLIP transferred to developing the new integrated tax code through the various reforms. However, the debates generated by the structural reform proposals, notably the controversial General Sales Tax, overtook the impetus for legislative simplification. The focus of the changes was on making substantial changes to the tax base, rather than focus on the issues associated with drafting. The most recent major rewrite of 1936 Act provisions was the Tax Laws Amendment (Transfer of Provisions) Act 2010. Nevertheless, the TLIP style continues to apply to reforms with provisions in the 1936 Act gradually rewritten and included in the 1997 Act but at a much slower rate than under TLIP itself.

In 2003, the Board of Taxation (BoT) began to scope a possible project for rationalising the 1936 and 1997 Acts (see Warburton, 2004). The BoT’s purpose, as the Institute of Chartered Accountants of Australia (2010, p. 4) observe, is to:
“... see whether there may be relatively straightforward options for reducing the volume of tax legislation and making it easier to use for taxpayers and their advisers - both in the short-term and by providing a better platform for longer-term improvement.”

The Australian government decided to remove more than 4,100 pages of ‘inoperative provisions’ (redundant legislation) from Australia’s income tax legislation in 2006. In the Bills Digest accompanying the Tax Laws Amendment (Repeal of Inoperative Provisions) Bill 2006, Pulle (2006) backgrounds the TLIP, outlines some of the concerns over the project, and comments on the likely approach to completing the TLIP’s aims now that ANTS had subsumed it. This led to the conclusion of improved readability of the tax legislation, a positive outcome. Such an exercise should occur on a regular basis, notwithstanding whether it comes within the umbrella of a rewrite project. Nevertheless, the assessment was that the reduction in complexity was not commensurate with the reduction in the size of the law, as it did not reduce the number of operative rules or their complexity. The TLIP was also indebted to, and influenced by, the NZ rewrite project, which was already well into the process of rewriting the tax law in 1995 (see Williams, 2008, p 2).

The BoT (2010, p 4, emphasis added) is on point when it states:

Although the [Report on Aspects of Income Tax Self Assessment] notes that the Tax Law Improvement Project was designed to rewrite the tax law over a considerable time, we doubt that it was contemplated that we would still have concurrent Acts some 14 years after the new ITAA 1997 was introduced. This is a particular concern for new entrants to the tax profession unfamiliar with the way in which the Acts are intended to interact and the different styles they adopt. In our view, at a minimum, a blueprint for the two Acts to be integrated with a consistent structure, language and standardised definitions should be developed.”

This request started to see the light of day in 2009 with the announcement of a rejuvenation of the TLIP. On March 13, 2009, the Assistant Treasurer, Chris Bowen, announced in a speech to the Taxation Institute of Australia, that TLIP would be back in focus (Bowen, 2009, emphasis added):

“Transferring the remaining sections of the 1936 Act to the 1997 Act, with the appropriate redrafting to reflect the language of the 1997 Bill is a task which we should begin to tackle with a definite view to finish the job. I don’t underestimate the size of the task – there are still in excess of 1900 pages of legislation in the 1936 Act – nor the difficulty. There will be hurdles, but with leadership from government and engagement from the profession a single tax Act can be achieved. …
We will continue to transfer large sections of the 1936 Act to the 1997 Act as part of our ongoing reforms, including in response to Board of Tax reports. Then there are the reforms that will arise out of the Henry Review which may address some of the big ‘P’ policy issues embedded in the legislation.

The response to the Henry Review is for the future and we are acutely aware that there many, many challenges facing us all at present which could throw up other reform priorities. So, I do not want to set a definite timetable for the amalgamation of the two Acts. Such timetables have been set before, only to lead to disappointment.

We do, however, need a goal, an aspirational date, by which we would like to see the acts amalgamated. I believe that 2013 is an ambitious, but achievable, target for Australia to have one tax act.”

With little evidence of progress, in August 2010, Nick Sherry, the new Assistant Treasurer, in a speech to the Australian Economic Forum, stated (Sherry, 2010, emphasis added):

“In addition I can commit today to continuing, as a high priority, the work to deliver Australia a single modern tax Act. Federal Labor has made progress on rewriting the provisions of the 1936 Income Tax Assessment Act (ITAA) into the 1997 ITAA, to create one single consolidated and modern Tax Act for the Australian people, and if we are re-elected I commit that this work will continue as a high-priority.”

At the time of writing this paper, we are moving into early 2013. There is no sign of any further formal draft legislation for rewriting the remainder of the 1936 Act (although the general anti-avoidance provision is proposed to be amended to restore its effectiveness – see Tax Laws Amendment (2013 Measures No 1) Bill 2013: General anti-avoidance) in the public domain. However, through reforming a number of regimes, rewriting of some of the remaining parts of the 1936 Act is continuing, with the new provisions inserted into the 1997 Act. Nevertheless, this indicates that we are yet to see a close to the TLIP, suggesting that 2013, as the year in which the TLIP is ‘completed’, will probably not be achievable.

2.3.2 Analysis of the Australian project

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

The early views on the TLIPs’ approach are mixed. Nolan and Reid (1993-4), with their close involvement in the TLIP, set the scene, outline the scope of the TLIP, the alternative approaches to delivering the final product and how to achieve the vision of the rewritten law. Not surprisingly, they are very positive and enthusiastic about the project.

Durack (1995) did not expect that non-experts would be able to understand the legislation. He suggested that the implementation should be delayed pending rewriting of all of the legislation, rather than a progressive approach to its introduction. With hindsight, a delayed enactment would probably have avoided Australia’s problem of needing to work with two statutes for the best part of 20 years. Slater (1995) doubted that the TLIP could produce a “thing of beauty and simplicity”. The passage of time has certainly confirmed a failure on this account. Vann (1995) offers a perspective that draws upon the early NZ experience, along with suggestions for the drafters. Turnbull (1995), from a lawyer’s perspective, concludes on point that while the drafters may do a great job with the task they are given, they will fail with the ultimate aim of reducing complexity. This is a consequence of the government not permitting major policy issues to be part of the TLIP. To be fair this is a fault common to all three rewrite projects.

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

Focussing on a theme of consultation, the Office of Regulation Review (ORR) (1995) recommended that the TLIP provide more information in the area of compliance costs to facilitate consultation. The ORR (1995) observed that that the TLIP could take one of three approaches, namely: the NZ approach, a specialist approach and a modular approach. The choice, however, was a combination, creating ‘the pyramid’. Here, the top level reflects the core provisions, followed by the general provisions as the middle level, and the specialist groupings at the bottom. Importantly, the ORR (1995) recognised implicitly, what I would term the risk of type 1 and type 2 errors
occurring. The first was insufficient resources allocated to the main sources of compliance costs. The second too much time and resources allocated to those areas that create little in the way of compliance costs. The premise for this outcome is that a reduction in compliance costs is the key driver to achieving simplification.

Importantly for Australia, the government accepted the recommendation to investigate compliance and administrative costs. The Australian School of Taxation (Atax), at the University of New South Wales (UNSW), has been instrumental in developing Australian-focussed compliance cost research (for an example of this work, see Tran-Nam et al, 2000). Notwithstanding this goal, the ORR (1995) correctly observes that the narrow scope of the TLIP means that it cannot address many of the issues associated with compliance costs.

Further concern over the TLIP appears in a special feature in *Taxation in Australia* in 1995 with a pot pouri of views, including proponents and opponents of the TLIP process. An emerging issue is the additional forms of complexity that the new drafting style was introducing. However, the contributors anticipated that the TLIP would reveal areas of underlying inconsistency in tax policy that with time the government would address.

Burton and Dirkis (1995), in an early academic assessment of the TLIP, aptly observe that a major flaw in the TLIP was the uncertainty over the type of complexity under review, and the audience of the legislation (taxpayers or the actual readers?). The authors develop criteria to assess complexity and apply this to the TLIP. Burton and Dirkis (1995) identify a major flaw, the exclusion of tax policy, being the result of a decision made by the government and not a choice exercised by those directly involved with the TLIP. This was a missed chance to complete something fundamental, and arguably, the TLIP needed to adopt objectives that are more modest. In the parlance of this paper, such an approach may have ‘restored some of the shine to the leaden legislation’ but certainly could not deliver some form of ‘chemical reactions necessary to transform the leaden legislation into gold’. This could only be possible if attention focuses on both underlying concepts and policies, thereby creating an entirely new tax statute.

Mann (1997, pp 42-43), supports Burton and Dirkis’ (1995) view, when he states that:

“Playing around with ‘rewording and renumbering’ is a drafting matter. Where complexity is concerned in a revenue statute, you have to go back to basics – consider the activity you are intent on taxing, conceptualise that activity, redesign it if need be and test it by modelling. Only then can drafting commence.”
In a hard-hitting editorial, Pagone (1996, p 159) suggests that part of the problem may “stem from what many feel to be a lack of engagement by, or enthusiasm of, government (present and immediate past) in the process of tax improvement.” Pagone (1996) calls for the government to enable departments and professional bodies to work more closely to enable effective tax law improvement in Australia.

The Australian Productivity Commission (1997, p 21, emphasis added) expressed its concern over the TLIP’s focus, suggesting that many of the issues associated with compliance costs would remain:

“While reducing compliance costs is one of the explicit goals of the project, its narrow scope will necessarily limit the extent to which compliance costs can be reduced. Poorly structured and poorly written law is only one source of excessive compliance costs and is arguably not one of the most important sources. Many taxpayers, both individuals and firms, never have cause to refer to the Tax Act. It is the record keeping and reporting requirements of the Act — as well as how it is worded — which impose excessive costs.

… Concerns are also being expressed by industry over whether worthwhile gains will be achieved under the program. Indeed, some business associations have suggested that the project has the potential to make laws more, rather than less, complicated.

However, the TLIP can deliver worthwhile gains. But its narrow terms of reference and multiple objectives — of which reducing tax compliance costs is only one — mean that it will not address many of the issues associated with compliance costs. In this context, it would not be surprising if broad surveys of compliance costs or attitudes to the tax system (such as the benchmark study Wallschutzky undertook for the ATO) fail to show major falls in tax compliance costs after the TLIP is complete.”

Commenting when the TLIP was well underway, Ibbery (1997) is on point when he notes that even a number of ‘small p’ policy issues may not be resolved (‘big P’ policy issues were off the agenda). Furthermore, there was a real danger that once the TLIP was complete, the government would consider the job done, without the ‘big P’ issues addressed. Interestingly, from 1998, the TLIP was on hold indefinitely as some ‘big P’ issues emerged through the Ralph Review of Business Taxation and subsequent tax policy reviews. Taxation in Australia (1997), in commenting on an earlier Joint Committee of Public Accounts’ (JCPA’s) report, highlights that Australian governments had chosen to interpret simplification in a narrow sense, leaving major tax policy of the agenda. Again, this is
an example a failure to recognise what is needed if one is to realistically have a chance to convert ‘dross into gloss’. Lehmann (1997) is also on point when he recommends that TLIP should take stock, be permitted to take on a broad range of ‘small p’ policy issues (as a minimum), and not seek to preserve existing complexity. Rather, Lehmann (1997, p 520) suggest it should “… carry out comparative studies to determine what would be an international best practice Tax Act.”

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

In 1996, Assistant Commissioner of Taxation, Michael D’Ascenzo commented in a speech that the TLIP would be working towards a more streamlined version of the income tax legislation. D’Ascenzo (1996) notes that it “… contains the same law but it exists in a new improved form - stripped of its excess and tailored to encourage its use.” Furthermore, D’Ascenzo (1996) cautions, “… it is the form and not the law or the policy behind the law which will change - it will just be more easily digested.” The main goal was to reduce compliance costs, thereby suggesting that this should be a key measure of evaluation of the success or otherwise of the TLIP. If successful, this could become the basis for all Commonwealth of Australia legislation drafting. Importantly, the JCPA had recommended that a committee of the Australian Parliament be given a role in addressing the substantial number of minor policy simplification issues highlighted by the TLIP but outside its ambit.

By 1997, the Commissioner of Taxation, Michael Carmody, in launching the 1997 Act (Carmody, 1997), described in his speech the process as one of renovation of income tax legislation. At best, this was an attempt to restore the 1936 Act to its ‘former glory’ via the 1997 Act, through ‘polishing’. Specifically Carmody stated (1997, emphasis added):

“The term ‘renovation’ seems appropriate when speaking of the task assigned to TLIP. It is what they have set out to accomplish: to take an Income Tax Assessment Act first introduced
in 1936 and renovate it into a streamlined and accessible piece of legislation that better performs its function. …

I think it is fair to say that one of the biggest challenges faced by TLIP turned out to be that it became the ‘meat in the sandwich’ for some of those urging tax reform on the Government. With the Government having embarked on the tax reform path, perhaps calmer reflection is showing the benefit of the TLIP approach. *I have no doubt that the TLIP work will be just as relevant in an environment of tax reform.*

I say that because *TLIP work in clarifying just what the existing law is, stripped of its excessive complexity, will be of great assistance; as will the lessons on language layout and presentation.*”

Tran-Nam (2000, p 249, emphasis added), in commenting on the end of the TLIP, suggests that the TLIP has left an impression, namely that:

“The TLIP has shown two things. First, *poor drafting has made the tax law difficult to comprehend.* Second, *without tax policy changes, the project’s simplification impact has been limited.* Thus, the *cessation of the TLIP will have little effect on the simplicity of the tax system.*”

A persuasive summary of the Australian rewrite ‘experiment’, as it stood in the early 2000s, is provided by Krever (2003, p 505), when he concludes:

“During the past decade there have been two ineffective or unsuccessful attempts at simplification of the tax law, first by redrafting the law in plain English without addressing structural issues and second by the proposed wholesale replacement of the legislation and its current concepts with a new foundation that incorporated most of the causes of complexity in the current law. … Simple amendments to address structural flaws, purposive definitions and better-designed tax expenditures are useful starting points for such an exercise.”

Pinder (2005), a member of the Tax Design Team in the Australian Treasury, suggests that a coherent principles approach holds promise as one means for addressing concerns about the sustainability of Australia’s tax laws. Samarkovski and Freudenberg (2006) undertake an assessment of this approach. The authors present a comprehensive analysis of the work of the TLIP and debate the meaning of ‘simplification’. Samarkovski and Freudenberg (2006) examine the role of the rule of law, and evaluate whether the drafting principles employed continued to be utilised
with new legislative provisions (notwithstanding the suspension of the TLIP). The authors also comment on the role of the BoT in reviewing tax policy. Samarkovski and Freudenberg (2006) find that the drafting principles remain evident and that the level of readability is such that it is arguably of an acceptable standard for professional users.

Cooper (2008, p 131, emphasis added) further observes:

“So the recommendations in the [A New Tax System] Statement and [A Tax System Redesigned] languished. No new code emerged and the radical changes to drafting style were not evident. The TLIP drafting style and practices continued with a few discernible changes (discussed below) but it was certainly not apparent that there was a shift to using ‘general principles in preference to long and detailed provisions,’ and the number of pages of tax legislation most certainly did not decrease during this period.”

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

3.0 AN ASSESSMENT OF COMMON THEMES AND LESSONS

James et al (1998) undertake an early comparative analysis of the three rewrite projects. The authors conclude (p 63, emphasis added):

“More generally, the way forward seems to be to incorporate simplification into tax policy itself in a rather more determined way than appears to have been done in the past. It would, of course, be only one of a range of goals of tax policy and there are perhaps some rather more important ones, such as equity. … One place to start is the meaning of simplification as outlined in section II above. From there it would clearly be possible to derive a set of guidelines for simplicity in tax policy. It would not, of course, be the case that these would necessarily override other objectives, but their adoption might ensure that simplification became a routine part of the development of tax policy.”

What simplification means is a critical issue, as Tran-Nam (1999) observes. Tran-Nam (1999) suggests that there is both legal simplicity (how difficult is a tax law to read and understand) and effective simplicity (how easy is it to determine the correct tax liability). The tax rewrites in all three countries focused on the former and largely neglected the latter. Tran-Nam (1999) concludes
that even the ensuing tax reform packages in Australia are likely to be negative in terms of their impact on simplification and may lead to an increase in the ratio of operating costs to GDP. Also in an Australian context, Krever (2003, p 493, emphasis added) observes that:

“…when taxpayers and tax advisers sat down to work with the new law, they quickly discovered none of the complexity had dissipated. Indeed by unveiling many of the inconsistencies, anomalies overlaps and lacunae in the law, the plain English redraft exposed the real causes of much of the former law’s complexity, namely its wholly irrational and inconsistent policy base.”

Hill (2005) reinforces the negative outcome of retaining two statutes in Australia. This approach frequently requires taxpayers and their advisers to consult both the 1936 Act and the 1997 Act, converting what possibly could have been a case for simplicity into a negative of additional complexity. In this regard, the NZ approach of enacting a new Act with each major rewrite phase is preferable.

Comments made by the Ministerial Panel on Business Compliance Costs (2001) suggest that there has been minimal impact on reducing complexity or compliance costs with tax policy developments during the period 1989-2001 in NZ. However, to be fair, this is not a direct reflection on the NZ rewrite project’s efforts since it overlapped other major tax reforms. Owens and Hamilton (2002) observe that these rewrite projects have failed to reduce the length of the tax codes or complexity with regard to complying with obligations. However, they observe that Australia and the UK have removed a sizeable number of redundant provisions in their key tax statutes.

Post the TLIP and the Review of Business Taxation in Australia, a focus on principles began to emerge. Cooper (2008) argues that the logic of the pyramid is attractive but flawed. Specifically it does not clearly separate the common questions and transactions from the rare and specialised. Furthermore, it does not explain or reconcile conflicts in measures, and leads to rules dealing with the same subject appearing in more than one chapter. Cooper (2008) also suggests that as the legislation has become more elaborate the process of housekeeping takes more time and effort by drafters and Parliament. Furthermore, with time, successive generations of drafters will not necessarily continue with the policies of the past, something that the 15 years period of the TLIP (at the time of Cooper’s analysis) has revealed. Cooper (2008, pp 178-179, emphasis added) concludes:
“Certainly the language used is clearer but meaning is often still opaque; legislative structures are more evident but they are not always logical; tables and lists may be easy to follow but they lack conceptual coherence; new approaches are not sustained suggesting their trumpeted merits are not indisputable. … The trick for succeeding generations of legislative drafters will be to retain those parts of the new drafting style which are beneficial and discard the rest. And if we are to have any confidence that the drafters will be able tell which is which, it certainly would not hurt for someone to test – even just a bit – whether and where all of this change has been worth the effort.”

Sir Ivor Richardson (2012), a major proponent of the NZ rewrite project, comments on the importance of simplicity in legislative drafting. In this regard, he provides an excellent overview of the Australia, NZ and the UK rewrite projects’ efforts to simplify their respective statutes. Sir Ivor Richardson compares the original drivers for the three projects, and reflects upon insights provided by a number of commentators on each of the three countries’ rewrite exercises. In relation to NZ’s rewrite, he supports the comment made by Sawyer (2008) on the positive role of the RAP. Sir Ivor goes further to emphasise that the collaborative nature of the rewrite, the response to the exposure of the first phase of the rewrite in 2004, the extensive attention to quality control, and the setting of goals were critical. Last, but not least, he draws attention to the commitment of the small groups of experts and officials involved who were collectively crucial to the success of the NZ project.

The UK suffered from the almost complete absence of such a body as the RAP, and furthermore, was perhaps even less inclined to raise issues of a tax policy nature. The decision in 2008 to establish the Office of Tax Simplification (OTS), a new Joint Parliamentary Select Committee on Taxation and an earlier announcement of technical law changes (to be no later than the Pre-Budget Report) are welcome. However, James (2008, p 412) suggests these are unlikely to address any of the real issues behind the complexity of the law, no matter “… how eloquently they might allow the case for it to be made.”

Sawyer (2012) offers a comparative analysis of the NZ and UK rewrite projects. Drawing upon the contributions of earlier commentators, he reflects upon what lessons there may be because of these two ‘completed’ exercises, observing (Sawyer 2012, pp 39-40, emphasis added):

“Given the benefit of hindsight would either NZ or the UK have undertaken their respective rewrite projects? I would suggest the answer is a very tentative yes but with much less expectation of outcomes at the start, arguably different steps to achieving the final products
would be employed, and hopefully the underlying issues driving complexity, such as the policy process and key concepts, would be addressed simultaneously. I would suggest that decisions in the early planning stages would be significantly different. For other jurisdictions that may contemplate rewriting their legislation; do so with extreme care and with the benefit of the lessons from the experiences of Australia (still unfolding), NZ and the UK.”

James (2007, p 12, emphasis added), in relation to the Australian and UK rewrite projects, observes:

There are two main reservations about simplifying tax law in this way. The first is that rewriting the law may inadvertently change its meaning in places when over many years Courts have gone to considerable trouble to establishing precise meanings. The second is that taxpayers themselves do not normally read primary tax legislation and therefore there is no need to direct it at them. The present author got the impression at the time that the tax law rewrites were seen as the solution to the problem of excessive complexity but, certainly on their own, they are not.”

While there was an expectation early on that tax rewrite projects were a solution to the problem of excessive complexity, the benefit of hindsight reinforces that this expectation was misguided, at best. Evidence that emerged early on, and reinforced during the rewriting processes, has made it clear that on their own, a rewrite of legislation is not a solution to the problem of complexity (James, 2008, p 7). As James (2008, pp 7-8, emphasis added) observes:

“Although initiatives such as those for tax law improvement are to be welcomed, in Australia, New Zealand and the UK they have been limited in that they were concerned with only part of the problem, complexity of language, and sometimes that is only a small part of the problem. These initiatives made no serious attempt to address the underlying complexity of the tax system and the process of tax reform generally from which such complexity arises. Nor was there much recognition that other aims and realities of the tax system might sometimes be more important than simplification. As in the case of compliance, what is needed is a much wider approach to these issues.”

Cooper (2010, p 337, emphasis added) comments in relation to the three rewrite projects:

“The [Australia] project was, in the terms used above, a housekeeping project designed to rephrase, but not change, the existing legislation. In this respect, it mirrored the UK and New Zealand “tax law rewrite” projects which were both similarly constrained. The main
contribution of these projects to legislative drafting in all three countries lay in innovations in language and presentation—the “use of plain language to make the legislation simpler, clearer and more user-friendly.” In many respects, they were the manifestations in tax drafting of the plain legal language movement occurring elsewhere.”

Later on Cooper (2010, pp 340-341, emphasis added) reflects upon the enthusiasm for the new principles-based style, observing:

“The syllogism underlying all this enthusiasm was not seriously challenged at the time nor subsequently, but it is worth dwelling on it, if only briefly. The first idea is that behind tax legislation there is always a clear policy intent (or perhaps a series of basic principles) to be found, but that the purpose or principles will often not be apparent to readers. Secondly, this confusion often arises because the legislation is written in excessive detail--too much detail not only fails to elucidate, it can actually obscure. Thirdly, the level of detail can be reduced if the legislation sets out to express simply statements of the intended policy or principle, and so, in appropriate cases, statements of intent or principle should be made operative rather than merely serving as aids to interpretation. Fourthly, and somewhat at odds with the third point, if reductions in clarity arise using principles-based drafting, they can (and should) be addressed through other means, particularly administrative guidance. A moment's reflection may suggest some scepticism [sic] about several of the steps in the argument; the experience described below may tend to confirm that caution.”

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

The three rewrite projects have a number of features in common, in addition to their focus on the language used rather than addressing issues of policy. All three have taken much longer than the original periods, which were unrealistically set at three to five years. New Zealand, the first to start (and finish), took around 15 years. The UK, the second to finish, took around 16 years. Australia, yet to complete, will take at least 20 years. However, during that time the focus turned to other
matters of substantive policy, leaving a partially constructed 1997 Act and a partially deconstructed 1936 Act. Furthermore, from the limited available data, all three projects incurred much greater administrative expense than originally expected. In absolute terms, the NZ project appears to be the least expensive, with the UK and Australia consuming much more in terms of resources and time. The scope of NZ’s rewrite is significantly less than that of the UK, but similar to that of Australia. Comprehensive estimates of compliance costs are not available, and if available, would be unreliable given the inter-related nature of the rewrite activities with other tax policy developments.

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

Consultation was a feature of all three of the rewrite projects, with draft legislation made available for submissions from interested parties such as tax advisors. Discussion papers also featured from time to time. Unique to the NZ approach was use of the RAP to provide technical assistance and resolve issues over unplanned changes throughout the rewrite process and beyond (Sawyer, 2008).

Collectively the three approaches to tax simplification has been narrow, in that primarily legislative simplification was sought through rewriting legislation in a manner to improve its readability and understandability by expert users. None of the projects tackled the wider issue of effective simplicity of making compliance easier (and thereby reducing compliance costs for taxpayers), as noted by Tran-Nam (1999). Indeed, with the constant change of other aspects of the tax legislation, the decisions not to address issues of a ‘big P’ policy nature (but only limited ‘small p’ policy issues), meant that underlying complexity was not addressed (see Ilbery, 1997). Australia’s attempts to address some of the ‘big P’ policy issues through business tax reform and the tax value method have not proved successful. Furthermore, in the view of many commentators, these have added further complexity to the tax system.
In their analysis of the relative success of the tax simplification initiatives in Australia, NZ and the UK, McKerchar et al (2006) suggest that reductions in legal complexity and compliance costs have proven generally elusive. Therefore, the focus has turned to administrators and policymakers seeking to simplify processes and procedures. Furthermore, Evans and Kerr (2012, p 393) observe that “… the focus has shifted to managing tax system complexity: making it easier for taxpayers to comply while conceding the system remains complex.” The authors also suggest that to achieve genuine simplification may require following the advice and approach taken by the NZ Labour Government in the 1980s under Sir Roger Douglas. Rather than a process of a long hard slog of tackling one reform after another (the recommendation presented at the 2011 Tax Forum in Australia by Wayne Swann), it should involve implementation “… in quantum leaps, using large packages.” This will involve clearly defining the objectives and by moving forward in quantum leaps, this will reduce the amount of time interest groups have to mobilise and “drag you down” (Evans and Kerr, 2012, p 410, citing Sir Roger Douglas).

4.0 WHERE TO FROM HERE?

The path forward for the three countries would appear to be dependent upon in part where their rewrite project left them and how they plan to address issues of major tax policy complexity.

Australia has yet to complete the TLIP, so in a sense its direction for 2013 (and beyond) is to ensure that the 1936 Act can be repealed once remaining operative provisions are rewritten and included into the 1997 Act. Once draft-rewritten legislation becomes available, a closer examination of the TLIP should be undertaken. Furthermore, it would not be a bold prediction to make that once this is complete, there will be no appetite to rewrite other tax statutes in Australia. Concurrently, while there are no other similar tax reforms in progress, there is the critical issue of whether the benefits of the drafting style of TLIP will continue to be experienced. On the other hand, will there be a return to the former styles of drafting, potentially leading to more legislative complexity?

In NZ, apart from the ITA 2007, the other tax statutes follow the traditional non-plain English drafting style and therefore experience the associated complexity of that style. Amendments to the ITA 2007 have used the rewrite team’s drafting style, layout and section numbering approach. However, this in itself is no guarantee that the resulting text will be understandable when it is assessed using various forms of ‘readability’ testing. There remains no appetite to expand the rewrite to other tax statutes, such as the GSTA or TAA, notwithstanding encouragement from a member of the NZ Supreme Court to address legislative complexity brought about by the GSTA
(see Sawyer, 2007, p 427). The tax policy process (GTPP) in NZ remains in place, and as Sawyer (2013) would suggest, is worthy of close examination by other jurisdictions, including Australia and the UK.

For the UK, the focus is clearly now on the tax policy process, with the OTS a major new player in the process (see Salter, 2010; Sawyer, 2012). Like NZ, there appears to be no appetite in the UK to rewrite any other statutes at this time. Given the enormity of the task to make the tax policy process more transparent and coherent in the UK, this approach is understandable.

Overall, the three projects are in part a reflection of the environment in the early 1990s, including the close sharing of personnel and ideas between the revenue authorities in each jurisdiction. Arguably, the projects also reflect a response by the legislators to criticisms from taxpayers and tax professionals that nothing tangible was evident in terms of efforts to address growing complexity and compliance costs. Unfortunately, it is not overly cynical to suggest that even with these three projects, there has been little in the way of tangible reduction in complexity and compliance costs. Indeed, it is arguable that there has been an increase in such costs, especially with the approach taken in Australia of having two statutes. The sooner there is one income tax statute the better for all concerned.

5.0 CONCLUDING OBSERVATIONS – AN EXERCISE IN “TAX ALCHEMY”?

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

In terms of the rewrite projects themselves, NZ and the UK have ‘finished’ their ‘marathon’ projects (receiving, in the Olympian parlance, the ‘gold’ and ‘silver’ medals, respectively). Meanwhile, Australia is closing in on the ‘bronze’ medal, with an aspirational (and perhaps unrealistic) target of completing their project in 2013.

A premise of all three projects was that, through redrafting of legislation to give it an appearance of more readable and understandable prose, real simplification would be possible and compliance costs reduced, is a fallacy. This fallacy became clearer with time and was apparent to a number of commentators from soon after the commencement of the various rewrite projects. Without
addressing the issues of substantive policy (big P issues) and underlying conceptual complexity, this is close to an exercise in futility in terms of the goals sought. That said the desire to make the legislation more understandable, in the context of expert users, is laudable. The preliminary assessment of the three projects would suggest that each has been successful in this regard, especially in revealing additional complexity in the underlying concepts. This finding is perhaps analogous to removing the outer cladding of a building to be able to make a more accurate assessment of the underlying issues in need of remediation and/or replacement. The projects have also highlighted the need for enhanced transparency and consultation in the design of tax policy, something that NZ has utilised with considerable success.

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

Even with the early vigour of the projects to achieve the challenging goal of reduced complexity through simplification of legislation, these are exercises in tax alchemy. Brain Nolan’s comments in 1997 are indicative of this early enthusiasm, at least from an Australian perspective. It is just not possible, when using the analogy, for example, of a motor vehicle, to suggest that one can convert a family station wagon into a ‘top of the line’ sports car by polishing the exterior, changing the paintwork, and rearranging some of the parts. How will some form of ‘mechanical magic’ overcome the underlying differences and complexities of a family station wagon versus a top of the line sports car? Such a conversion requires much more than outward appearances and some limited form of reordering of the component parts. It necessitates something closer to a complete strip down to the basic parts, some major structural changes, and a finishing that reflects a clear blueprint or design. Some may even suggest abandoning the former structure and commencing afresh. Notwithstanding the analogy, I do not wish to suggest that the station wagon is the equivalent of ‘legislative dross’ and the top of the line sports car that of ‘legislative gloss’!

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

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

In terms of future research, one obvious area is to complete a review of the TLIP once it is completed in Australia. A further study could also focus on areas of major tax policy that should be addressed (the big P’s), which could incorporate developments of the OTS in the UK, and various government initiatives in Australia and NZ.

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

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