



Journal of Australian Taxation



TABLE OF CONTENTS

Foreword	i
JOHN MCLAREN, EDITOR	
Country – by – Country Reporting: A New Dimension in Taxpayer Compliance Obligations in Australia	1
LES NETHERCOTT, LIVIA GONZAGA AND ESIN OZDIL	
The Role of Taxes in Promoting the Experience of Home for Tenants	29
JONATHAN BARRETT	
The Firm: Re-thinking tutorials to provide greater authenticity for future tax professionals	53
BRETT FREUDENBERG AND ANNA MORTIMORE	
UNIVERSAL BASIC INCOME: The Potential Impact on the Australian Tax System ...	66
MYLES BAYLISS	

FOREWORD

JOHN MCLAREN, EDITOR

This is the first edition of the *Journal of Australian Taxation* for 2019. Volume 21(1) consists of four papers covering a range of taxation topics. The first paper by Les Nethercott, Livia Gonzaga and Esin Ozdil examines the Base Erosion and Profit Shifting Action Plan (BEPS Action Plan) aimed to combat tax evasion through improved tax transparency and enhanced exchange of information and co-operation between tax authorities. As part of the BEPS Action Plan's recommendations on transfer pricing and country-by-country reporting (CbCR) requirements have been introduced in many countries, including Australia. This paper analyses the Australian 'Country by Country Reporting' legislation and the impact of compliance requirements on large multinational consolidated groups in Australia. The paper reflects on CbCR issues that include and transcend the taxation sphere, such as general business reporting and corporate governance, as well as the consequences of failing to comply with CbCR obligations. The discussion underlines the need for a cohesive global cooperative effort involving tax authorities and taxpayers. It also raises the need for reporting entities to make the necessary governance adjustments in order to comply with the CbCR obligations, which will support the objectives outlined in the BEPS Action Plan.

The second paper by Jonathan Barrett examines the role of taxes in promoting the experience of home for tenants. His paper contends that taxes can neutralize, to some extent, the different wealth experiences of tenants and owner-occupiers. While taxes cannot be effective alone, they may also contribute to closing the gap in consumption experiences of owner-occupiers and tenants. This article investigates how taxes can supplement regulation in promoting an experience of home for tenants.

The third paper by Brett Freudenberg and Anna Mortimore looks at re-thinking tutorials to provide greater authenticity for future tax professionals when studying Advanced Taxation at University. The article reports a simulated work integrated learning scenario – The Firm – which was integrated into tax tutorials. The findings of the outcomes of the 'firm case study' are reported, including observations about the advantages and disadvantages of the approach. It is argued that with a re-think of tax tutorials, it is possible to provide a learning environment with greater authenticity that can assist to enhance the students' professional identity, as well as their technical knowledge; although it is not without its challenges. The authors contend that it is with such enhancement, that students will be better placed to commence their careers as tax advisors.

The fourth paper by Myles Bayliss examines the concept of a Universal Basic Income and the Potential Impact this would have on the Australian Tax System. The author contends that due to changes in the labour force and the effects of growing income inequality, sustenance payment policies such as Universal Basic Income (UBI) are increasingly being looked to as possible solutions. The idea of a UBI provides a different way of conceptualising the transfer system. This paper examines if UBI legislation would be valid under the Australian Constitution and the potential impacts it may have on Australian tax law.

COUNTRY – BY – COUNTRY REPORTING: A NEW DIMENSION IN TAXPAYER COMPLIANCE OBLIGATIONS IN AUSTRALIA

LES NETHERCOTT, LIVIA GONZAGA AND ESIN OZDIL*

ABSTRACT

The G20/Organisation for Economic Co-operation and Development's (OECD's) Base Erosion and Profit Shifting Action Plan (BEPS Action Plan) aims to combat tax evasion through an effort to improve tax transparency and enhance the exchange of information and co-operation between tax authorities, governments and global entities. As part of the BEPS Action Plan's recommendations on transfer pricing documentation, country-by-country reporting (CbCR) requirements have been introduced in many countries, including Australia. This paper analyses the Australian CbCR legislation and the impact of compliance requirements on large multinational consolidated groups in Australia. The paper reflects on CbCR issues that include and transcend the taxation sphere, such as general business reporting and corporate governance, as well as the consequences of failing to comply with CbCR obligations. The discussion underlines the need for a cohesive global cooperative effort involving tax authorities and taxpayers. It also raises the need for reporting entities to make the necessary governance adjustments in order to comply with the CbCR obligations, which will support the objectives outlined in the BEPS Action Plan.

Keywords: BEPS, Country-by-Country Reporting, Compliance, Accounting, Taxation, Australia

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I INTRODUCTION

In the search for greater tax transparency and accuracy in reporting, the efforts of the G20/Organisation for Economic Co-operation and Development (OECD) and European Union (EU) have led to shifts in the global tax landscape, with the introduction of base erosion and profit shifting (BEPS)¹ and the ‘Action Plan on Base Erosion and Profit Shifting’.² The Action Plan contains a number of actions designed to address the issue of BEPS. In particular, Action Plan 13 focuses on the issue of transfer pricing documentation and country-by-country reporting (CbCR).³ Under the CbCR requirements outlined in the BEPS Action Plan 13, multinational enterprises (MNEs) are required to provide and report financial and tax information detailing their global allocation of income and taxes. Since the introduction of CbCR, approximately 76 jurisdictions⁴, including Australia, have agreed to incorporate the OECD’s CbCR recommendations into their domestic legislation to varying degrees and/or have signed the OECD’s Multilateral Competent Authority Agreement on CbCR⁵, which will facilitate the automatic exchange of CbCR information among signatories. CbCR compliance requirements may have varying effects on MNEs, and in particular, impose certain challenges and obstacles. The strategic responses of MNEs will be central to preparing them for compliance and helping CbCR become established as authoritative guidelines for tax behaviour.

This analytical paper considers the implications of CbCR requirements in Australia and how MNEs can respond as organisations. In particular, this paper considers how corporate entities in Australia may change their systems, structures and procedures in response to this legislation in order to support their compliance with national and international tax authorities. This paper contributes to the limited academic literature on CbCR by examining the global context of CbCR and its introduction in Australia. It also alludes to the various strategic and accounting considerations reporting entities will need to consider in preparing themselves for CbCR compliance. The key matters and issues of CbCR and the possible responses outlined in this paper will provide fruitful guidance for reporting entities in preparing them for CbCR as well as alerting them to various organisational challenges and opportunities.

¹ OECD, ‘About BEPS and the Inclusive Framework’ (2016) <http://www.oecd.org/ctp/beps-about.htm>. Also: OECD, ‘Country-by-Country Reporting: Update on exchange relationships and implementation’ (2016) <http://www.oecd.org/ctp/exchange-of-tax-information/country-by-country-reporting-update-on-exchange-relationships-and-implementation.htm>

² OECD, ‘Action Plan on Base Erosion and Profit Shifting’ (2013) <https://www.oecd.org/ctp/BEPSActionPlan.pdf>

³ OECD, ‘Transfer Pricing Documentation and Country-by-Country reporting, Action 13—2015 Final Report’ (2015) <http://www.oecd.org/tax/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report-9789264241480-en.htm>

⁴ OECD, ‘Country-by-Country Reporting: Update on exchange relationships and implementation’ (2018) <http://www.oecd.org/tax/beps/country-by-country-reporting-update-on-exchange-relationships-and-implementation.htm>

⁵ Australian Taxation Office, ‘Country by Country Reporting – Automatic Exchange of CbC Reports’ (2018) <https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Transfer-pricing/Country-by-Country-reporting/>

II BACKGROUND – GLOBAL CONTEXT

The erosion of the tax base by artificial shifting of profits to low tax or no tax jurisdictions is a serious issue that affects most developed and developing countries. Profit shifting and base erosion practices are possible where there is low tax transparency associated with inadequate or outdated tax legislation and poor international coordination between tax authorities. The OECD estimates an annual revenue loss of between US\$ 100 billion and US\$ 240 billion as a result of BEPS.⁶ Among other factors, lack of tax transparency in reporting practices of multinational entities, lack of coordination between tax administrations, and poor interaction with domestic tax rules have been mentioned as some of the main causes for these losses.⁷

According to the Financial Transparency Coalition’s report ‘Why Public Country-by-Country Reporting for Large Multinationals is a Must’⁸, the functions of CbCR go way beyond increasing tax transparency. In particular, the high-level information provided by CbCR will allow governments to assess the effectiveness of their tax policies and make adjustments over time. These will lead to a better-informed civil society, effective policymaking and an increase in governments’ accountability. This is an especially desirable outcome for developing countries battling corruption in governmental institutions. CbCR is relevant not only for tax purposes, it is also important for general transparency affecting global corporate social responsibility, corporate governance, accountability, and, on a macro-economic scenario, prevention and combating of corruption, political stability, economic development and fair trade.⁹

The consequences of BEPS are always harmful and have widespread impact. D’Ascenzo¹⁰ explains that BEPS reduces the corporate tax revenue available to governments, distorting the allocation of resources and ultimately affecting the government’s capacity to provide adequate levels of public services and infrastructure. This effect is particularly harmful in developing countries, whose economies are heavily reliant on the revenue from corporate taxes. BEPS

⁶ OECD, ‘Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project’ (2015) <https://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf>

⁷ Monique Longhorn, ‘Country-by-Country Reporting: A Critical Analysis’ (2015). Brisbane: Queensland University of Technology.

⁸ Financial Transparency Coalition, ‘Why Public Country-by-Country Reporting for Large Multinationals is a Must—Questions and Answers’ (2016) Financial Transparency Coalition (eds) https://financialtransparency.org/wp-content/uploads/2016/02/Joint_Civil_Society_QA_pCBCR.pdf

⁹ Richard Murphy, ‘Country-by-Country Reporting: Accounting for Globalisation Locally’ (2012). Norfolk: Tax Justice Network; Longhorn, above n 7; Francesco Cortellese, ‘Country-by-Country reporting: Comparison and Analysis, 23rd Public Economics Meeting’ (2016) Ourense, Galicia (Spain): Universidad Autonoma de Madrid; Monique Longhorn, Mia Rahim and Kerrie Sadiq ‘Country-by-Country Reporting: An Assessment of its Objective and Scope’ (2016) 14 e-Journal of Tax Research 4–33.

¹⁰ Michael D’Ascenzo, ‘The Spotlight on BEPS: Business Erosion and Profit Shifting’ (2013) Melbourne Law School Conference – Tax Avoidance in the 21st Century, Melbourne: Melbourne Law School https://law.unimelb.edu.au/__data/assets/pdf_file/0007/1550653/Michael-DAscenzo-Spotlight-BEPS-Tax-Avoidance12.pdf.

minimisation strategies also undermine the notion of tax justice, where the wealthiest entities pay little or no tax, while individuals and smaller entities bear the bulk of the tax burden.

In order to address this issue, tax and policy specialists from the OECD and G20 countries analysed the tax planning strategies utilised by multinational companies to identify the loopholes that allowed opportunities for BEPS. The findings were published in the 2013 report entitled ‘Addressing Base Erosion and Profit Shifting’ (the BEPS Report).¹¹ The Explanatory Statement that accompanied the ‘OECD Guidance on the Implementation of Country-by-Country Reporting’ highlighted that ‘standardised country-by-country reporting and other documentation requirements will give tax administrations a global picture of where MNE profits, tax and economic activities are reported, and the ability to use this information to assess transfer pricing and other BEPS risks, so they can focus audit resources where they will be most effective’.¹² Knobel and Cobham¹³ further elaborate the OECD findings, stating that ‘CbCR is a transparency measure that genuinely shifts power and drives greater accountability in multiple channels. Those accountability channels can address a range of unequal power relations: from the principal–agent issues that may face investors in opaque, tax-avoiding multinationals, to the gross inequality that faces lower-income countries in the distribution of taxing rights on multinationals’.

Following the BEPS Report, the OECD/G20 group issued the ‘Action Plan on Base Erosion and Profit Shifting’ (the BEPS Action Plan), which comprises 15 action points with recommendations to address the issues of each particular area. The BEPS Action Plan final reports were published in 2015 and contain a number of recommendations for legislative changes in the relevant areas of concern. CbCR was introduced in Action 13 as part of the transfer pricing documentation recommended actions designed to increase tax transparency.¹⁴ Action 13 is specifically aimed at MNEs with annual consolidated group revenue equal to or exceeding EUR 750 million (or equivalent in domestic currency), requiring that they provide annual statements detailing their business activities and allocation of profits to the tax authorities of the countries where they carry out business.¹⁵

Action 13 was further developed into two subsequent reports: the 2015 ‘Action 13: Guidance on Transfer Pricing Documentation and Country-by-Country Reporting’,¹⁶ which outlines the

¹¹ OECD, ‘Addressing Base Erosion and Profit Shifting’ (2013) <http://www.oecd.org/tax/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm>

¹² OECD, above n 6.

¹³ Andres Knobel and Alex Cobham, ‘Country-by-Country Reporting: How Restricted Access Exacerbates Global Inequalities in Taxing Rights’ (2016) *Tax Justice Network* https://financialtransparency.org/wp-content/uploads/2016/12/TNJ_AccesstoCBCRreport.pdf.

¹⁴ OECD, above n 3.

¹⁵ OECD, above n 6.

¹⁶ OECD, ‘OECD/G20 Base Erosion and Profit Shifting Project. Action 13: Guidance on the Implementation of Transfer Pricing Documentation and Country-by-Country Reporting’ (2015) <https://www.oecd.org/ctp/beps-action-13-guidance-implementation-tp-documentation-cbc-reporting.pdf>

three-level reporting system; and the 2015 ‘Action 13: Country-by-Country Reporting Implementation Package’,¹⁷ which presents a legislative template to be used by countries in the process of introducing CbCR into their domestic legislations. The findings and recommendations of the three initial reports were consolidated in the 2015 ‘Transfer Pricing Documentation and Country-by-Country Reporting, Action 13—2015 Final Report’,¹⁸ according to which:

- The revised standards for transfer pricing documentation and CbCR incorporated a master file, local file, and a country-by-country report that would outline revenues, profits, taxes paid and certain measures of economic activity.
- The standardised approach meant that (i) taxpayers would need to review and articulate their transfer pricing positions and (ii) the information will be provided to the tax authority in a standardised format, thus facilitating the risk assessment and audits processes.
- Some CbC reports will be automatically exchanged (or exchanged at request) between tax authorities.

Under the recommendations of Action 13, the statements to be provided by relevant MNEs under the CbCR requirements are:

- The master file: The master file will contain high-level information regarding the MNE’s global business operations and transfer pricing policies and will be made available to all relevant tax administrations
- The local file: The local file will be lodged with the local tax authority and will include detailed transactional transfer pricing documentation, identifying material related party transactions and their respective amounts, as well as the MNE’s analysis of the transfer pricing determinations made in relation to those transactions.
- The CbC report: The CbC report will typically be prepared by the MNE’s parent entity and will provide, on an annual basis, details on revenue, before-tax profits, income tax paid and accrued, number of employees, stated capital, retained earnings and tangible assets for each country in which the MNE does business. It also requires that the MNE identifies and explains the business activities undertaken by each entity within the group in each jurisdiction¹⁹.

As the legislative template refers to automatic exchange of reports between tax authorities, the implementation of CbCR is also related to the application of the Multilateral Convention on

¹⁷ OECD, ‘Guidance on the Implementation of Country-by-Country Reporting—BEPS Action 13, OECD/G20 Base Erosion and Profit Shifting Project’ (2015) <https://www.oecd.org/ctp/beps-action-13-guidance-implementation-tp-documentation-cbc-reporting.pdf>

¹⁸ OECD, above n 3.

¹⁹ OECD, ‘OECD/G20 Base Erosion and Profit Shifting Project. 2015 Final Reports. Executive Summaries’ (2015) <https://www.oecd.org/ctp/beps-reports-2015-executive-summaries.pdf>

Administrative Assistance in Tax Matters,²⁰ as well as to the double taxation agreements and information exchange agreements in force between the countries involved. Therefore, the process of implementing CbCR legislation may require further amendments to existing double taxation agreements and information exchange agreements to accommodate the new reporting requirements. Since the 2015 Final CbC Report was published, many countries have made considerable progress in introducing CbCR into their domestic transfer pricing regulations. Alongside other OECD countries, Australia applied the CbCR legislation on 1 January 2016, and submitted the first round of CbC reports on 30 June 2018.

In this paper, we used secondary sources of information to provide facts, and support and inform our discussions. We searched for all secondary sources relating to CbCR in Australia and globally. We retrieved information and documentations from the OECD, Australian Taxation Office, American Institute of Certified Public Accountants and Financial Transparency Coalition websites, tax journal articles, and communications from KPMG, Deloitte and PricewaterhouseCoopers. We examined all secondary sources of data collected, and collated and reported information relating to the main points of discussion of this paper in relation to CbCR in Australia, namely compliance challenges, penalty protection, tax auditing risk policy, and the strategic, governance, reporting, data management and risk management considerations, which are presented in the following sections and subsections.

III COUNTRY – BY – COUNTRY REPORTING IN AUSTRALIA

Following the OECD recommendations of BEPS Action 13, in December 2015 the Australian Government enacted amending legislation introducing CbCR obligations to certain categories of large multinational consolidated groups, effectively implementing the recommendations of Action 13 of the OECD/G20 BEPS Action Plan (Action 13).²¹ The new legislation, introduced into the Australian Income Tax Assessment Act 1997 (ITAA97) as Subdivision 815-E (Subdivision 815-E ITAA97), applies to years starting 1 January 2016. This demonstrates the Australian Government’s commitment to global tax transparency and Australia’s engagement with other tax jurisdictions in fighting international tax avoidance by profit shifting.²²

²⁰ OECD and Council of Europe, ‘Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol’ (2011) *Paris: OECD Publishing* <https://www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Convention.pdf>

²¹ OECD, above n 3; OECD, above n 17.

²² Commonwealth of Australia, ‘Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015 No. 170’ (2015) *Canberra: Commonwealth of Australia*. Commonwealth of Australia, ‘Explanatory Memorandum to the Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015’ (2015) *Canberra: Commonwealth of Australia*.

The Australian CbCR requirements reflect most of the recommendations of Action 13, with the exception of the particular format adopted for the local file.²³ They target a group of entities legally referred to as ‘significant global entities’ (SGEs), comprising Australian resident corporate entities that are either ‘global parent entities’ (GPEs) or members of consolidated multinational groups with an annual global income exceeding A\$1 billion.²⁴ The concept of SGE also includes cases where the global group’s annual income exceeds the A\$1 billion threshold due to an extraordinary transaction in one year only, unless the group is granted an exemption upon written application to the Commissioner.²⁵

The main reason why only SGEs are required to comply with CbCR obligations is related to the belief that large MNEs have more opportunities to engage with aggressive international tax avoidance schemes²⁶ involving related party international dealings.²⁷ Addressing the reasons why CbCR is necessary for large multinational entities, the Financial Transparency Coalition explained that:

‘... despite publishing their accounts as if they are unified entities, transnational enterprises are not taxed in this way. Each business entity within the transnational enterprise is taxed individually, making it difficult to establish an overview of what is happening within a group of companies for tax purposes. This would be different if reporting was done on a “country-by-country basis’.²⁸

Large multinational entities are generally able to avoid (or evade) taxes through artificial shifting of profits to lower tax or even to no tax jurisdictions, effectively eroding the tax base through exploitation of gaps and mismatches in the tax legislation, ultimately undermining the principle of tax justice and the fairness of tax systems.²⁹ For example, multinational groups often have subsidiaries in several countries, meaning that they do not necessarily have to engage third parties to finance their transactions. By utilising intra-group loans, multinational entities can easily claim excessive interest deductions on intra-group debts. Analysing the introduction of the new Australian Multinational Anti-Avoidance Law (MAAL) and the

²³ Adrian Sawyer and Kerrie Sadiq, ‘Country by Country Tax Reporting: A critical analysis of enhanced regulatory requirements for multinational corporations’ (2019) 36(7) *Companies and Securities Law Journal* 570-586. Sawyer and Sadiq highlight the much-reduced requirements for New Zealand-headquartered entities.

²⁴ Commonwealth of Australia, above n 22.

²⁵ Australian Taxation Office, ‘Country-by-Country Reporting: Questions and Answers’ (2017) <https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Transfer-pricing/Country-by-Country-reporting/>; Commonwealth of Australia, ‘Income Tax Assessment Act’ (1997).

²⁶ Commonwealth of Australia, ‘paras 2.4–2.5 Explanatory Memorandum to the Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015’ (2015) *Canberra: Commonwealth of Australia*.

²⁷ OECD, above n 6.

²⁸ Financial Transparency Coalition, ‘Why Public Country-by-Country Reporting for Large Multinationals is a Must—Questions and Answers’ (2016) *Financial Transparency Coalition (eds)* https://financialtransparency.org/wp-content/uploads/2016/02/Joint_Civil_Society_QA_pCBCR.pdf.

²⁹ Cortellese, above n 9; Leslie Nethercott and Livia Gonzaga, ‘Australia—Country-by-Country Reporting: Another Step in Global Tax Transparency’ (2016) 22(5) *Asia-Pacific Tax Bulletin* 1–6.

introduction of CbCR, Ting³⁰ explains that the creation of intra-group debt is a tax avoidance tool, which is both relevant and relatively simple to implement. The simplicity is because it does not require the involvement of third parties or movement of personnel or assets. This type of arrangement only requires a legal agreement between the Australian subsidiary and the overseas subsidiary whereby the interest on the loan repayments is claimed by the Australian subsidiary, while the overseas subsidiary who receives the interest is subject to low (even zero) tax on this income. Furthermore, as intra-group loans are not subject to the constraints that would generally apply to amounts, interest rates and credit securities in an unrelated party transaction, such intra-group loans, open an avenue for manipulation and flexibility. SGEs are also much more likely to be regarded as being at high risk of obtaining a transfer pricing benefit, and as such, producing the CbCR statements would allow such entities to properly justify their intra-group international dealings.³¹

From a different perspective, restricting the scope of CbCR legislation only to SGEs (defined by their international status associated with the elevated consolidated income, as explained above) is not without problems. As suggested by the Financial Transparency Coalition³², this may generate fair competition issues whereby medium-sized multinational entities or even those just below the annual income threshold³³ might not be subject to the same compliance requirements and therefore could benefit from an unfair competitive advantage.

Other potential reporting issues may result from corporate restructures (including mergers, demergers, takeovers, etc.) undertaken during a year while an entity is an SGE with CbCR obligations in place. These issues are addressed in the ATO's Country-by-Country Reporting Guidance, which clarifies that 'a restructure during an income year of a group consolidated for accounting purposes does not change whether you are an SGE in the preceding year' because 'the CbC reporting obligation follows from being an SGE in the preceding year or for part of

³⁰ Anthony Ting, 'Multinational Tax Avoidance is Still an Issue for the Government, The Conversation' (2016) <https://theconversation.com/multinational-tax-avoidance-is-still-a-revenue-issue-for-government-61674>. See also: Max Bruce, 'Multinational Anti-Avoidance Law (MAAL) and Pt IVA — a critical analysis of the Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015 (Cth) and Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017 (Cth) and comparison with general anti-avoidance provisions' (2017) 4(4) *Australian Tax Law Bulletin* 63-69.

³¹ Cortellese, above n 9.

³² Financial Transparency Coalition, above n 28.

³³ The issue is illustrated at the Exemptions section of the ATO's Country-by-Country Reporting Guidance: 'Example 4: Different currency thresholds: L Co is an Australian resident that is a subsidiary of a foreign global parent entity. The foreign global parent entity is resident in a jurisdiction that is implementing CbC reporting with a specified threshold amount in another currency. L Co and its parent do not have related entities or operations in any other jurisdictions with CbC reporting obligations. The annual income of the global group exceeds Australia's threshold of A\$1 billion, however the currency exchange rates are such that the foreign global parent entity falls slightly below its local CbC reporting threshold. An exemption from lodging the CbC report and master file will be considered.' Australian Taxation Office, 'Country by Country Reporting Exemptions' (2018) https://www.ato.gov.au/business/international-tax-for-business/in-detail/transfer-pricing/country-by-country-reporting/country-by-country-reporting-guidance/?anchor=BK_2Exemptions#BK_2Exemptions.

that year'.³⁴ The Australian CbCR requirements require that SGEs lodge three separate statements, being (i) the CbC report, (ii) the master file and (iii) the local file³⁵ (with the Australian Taxation Office (ATO) within 12 months after the end of their income tax year. While the Australian CbC report and the master file closely follow the OECD template in terms of both content and structure, the Australian local file departs from the OECD model in relation to both content and structure.

For the structure and format, the Australian local file is closely related to the International Dealings Schedule (IDS), which forms part of the Australian transfer pricing documentation requirements.³⁶ Having said that, the Australian local file follows a two-tier structure, which aims to facilitate compliance by entities with less complex transfer pricing affairs. The first tier is the 'short form local file', which must disclose data on the reporting entity's organisational structure, including business strategies and restructures affecting the entity in the current or previous income year; the entity's management reporting hierarchy, indicating the countries to which local managers report, as well as a description of any transfers of intangibles in the current or previous year; and finally, a list of key competitors. However, as the eligibility requirements are extremely limited and the materiality thresholds are very low,³⁷ in practice very few entities will benefit from this simplified reporting option.

The 'full local file' is the standard report for any entity not eligible to lodge the short form local file, and it must include all the data required in the short form local file plus two additional parts. In the local file 'Part A', the entity will disclose information regarding all controlled transactions for the relevant income year, including the names of the Australian and foreign counterparties (and their countries of residence), category of transaction and the income and expenses associated with such transactions (including transactions of capital nature), the transfer pricing method (or capital asset pricing method) relied upon, and finally, the transfer pricing documentation code. The local file 'Part B' will further extend the information from Part A and will require that the reporting entity provides copies of all intercompany agreements underpinning all material international intra-group transactions, as well as any advance pricing agreements in relation to the Australian transactions and general purpose financial statements.

The local file Part A is substantially similar (although with a much deeper level of detail) to the IDS Part A. Due to this relative overlap, the ATO authorises entities who voluntarily lodge the local file Part A together with their income tax return to skip the majority of the questions of the IDS Part A. Where this is the case, the local file Part B must still be lodged by the relevant deadline. Most importantly, SGE global management teams wishing to prepare their global

³⁴Australian Taxation Office, 'CbC Reporting Obligations' (2018) https://www.ato.gov.au/business/international-tax-for-business/in-detail/transfer-pricing/country-by-country-reporting/country-by-country-reporting-guidance/?page=2#CbC_reporting_obligations.

³⁵ See Appendix 1 of this paper for detailed explanations of each statement.

³⁶ See Appendix 1 of this paper for details on transfer pricing documentation.

³⁷Australian Taxation Office, 'Local File Instructions 2017' (2017) <https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Transfer-pricing/Country-by-Country-reporting/Local-file-instructions--2017/>.

CbCR statements based on the OECD templates will need to keep in mind the peculiarities of the Australian local file and make sure it is prepared in accordance with the Australian model, or otherwise they could be at risk of failing to comply with the Australian CbCR requirements and therefore be subject to heavy penalties.³⁸

With the clear interface between the transfer pricing documentation and the CbCR statements, it is important to clarify that the CbCR statements and the transfer pricing documentation (which includes the transfer pricing report [TPR]), as well as the IDS, constitute independent compliance requirements based on separate legislative bases. For this reason, even though there are similarities between the two sets of statements, they are not substitutes for one another, and reporting SGEs must be aware that each of the CbCR statements is regarded as a separate statement for the purposes of late lodgement penalties.³⁹ The transfer pricing documentation, although technically not mandatory, is required for the purposes of establishing a reasonably arguable position and for penalty protection. However, all SGEs operating in Australia must lodge CbCR statements regardless of their volume of operations or the materiality of international related party (IRP) dealings.⁴⁰ Failing to comply, including late lodgement, will lead to the application of potentially extremely high penalties to the SGE.

A. Compliance Challenges

Even though CbCR obligations represent a major effort to increase tax transparency and to improve the risk assessment of SGEs, complying with such legislation may pose significant challenges to Australian SGEs and may represent an exposure to possible penalties for non-compliance.

For example, CbCR requirements apply to income years beginning on or after 1 January 2016. Considering that in Australia the income year runs from 1 July until 30 June, and given that SGEs may lodge their documentation up to 12 months after the end of the income year, the first CbCR deadline was 30 June 2018. However, the operations developed during this period might not necessarily have begun exactly on or after 1 January 2016. On many occasions, the reports may contain several entries of intra-group loans taken before January 2016, which might not have been documented in accordance with the CbCR obligations because there were no such obligations at the time the underlying legal agreements were entered into.

³⁸ PwC, ‘Australian Country-by-Country Reporting Implementation—Unique Local File Design Finalised’ (2016) <https://www.pwc.com/au/tax/taxtalk/assets/monthly/pdf/cbc-reporting-implementation-jul16.pdf>

³⁹ Australian Taxation Office, ‘Country by Country Reporting Administrative Matters’ (2018) <https://www.ato.gov.au/business/international-tax-for-business/in-detail/transfer-pricing/country-by-country-reporting/country-by-country-reporting-guidance/?anchor=Administrativematters#Penaltiesforlatelodgment>.

⁴⁰ PwC, ‘Update on Australian Country-by-Country Reporting Local Files’ (2017) <https://www.pwc.com/gx/en/tax/newsletters/pricing-knowledge-network/assets/pwc-tp-australia-cbcr-update.pdf>

Therefore, it is possible that under the CbCR requirements entities may face the challenge of having to report on structures and operations that may not be readily available. This may be due to the fact the information has not been recorded or because there was no legal obligation to do so. This represents a challenge insofar as failing to produce adequate evidence, especially for the purposes of elaboration of the local file, may place the entity at risk of heavy penalties.

On other occasions, an SGE may find itself in a position of not being able to comply with the Australian CbCR obligations either because its GPE is located in a jurisdiction that does not impose CbCR obligations; or because one or more of its subsidiaries is/are located in countries that do not have CbCR requirements in place,⁴¹ or maybe because the relevant information might never have been available or documented in the foreign jurisdiction. While some degree of administrative relief may be available (including exemptions, in certain cases), such relief would only be considered on a case-by-case basis, and there is no guarantee that entities in circumstances as described above would effectively be granted such relief measures or that such an application for relief would prevent the application of late lodgement penalties.⁴²

As further highlighted by Nethercott and Gonzaga,⁴³ another relevant challenge concerns the interpretation of the materiality thresholds for the purposes of the local file. The problem in this case is that there is no consensus as to what parameters are to be used in defining materiality, such as qualitative outcomes or quantitative data. These authors further explain that ‘while some information relating to a reportable transaction may be immaterial when it is considered in isolation, this may not be the case when considered in relation to other transactions undertaken, which, in aggregation, may be material. In this respect, a quantitative guideline viewed in isolation may not reflect what is truly material’.⁴⁴ The risk here is due to the fact that even though there is no consensus regarding materiality thresholds, penalty provisions will still apply if the information provided by the entity is considered inaccurate.

⁴¹ These issues are likely to be particularly problematic for SGEs located in Middle Eastern countries, where CbCR requirements are either not implemented or their development is still at an early stage. This is the case in Egypt, Qatar and Saudi Arabia, which are expected to release CbCR guidelines by the end of 2018. Furthermore, while the United Arab Emirates and Bahrain are the most recent signatories to the OECD BEPS Inclusive Framework, any developments in CbCR legislation are only expected in 2019. KPMG, ‘BEPS Action 13: Country Implementation Summary’ (2018) <https://home.kpmg.com/content/dam/kpmg/xx/pdf/2018/07/tnf-beps-action-13-july31-2018.pdf>; PwC. 2018, Significant Transfer Pricing and Tax Transparency Developments Expected in the Middle East in 2018, at <https://www.pwc.com/ml/en/tax/documents/2018/significant-transfer-pricing-and-tax-transparency-developments-expected-in-2018.pdf>.

⁴² Australian Taxation Office, ‘Country-by-Country reporting Exemptions’ (2018) <https://www.ato.gov.au/business/international-tax-for-business/in-detail/transfer-pricing/country-by-country-reporting/country-by-country-reporting-guidance/?page=3#Exemptions>.

⁴³ Nethercott and Gonzaga, above n29.

⁴⁴ Ibid.

Some of these issues have already been addressed by the ATO in several guidance documents, such as the ‘Country-by-Country Reporting Guidance’,⁴⁵ as well as the ‘Law Companion Guideline (LCG) 2015/3’,⁴⁶ where the ATO outlines how the CbCR legislation will be applied. Relevant practical guidance is also provided in other documents, such as the ‘Country-by-Country Reporting: Questions and Answers’,⁴⁷ which addresses common issues and frequent questions regarding difficulties in complying with CbCR obligations. For example, the ATO CbCR Q&A explains that the Australian entity may apply for aligning its reporting period with that of the SGE’s GPE where it produces the CbC report and the master file. In a different scenario, the Australian entity may apply for a one-year exemption in relation to lodging the CbC report where the SGE’s GPE country of residence does not have CbCR legislation in force.

Finally, it is important to note that in some exceptional and very limited circumstances, an SGE may apply for a temporary exemption from CbCR obligations and, in any case, any exemption will depend on a formal, written and well-substantiated application. The one-year temporary exemption regarding the master file.⁴⁸ is one example. From a different perspective, SGEs headquartered in Australia with no IRP dealings that would need to be disclosed in the CbC report could potentially have good grounds for applying for an exemption.⁴⁹ However, where the SGE has an Australian GPE but has IRP dealings, it would not qualify for an exemption.

Considering a purposive interpretation of the Australian CbCR legislation, it could also be argued that tax-exempt multinational entities operating in Australia could potentially be good candidates for an exemption from CbCR requirements. This is because such entities, being tax exempt, would not be expected to engage in tax avoidance or profit shifting schemes, and as such, would be outside the scope of the CbCR legislation. This could arguably be the case, for example, for some multinational civil society groups, multinational charitable entities, and foreign universities operating in Australia. In any case, no SGE would ever be automatically exempt, meaning that even tax-exempt SGEs would in principle have an obligation to comply with CbCR requirements and would potentially be subject to penalties in case of non-compliance or late lodgement.

⁴⁵ This guidance is referred to in several paragraphs earlier on in this paper.

⁴⁶ Australian Taxation Office, ‘Law Companion Guideline 2015/2’ (2015) <https://www.ato.gov.au/law/view/pdf/psr/lcg2015-002.pdf>.

⁴⁷ Australian Taxation Office, above n 25.

⁴⁸ See Appendix 1 of this paper.

⁴⁹ KPMG, ‘ATO Releases Country-by-Country Reporting Exemption Guidance’ (2016) <https://home.kpmg.com/au/en/home/insights/2016/09/ato-releases-country-by-country-reporting-exemption-guidance-27-september-2016.html>.

B. *Penalty Protection—Establishing a Reasonably Arguable Position*

Lodging the CbCR statements as well as the transfer pricing documentation on time will offer protection against the increased administrative penalties announced in the 2017 Budget, which came into effect on 1 July 2017.⁵⁰ The recently enacted amendment will substantially increase the non-compliance and late lodgement penalties applicable to SGEs by a factor of 100. These penalties were further increased because of the adjustment of penalty units from A\$180 to A\$210,⁵¹ effectively pushing the highest possible penalty that can be applied to an SGE to \$525,000.⁵²

The failure to lodge on time (FTL) penalties were substantially increased to compel SGEs to comply with their CbCR obligations on time. Where the entity is an SGE the base penalty for late lodgement will be multiplied by 500. As a result, the minimum FTL penalty will start at \$105,000 where the documentation is up to four weeks late, potentially reaching \$525,000 where the entity is more than 16 weeks late. Importantly, the FTL penalties apply to all statements required from SGEs, including income tax and fringe benefits tax returns, business activity statements, CbCR and general purpose financial statements. However, administrative safe harbour provisions may protect SGEs where there is evidence that the SGE provided all relevant information to their tax agents and that due to their lack of reasonable care, there was a false or misleading statement or a late lodgement penalty.⁵³ However, safe harbour provisions may not be argued where it is a case of reckless behaviour or intentional disregard of the law.

C. *Tax Auditing Risk Policy and Compliance Burden*

CbCR statements represent an important tool both for entities and for the ATO for the purposes of tax auditing risk policy. In its ‘Guidance on Transfer Pricing Documentation and Country-by-Country Reporting’ the OECD has advised that ‘the specific content of the various documents reflects an effort to balance tax administration information needs, concerns about inappropriate use of the information, and the compliance costs and burdens imposed on businesses’.⁵⁴ As the three statements will contain a substantial amount of detailed information about the entire group’s IRP dealings and allocation of income, the Australian entity will be able to identify and review those arrangements that may be regarded by the ATO as at ‘high risk’ of raising a transfer pricing benefit.

⁵⁰ Commonwealth of Australia, ‘Treasury Laws Amendment (Combating Multinational Tax Avoidance) Act 2017’ (2017) No. 27, *Canberra: Commonwealth of Australia*.

⁵¹ Commonwealth of Australia, ‘Tax Integrity Package—Increasing Administrative Penalties for Significant Global Entities Measure’ (2016) *Canberra: Commonwealth of Australia*.

⁵² See Appendix 2 of this paper.

⁵³ Robin Woellner, Stephen Barkoczy and Shirley Murphy, ‘Australian Taxation Law’ (2016) *Sydney: Oxford University Press*.

⁵⁴ OECD, above n 16.

Much of the information to be utilised in assessing CbCR and transfer pricing risks will come from the data and documents provided in the local file, especially in the documents lodged in the local file Part B, due to the substantive overlap with the information required for the IDS Part A. Therefore, it is extremely important that SGEs keep their intercompany agreements up to date in order to correctly reflect the transactions that they formalise. Even though the ATO has indicated that it will not require SGEs to produce intercompany agreements solely for the purpose of substantiating IRP transactions in the local file, where such agreements did not previously exist the reporting entity must be able to provide enough documentation to substantiate the transaction as well as to evidence the observance of the arm's length principle. In view of this, it is of utmost importance that Australian reporting entities keep proper tax and accounting records, as well as proper records of their practices, processes, standards and evidence of any reviews thereof.

IV ACCOUNTING FOR COUNTRY – BY – COUNTRY REPORTING

As authoritative guidelines for reporting entities, the rules and requirements of CbCR can have certain implications for reporting entities' extant organisational arrangements. It is suggested that the issue of CbCR represents an important extension of corporate governance and corporate social reporting (CSR) by interfacing such requirements into a global tax forum.⁵⁵ In this context, corporate governance may be seen as limited to the disclosure of information to the shareholders of the company concerned and compliance with the requirements of regulatory bodies. CSR takes on a broader perspective by extending disclosure of information concerning the company activities to the broader community.⁵⁶ However, CbCR extends the reporting domain to include global taxation obligations.

According to Johnston and Sadiq⁵⁷ 'tax reporting obligations are likely to become a crucial means of holding MNEs accountable to society, marking an important break with the previous movement for voluntary CSR'. As a result, mandatory tax transparency rules, such as the CbCR requirements, have developed a third pillar of corporate accountability extending on from corporate governance and CSR requirements. In response to the introduction and implementation of CbCR, SGEs will need to consider, generate and apply a range of effective and timely tax and accounting measures and processes to help support compliance with national and international tax authorities, and manage associated risks.

As there is no universal approach established to guide and prepare SGEs for CbCR, SGEs will need to plan for CbCR with respect to entity-specific needs and circumstances. Undoubtedly,

⁵⁵ Murphy, above n 9.

⁵⁶ Kenneth Arrow, 'Social Responsibility and Economic Efficiency' (1973) *Public Policy*, 21 (3): 303–17.

⁵⁷ Andrew Johnston and Kerrie Sadiq, 'Beyond Country-by-Country Reporting: A Modest Proposal to Enhance Corporate Accountability' (2017) 27(3) *New Zealand Universities Law Review* 569–600.

this will require SGEs to take a proactive approach to various tax, accounting and accountability considerations and practices to prepare themselves for CbCR compliance with tax authorities. To prepare and safeguard themselves against these challenges, SGEs may need to review and adjust their interpretive schemes (strategies) and design archetypes (data management, risk management, governance and reporting structures) and all other CbCR compliance-related practices. The following sections discuss the significance of these considerations in preparing and adapting SGEs for CbCR.

A. Global and Local Strategies for Country-by-Country Reporting

The introduction of CbCR presents SGEs with both challenges and opportunities. SGEs can prepare themselves for CbCR compliance and any (un)anticipated challenges by developing flexible CbCR approaches and strategies.⁵⁸ A coordinated and consistent response strategy reflecting the interests of the reporting entities and the tax authorities is likely to generate greater benefits for SGEs.⁵⁹ Strategic frameworks developed at the SGE level with the input of the GPE and its subsidiaries can help determine appropriate reporting governance structures, provide greater reporting synergies among SGE groups, promote voluntary disclosure and dissemination of information across corporate reporting systems, and achieve a degree of standardisation in preparing and submitting CbC reports.⁶⁰ SGE level CbCR strategies can also facilitate revisions and adjustments to tax strategies and policies across the SGEs, leading to the (re)development of authentic and transparent tax structures and policies across entities, which may be effective in strengthening SGEs' corporate tax communication internally and externally. SGEs' strategic responses to the introduction and implementation of CbCR may vary. For example, some SGEs have begun articulating the magnitude and complexity of CbCR requirements and in response are taking immediate action (i.e., diagnostic reviews and strategic planning) to evaluate their tax business policies and reporting structures in line with CbCR expectations⁶¹. However, preliminary results from a recent study by Sawyer and Sadiq⁶² reveal that CbCR is not yet well understood by SGE clients of major accounting firms, with little comprehension of the magnitude of the influence that CbCR will have in their international dealings and in their businesses as a whole.

If SGE level CbCR strategies and approaches are not able to be established, then it is essential that local GPE and subsidiary level strategies are developed at local entity levels to help govern reporting entities. As mentioned earlier in this paper, an inability to comply with all reporting requirements may not only result in penalties, it can also have adverse effects on companies' public image and cause compliance burdens. Therefore, whether it is at the SGE or local GPE

⁵⁸ KPMG, 'Country-by-Country Reporting. An EU Perspective' (2016) <https://home.kpmg.com/content/dam/kpmg/pdf/2016/08/eu-tax-centre-cbcr-an-eu-perspective.pdf>.

⁵⁹ KPMG, 'Country-by-Country Reporting: What's Your Strategy?' (2015) <http://www.businessmirror.com.ph/country-by-country-reporting-whats-your-strategy/>.

⁶⁰ KPMG, above n 59.

⁶¹ *Ibid.*

⁶² Sawyer and Sadiq, above n 23.

and subsidiary level, clearly defined strategies and approaches to CbCR will be a stepping-stone in preparing reporting entities for compliance and responding to possible risks and opportunities.

As part of strategic contemplations, SGEs will need to assess and determine how to treat certain items for CbCR, such as branches, minority investments, permanent establishments, joint ventures, and subpart F income.⁶³ The development of clear philosophies and strategies for CbCR at the SGE and local entity levels, combined with corporate values, will assist reporting entities' compliance with CbCR expectations. CbCR strategies can also support corporate reputation management through the consistency achieved in information disclosures and reporting across all SGE groups.⁶⁴ Planning and strategising for CbCR will be pivotal in preparing reporting entities for compliance without significant burdens and difficulties. Non-compliance may also be an obvious strategy for some entities. However, the financial and non-financial cost of non-compliance is likely to redirect SGEs to the correct path of planning and preparing for CbCR compliance.

B. Governance and Reporting Structures

The introduction and requirements of CbCR may require SGE boards to not only strategise, but also to reconsider their corporate governance structures and financial reporting arrangements. Incoherent or inappropriate structures and practices may inhibit SGEs from retrieving vital information and generating the reports required by CbCR. Governance structures and reporting systems tailored for CbCR will assist with the identification and assignment of CbCR-related responsibilities and accountabilities among the SGE group. The establishment of clearly defined reporting structures and systems will help facilitate the generation and gathering of the information required for CbCR in a timely manner. If explicit governance structures and reporting streams are not determined in advance, reporting entities may face certain difficulties or conflicts in retrieving data required to prepare their CbC reports. This may be the case if, for example, GPEs or certain subsidiaries are residing in countries that have not implemented CbCR or are delayed in doing so. In order to address these challenges, some SGEs have begun evaluating their existing information technology systems, data collection and aggregation processes, as well as their financial reporting systems by performing dry-run CbC reporting using data from previous years in preparation for the real reporting period and to determine how the CbC report will be received by tax authorities.⁶⁵

⁶³ Deloitte, 'Tax Data Analytics and Country-by-Country Reporting. Insight to Action' (2016) <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-tax-data-analytics-and-country-by-country-reporting.pdf>.

⁶⁴ KPMG, above n 59.

⁶⁵ Deloitte, above n 63; PwC, 'Country-by-Country Reporting: Countdown to Compliance' (2015), at <https://www.pwc.com/gx/en/services/tax/transfer-pricing/country-by-country.html>

Without the collaboration and support from the GPE and other subsidiaries, the reporting entity may encounter difficulties in gathering all required information and providing complete reports to its tax authorities. For instance, specific CbCR-relevant information may be omitted from the reports if the information resides with the GPE or another subsidiary in different realms and could not be retrieved and reported due to foreign jurisdiction privacy concerns or delays in information transfers. Regardless of whether GPEs or other subsidiaries are exempt from reporting, local reporting entities will still be required to supply the master file and local file to their tax authorities. A key question then arises as to who is accountable for producing and filing these reports.⁶⁶ Although the OECD recommends that all SGE groups file CbC related reports, if the GPE or a subsidiary operates in a jurisdiction where CbCR is not mandated then they may not be motivated to fulfil such requirements. In addition to the establishment of inter-subsidiary reporting and governance structures, reporting entities will also need to determine their own entity's reporting and governance structures. For instance, the reporting entity will need to consider who within their own organisation (i.e., senior managers, tax division, board of directors, middle managers) is responsible for generating and managing the information required for CbCR and preparing the CbC report.

In preparation for CbCR, SGEs should clearly assign roles, responsibilities and accountabilities among the GPE group to determine who is responsible for preparing and submitting the reports and files required by CbCR, and who will be liable if requirements are not met. Definition of roles and responsibilities will be effective for determining which group of the SGE will be exempt from submitting the CbC report and master file and ensuring that local files are prepared accurately and are consistent with the CbC report and master file. An inability to assign roles and clarify responsibilities may result in the omission of significant data and submission of incomplete reports to tax authorities.

C. Managing Data

The vast amount of information required for CbCR will necessitate the need for appropriate and efficient data collection and management systems and staff expertise for the generation, collection and aggregation of relevant data from multiple sources in a timely manner. Developing and implementing consistent data management systems suitable for CbCR across all SGE groups will require time, effort and expertise. It can take six to nine months for an entity to implement a new centralised data collection process.⁶⁷ Therefore, SGEs and their professional advisors should assess their current data management system capabilities and perform data mapping to identify and determine if any changes will be required to enhance existing data collection systems or implement completely new ones. Entities should also assess their tax functions and perform local legal entity and jurisdiction mapping to ensure consistency of tax policies, approaches and reporting across cross-border operations. Inconsistencies in tax

⁶⁶ Deloitte, above n 63.

⁶⁷ Deloitte, 'Country-by-Country Reporting. The FAQs' (2016) <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-country-by-country-reporting-faqs.pdf>.

policies may result in the collection and reporting of inappropriate data, leading to the misinterpretation of reported data by tax authorities when local reports are exchanged among different jurisdictions and reconciled with the main CbC report.

To help compile the various information required for CbCR, a standardised (i.e., use of SharePoint, Excel or MS Office) and consolidated approach⁶⁸ across all entities can ease the burden of combining information from multiple groups and sources, especially if data is available across corporate systems. The development and implementation of joint reporting systems and adoption of the same definitions among SGE groups can help minimise the time involved in gathering and reporting information.⁶⁹ A centralised approach can ensure that all entities involved in collecting and reporting data have the same understanding of the parameters around the requested information. Potential misunderstandings or misinformation among entities may hinder the integrity and certainty of information collected and reported. Therefore, reporting entities should move from their current standalone processes to collecting and reporting local tax data and embrace data harmonisation⁷⁰ and aggregation at the SGE country level to ensure the consistency and integrity of reported data across all reporting SGE groups. They should also establish simple and routine approaches that can manage voluminous data and gather important information on a regular basis. For instance, Deloitte⁷¹ suggests the integration of tax data analytics into entities' tax compliance systems to gauge CbCR readiness by assisting entities with the collection and interpretation of data and the prevention of data anomalies and unintended consequences. Effective and appropriate data management systems and processes will be vital to help alleviate the problems of preparing CbC reports and achieving greater synergies across all corporate entities reporting.

D. *Managing Risks and Exposures*

CbCR may give rise to certain compliance and reputational risks and exposures for reporting entities. CbCR will provide tax authorities with detailed and transparent financial information about SGE group operations and tax strategies. This information may lead to tax authorities undertaking high-level transfer pricing risk assessments, and assigning tax audit resources accordingly.⁷² The detection of any data anomalies, non-arm's length behaviour and high-level transfer pricing risk across entities may lead to tax authorities raising concerns⁷³ and wanting to interrogate the entity's transfer pricing and tax practices, which may lead to audits or more extensive compliance burdens for entities (i.e., adjusting transfer pricing methods).

⁶⁸ Deloitte, above n 67.

⁶⁹ Nethercott and Gonzaga, above n 29.

⁷⁰ Deloitte, above n 63.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

A lack of risk management can be costly for SGEs, both financially and non-financially. Aside from incurring penalties and further costs, SGEs may risk damage to their reputation and competitive advantage.⁷⁴ Reporting entities can manage and mitigate (un)anticipated risks relating to CbCR by undertaking timely risk assessments and developing well-constructed tax risk management systems and frameworks across all SGE groups. For example, SGEs can identify and assess the impact of possible risks of CbCR by undertaking dry-run simulations using historic data.⁷⁵ Diagnostic review tools⁷⁶ can also help evaluate readiness for CbCR compliance and ability to respond to likely risks and opportunities. As part of these simulations, SGEs and their groups can determine whether their existing risk management frameworks are sufficient to track and manage CbCR-related risks.

The extensive requirements of CbCR may require the adoption of more advanced and proactive data analytic approaches,⁷⁷ and processes that can help detect and manage various risks. Analytical procedures can help determine the data required for the CbC report and provide precaution through the identification of possible tax outcomes and alternative strategies and approaches to CbCR. These deliberations, facilitated by analytical approaches, can help reporting entities detect data errors and anomalies in transfer pricing policies, and address CbCR-related risks prior to reporting.

E. *Compliance Costs*

Evers, Meier and Spengel⁷⁸ classify CbCR-related costs as direct and indirect. Direct costs relate to the tax compliance costs, such as outlays incurred for updating or adjusting extant data, financial reporting and IT systems and processes. They also relate to the ongoing preparation and reporting of CbC reports, as well as costs incurred for employing external tax expertise to undertake a diagnostic review of current systems and capabilities for CbCR and provide guidance on preparing CbC reports. On the other hand, indirect costs may emerge from the disclosure of corporate sensitive tax information, which may become public. Sawyer and Sadiq⁷⁹ suggest that CbCR may cause information overload for tax authorities, and, in turn, raise confidentiality and consistency issues in relation to the contents of local files across different jurisdictions. If no legal protections are enforced by jurisdictions to ensure the confidentiality of local reporting entities reported information, the availability of commercially sensitive tax data to competitors may affect the competitive advantage of SGEs. The disclosure of tax payments by reporting entities in certain jurisdictions may also violate the principle of

⁷⁴ Maria Evers, Ina Meier and Christoph Spengel, 'Transparency in Financial Reporting: Is Country-by-Country Reporting Suitable to Combat International Profit Shifting?' (2014) 68(6/7) *Centre for European Economic Research* 1–22.

⁷⁵ Deloitte, above n 63.

⁷⁶ KPMG, above n 59.

⁷⁷ Deloitte, above n 63.

⁷⁸ Evers, Meier and Spengel, above n 74.

⁷⁹ Sawyer and Sadiq, above n 23.

tax secrecy governed by tax law and may also give rise to double taxation for a reporting entity if relative tax authorities use the CbC reports to claim additional tax payments from the entity.⁸⁰

Another potential indirect cost may be reputational costs. If reporting entities do not fully meet their CbCR requirements or if their CbC reports unveil information that leaves the entity's tax affairs under further scrutiny, then the entity may face reputational harm from tax authorities as well as the public. Therefore, to minimise direct and indirect compliance costs, it is essential for reporting SGEs to develop and implement proactive strategies, appropriate governance and tax structures, reporting systems and risk management frameworks that facilitate CbCR compliance and reduce (un)anticipated problems and costs.

Overall, SGEs will need to evaluate their organisations in the context of a new global tax environment, and to some extent, adapt their organisational arrangements to help prepare themselves for CbCR expectations and achieve compliance. A lack of consideration of the possible implications of CbCR on organisational interpretive schemes and design archetypes may threaten SGEs' ability to fulfil the demands of CbCR, and potentially lead to financial penalties and impairments to their reputation with various stakeholders, including legal tax authorities. An inability to comply with CbCR expectations and fulfil all reporting requirements may leave certain stakeholders questioning the credibility of SGE tax reporting.

V OVERALL CRITIQUE OF COUNTRY – BY – COUNTRY REPORTING

From the above analysis, it can be seen that the CbCR issue is not only important from a tax perspective, but is also a reflection of the change in regulatory authorities and social perspectives at a local and global level arising from fiscal leakage. Furthermore, it should be seen as only part of the BEPS Action Plans designed to address the issue of BEPS.⁸¹ While the implementation of such a policy can be viewed through a local prism, such as that in Australia, effective implementation is dependent upon global co-operation with the appropriate policies, as evidenced by the BEPS Action Plans, but also on an administrative process that is able to implement and monitor compliance. In this sense, and from an Australian perspective, the amendments to the ITAA97 contained in Subdivision 815-E may be seen as a welcome addition to the ATO's armoury in reducing fiscal leakage arising from international transactions that lack commercial substance. However, the practical outcome will be dependent on local compliance by the affected SGEs as well as the ability of the ATO to access information offshore by related parties where necessary. While at first instance this will rely on voluntary disclosure of information by Australian SGEs, in a global sense there may also be a need for the effective exchange of information through the multilateral exchange of information between relevant overseas jurisdictions.⁸² Without such an agreement, there is a concern that the appropriate information required under the CbCR provisions may not be obtained.

⁸⁰ Evers, Meier, and Spengel, above n 74.

⁸¹ OECD, above n 20.

⁸² OECD, 'Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS' (2017) <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm>

Australia has been actively involved in the BEPS project for some time and has been supportive of the recommendations contained in the BEPS Action Plans. The legislation contained in Subdivision 815-E ITAA97 very much mirrors Action Plan 13 outlined in the BEPS Action Plan. However, with the introduction of Subdivision 815-E there may be some concern as to whether various countries may introduce their own legislation, which may not be consistent with the BEPS Action Plan recommendations. A lack of consistency by way of information, disclosure requirements or operative and penalty provisions may undermine the effective operation of Action Plan 13 at a global level and reduce the effectiveness of any information exchange of information between countries. As a reflection of the above, some of the following issues arise with the Australian legislation relating to CbCR.

First, it is not clear whether there is a need for overseas financial statements to comply with Australian accounting standards. If overseas countries are compliant with International Financial Reporting Standards (IFRS) as released by the International Accounting Standards Board (IASB) there may not be a significant issue. However, in the case of entities affected by the CbCR rules (such as a corporate limited partnership, or where the taxpayer is a foreign resident operating a permanent establishment and did not lodge a general purpose financial statement [GPFS] with the Australian Securities and Investment Commission [ASIC], etc.), there may be a need to formalise information that is compliant.

Additionally, in the case of large multinational corporations the question arises as to whether the consolidated statements of the parent entity would be compliant. Given the earlier comments, it may be possible that such consolidated statements are not compliant. It is understood that the ATO is seeking feedback on the issue. A main example of where such a difficulty would arise is in the situation where the parent entity is a company based in the US. As such, for reporting purposes in the US the entity would be required to adopt US Generally Accepted Accounting Principles (GAAP). As the US GAAP is not compliant with IFRS, such disclosures would not meet the requirements of the CbCR provisions in Subdivision 815-E ITAA97. If such an issue arises, there would be a significant cost in making such reports Australian compliant and this would raise the issue of penalties being imposed. While an immediate solution would be for the legislation to require disclosure-based non-IFRS compliant reports, the issue of US GAAP is a major issue. It is understood the ATO has indicated that as part of a transitional process for the first year SGEs may comply with their respective countries' accounting standards. However, this is not enshrined in any legislative process. In particular, a reason for the divergence between IFRS and US GAAP accounting standards is attributable to the fact that IFRS is largely principle based, whereas US GAAP is largely rule based. According to the American Institute of Certified Public Accountants,⁸³ some examples of where IFRS and US GAAP divergence occurs are in the following areas:

⁸³ American Institute of Certified Public Accountants (AICPA), 'IFRS Resources' (2018) <https://www.ifrs.com/overview/General/differences.html>

1. Under US GAAP acquired intangible assets, such as goodwill, are recognised at fair value. However, under IFRS acquired intangible assets can only be recognised at fair value where the asset has future economic benefits that can be measured reliably.
2. Inventory: may be valued using Last In, First Out (LIFO) or First In, First Out (FIFO) for US GAAP purposes. However, under IFRS only FIFO may be used.
3. Where inventory is written down under IFRS, in certain situations the write-down can be reversed under IFRS in later periods. This is not possible under US GAAP.
4. Development costs: may be capitalised under IFRS where future economic benefits are assured, whereas under US GAAP they are expensed when they occur.
5. Fixed assets must be valued at cost under US GAAP, whereas IFRS allows entities to use cost or apply the revaluation model and adopt their fair value.

In relation to CbCR requirements, the ATO has indicated that the financial statements lodged with the ATO will not be required to be audited. This is quite an anomaly. While it is a requirement that the CbCR financial statements must be compliant with Australian standards, there is no process to verify the veracity or integrity of the data other than through the penalty provisions relating to false and misleading statements. In an attempt to address some of these issues, the ATO has released the ‘Law Companion Guideline 2015/3’⁸⁴ and the ‘Country-by-Country Reporting Guidance’.⁸⁵ However, the guidelines contained in these documents do not fully address the matters raised above. Furthermore, it is a questionable outcome that uncertainty in legislation is addressed by the release of a law companion guideline, only part of which is designated as a public ruling (see Law Companion Guideline 2015/3, paragraphs 1–39). It can be seen from the discussion above that accounting for CbCR has become an issue of utmost importance (in spite of the relative unawareness of some SGEs) requiring a proactive approach and implementation of adequate CbCR compliance policies as a matter of prudent risk management⁸⁶.

The task of compliance with the provisions in Subdivision 815-E ITAA97 is onerous and time-consuming, especially where there are a number of overseas entities that may come within the scope of the provisions. In this respect, given the urgency of compliance with such statements, there is a degree of urgency to ensure affected companies are compliant and avoid any related penalties. Although it is the SGE’s responsibility to ensure compliance, the question arises as to whether the entity will undertake this task, delegate it or outsource it to their professional advisor. Where such a task is delegated, it will be critical that the appropriate advisors and the

⁸⁴ Australian Taxation Office, ‘Law Companion Ruling 2015/3’ (2015) <https://www.ato.gov.au/law/view/document?DocID=COG/LCG20153/NAT/ATO/00001&PiT=99991231235958>

⁸⁵ Australian Taxation Office, ‘Country by Country Reporting Guidance’ (2018) <https://www.ato.gov.au/business/international-tax-for-business/in-detail/transfer-pricing/country-by-country-reporting/country-by-country-reporting-guidance/>.

⁸⁶ Les Nethercott, ‘Country-by-Country Reporting: A Paradigm Shift in Tax Compliance’ (2017), *In The Black* <https://www.intheblack.com/articles/2017/09/08/country-by-country-reporting-tax-compliance>.

entity concerned have an engagement letter or formal process established to ensure the relevant financial information is documented in a timely and accurate manner.

On a broader and macro level, it may be argued that a failure by MNEs to implement an appropriate level of disclosure as required by CbCR may result in a substantial backlash from consumers and governments at both a local and global level. More recently, as the issue of BEPS and fiscal leakage has become more public there is increased scrutiny of large corporations concerning their cross-border transactions and the legitimacy of their operations. An example of this occurred in 2016 when Apple was ordered to pay €13 billion concerning cross-border transactions. Consequently, it is suggested that CbCR reporting is a necessary step in identifying and disclosing such transactions and that MNEs need to be aware of such changes and implement appropriate strategies and reporting functions to deal with their reporting requirements.

VI CONCLUSION

This paper has examined CbCR requirements according to the recent amendments to the Australian Income Tax Assessment Act 1997 and the tax and accounting implications arising from these for large multinational consolidated groups. The paper provides an analysis and discussion of the anticipated issues, challenges and opportunities of CbCR for Australian SGEs. With the release of the OECD Action Plan 13 concerning CbCR disclosure and the formalisation of the Australian requirements in Subdivision 815-E ITAA97, the local Australian and global environment has become much more aware of, and concerned by, fiscal leakage through BEPS, and there is a call for a cohesive and global effort to address the implementation of CbCR obligations. While an individual country may attempt to address the matter by implementing domestic legislation, caution is needed to ensure there is no fragmentation of the appropriate global policies as outlined in all of the BEPS Action Plans, and particularly in Action Plan 13. The reduction or elimination of global tax avoidance by BEPS can be supported through a global effort where taxpayers, tax authorities and government institutions work together for the ultimate purpose of increasing tax transparency and ensuring that the tax burden is fairly distributed among taxpayers. Without effective operation of the multilateral treaties on the exchange of CbCR information, reporting entities may place at risk the timely submission of reliable and accurate information to address the issue of BEPS. While CbCR obligations represent an opportunity to increase tax transparency and improve the risk assessment of SGEs, obeying such legislation may pose significant challenges to Australian SGEs and may represent an exposure to possible penalties for non-compliance.

In order to mitigate the potential challenges and penalties, Australian SGEs will need to consider their governance structures to ensure CbCR becomes established as an authoritative guideline for organisational and tax behaviour. This will require entities to reconsider their global and local entity-level strategies, systems, structures and procedures in response to this legislation to better equip themselves for compliance.

This paper has considered the anticipated issues that may affect the capacity of Australian SGEs to comply with their CbCR obligations and outlined the key tax and accounting considerations for SGEs to ensure and support compliance. As the first CbCR statements were due on 30 June 2018, future research can provide empirical evidence as to the extent to which

SGEs have responded to and managed the anticipated challenges during their CbCR compliance efforts.

VII APPENDICES

A. *Appendix 1: Outline of Transfer Pricing Documentation and Country-by-Country Reporting Statements*Source: www.ato.gov.au

Transfer Pricing Documentation
<p>Transfer Pricing Report (TPR): The TPR comprises a detailed analysis of the entity's international related party transactions, with clear identification of the arm's length conditions applicable to each relevant transaction and the comparable circumstances relevant to identifying the arm's length conditions, supported by a functional analysis and benchmarking study in accordance with the applicable transfer pricing methods.⁸⁷ Even though it is not mandatory to lodge a TPR, lodging it before lodgement of corporate tax returns⁸⁸ allows the reporting entity to establish a reasonably arguable position⁸⁹ and provides penalty protection. Having adequate transfer pricing documentation has become especially important in view of the recent substantial increase in the penalties for non-compliance with reporting obligations, in force from 1 July 2017.</p>
<p>International Dealings Schedule 'Part A' (IDS Part A): The IDS Part A is a mandatory part of Australian corporate entities' tax return where the taxpayer is engaged in international related party dealings above the threshold of A\$ 2 million. It follows a questionnaire structure and provides information about the nature and size of a company's international related party dealings for the purposes of risk and materiality assessment; however, it does not require an analysis of the arm's length principle or the transfer pricing methods used by the taxpayer.</p>
Country-by-Country Reporting Statements
<p>Country-by-Country Report (CbC Report): The CbC Report follows the OECD recommended model. It is a statement relating to the SGE's global operations and activities, including its transfer pricing policies. This statement is to be prepared and lodged by the global parent entity in their own jurisdiction and must include data relating to all other members in the global group. In other words, the CbC Report is filed by the parent entity, but relies on information provided by its subsidiaries. Where there is an information exchange agreement between Australia and the global parent entity's country of jurisdiction, the CbC Report will be automatically be exchanged between tax authorities. However, if the global parent entity is based in a country that does not automatically exchange information</p>

87 Australian Taxation Office, 'Tax Ruling 98/11' (1998)
<https://www.ato.gov.au/law/view/document?DocID=TXR/TR9811/NAT/ATO/00001&PiT=99991231235958>

88 Commonwealth of Australia, 'Tax Administration Act 1953' (1953).

89 Australian Taxation Office, 'Tax Ruling 2014/8' (2014)
<https://www.ato.gov.au/law/view/document?DocID=TXR/TR20148/NAT/ATO/00001>

with Australia, or if the global parent entity's country of residence does not have CbCR legal requirements, the Australian entity becomes responsible for lodging the CbC Report with the ATO. In this case, the Australian entity will electronically lodge the CbC Report using the OECD XML schema, separately from the local file and master file, which must be lodged using the XML schema designed by the ATO. Finally, if there are discrepancies in the reporting periods, the Australian entity is required to request a replacement of the reporting period.

Local File: The Australian local file is substantially different from the OECD recommended model both in relation to its format and in its content. As such, it will require careful preparation and attentive management by reporting entities.

The Australian local file follows a two-tier structure, which aims to facilitate compliance by entities with less complex transfer pricing affairs. The first tier comprises the 'short form local file', which is a simplified version of the 'full local file' and is available to reporting entities with few international intra-group transactions, provided they meet certain eligibility conditions. The short form local file must contain information on the reporting entity's organisational structure, including business strategies and restructures affecting the entity in the current or previous income year; the entity's management reporting hierarchy, indicating the countries to which local managers report; as well as a description of any transfers of intangibles in the current or previous year, and finally, a list of key competitors. However, because the eligibility conditions reflect very low materiality thresholds, in practice it is expected that very few reporting entities will be able to lodge the short form local file.

Reporting entities not eligible to lodge the short form local file will need to lodge a full local file. This will include all the information required in the short form local file plus two additional parts. In the local file 'Part A' the entity will disclose information regarding all controlled transactions for the relevant income year, including the names of the Australian and foreign counterparties (and their countries of residence), categories of transactions and the income and expenses associated with such transactions (including transactions of capital nature), the transfer pricing method (or capital asset pricing method) relied upon, and finally, the transfer pricing documentation code. The local file 'Part B' will further extend the information from Part A and will require that the reporting entity provides copies of all intercompany agreements underpinning all material international intra-group transactions, as well as any advance pricing agreements in relation to the Australian transactions and the general purpose financial statements.

The information required in the local file Part A is substantially similar (although with a much greater level of detail) to that required in the IDS Part A. Due to this relative overlap, the ATO authorises entities who voluntarily lodge the local file Part A together with their income tax returns to skip the majority of the questions of the IDS Part A. Where this is the case, the local file Part B must still be lodged by the relevant deadline.

Most importantly, SGE global management teams wishing to prepare their global CbCR statements based on the OECD templates will need to keep in mind the peculiarities of the Australian local file and make sure it is prepared in accordance with the Australian model,

otherwise they could be at risk of failing to comply with the Australian CbCR requirements and therefore subject to heavy penalties.⁹⁰

Master File: The master file will follow the OECD template and will provide information on the allocation of income between countries where the group operates, the activities of, and taxes paid by, the SGE parent entity and by the other members of the global group. Generally, the master file will be prepared by the foreign parent entity and the Australian entity will lodge a copy of it with the ATO, together with the local file. However, if the GPE is not mandated to prepare the master file, then the local reporting entity will be required to prepare and submit the master file and the local file.

In some cases, a temporary one-year exemption (concessional treatment) may apply to reporting entities meeting the following criteria:

The taxpayer has a foreign global parent entity; and

Neither the global parent entity nor any other entity in the group is required to prepare a master file prior to the due date in Australia; and

The reporting entity commits to providing the master file for the second reporting period.⁹¹

However, these cases are expected to be very limited, given that a significant number of OECD countries already have legislated CbCR obligations and in most cases, the deadlines recommended by the OECD are followed, just as they are in Australia.

⁹⁰ PwC, above n 38.

⁹¹ PwC, above n 40.

B. Appendix 2: Outline of Recently Enacted Increased Penalties

Source: www.ato.gov.au

Administrative Penalties (False or misleading statements resulting in tax shortfall)	Culpable behaviour		Former base penalty (% of shortfall/penalty units)	Current base penalty (% of shortfall/penalty units)		
	Making a false or misleading statement		25%, 50%, 75%	50%, 100%, 150%		
	Making a statement that treats a law as applying in a way that was not reasonably arguable		25%	50%		
	Failing to provide a document as required		75%	150%		
Administrative Penalties (False or misleading statements not resulting in tax shortfall)	Intentional disregard of the law		60 penalty units (\$10,800)	120 penalty units (\$25,200)		
	Reckless behaviour		40 penalty units (\$7,200)	80 penalty units (\$16,800)		
	No reasonable care		20 penalty units (\$3,600)	40 penalty units (\$8,400)		
Failure to Lodge on Time (FTL)	Days late	<28	29>56	57>84	85>112	112+
	Current large entity penalties	\$900	\$1,800	\$2,700	\$3,600	\$4,500
	Large entity penalties (increased penalties)	\$1,050	\$2,100	\$3,150	\$4,200	\$5,250
	SGE penalties (increased penalties)	\$105,000	\$210,000	\$315,000	\$420,000	\$525,000

THE ROLE OF TAXES IN PROMOTING THE EXPERIENCE OF HOME FOR TENANTS

JONATHAN BARRETT*

ABSTRACT

Tenants and owner-occupiers experience housing differently both in terms of wealth and consumption. An owner-occupied property is typically a person's primary investment as well as a shelter, whereas a tenant also enjoys a roof over their head but does not share increases in value of the property they occupy. Furthermore, an owner-occupier typically enjoys non-financial benefits, including a sense of continuity and order in events (ontological security). In contrast, due to relatively weak legal protections in Australia and New Zealand, tenants often face ontological insecurity. These different experiences matter because owner-occupation is a normal aspiration, and has traditionally been privileged by government policies in property-owning democracies. Yet more than one-third of Australians and New Zealanders do not own the housing they occupy. Seeking to equalise housing experiences between tenants and owners is therefore an appropriate goal for government. In this article, the term 'synthetic owner-occupation' is used to describe a practicable, equalised housing experience for tenants relative to owner-occupiers, but 'home' has similar import.

Taxes can neutralise to some extent the different wealth experiences of tenants and owner-occupiers but, because these measures tend to level the circumstances of the majority downwards, they are politically implausible. While taxes cannot be effective alone, they may also contribute to closing the gap in consumption experiences of owner-occupiers and tenants. This article investigates, in particular, how taxes can supplement regulation in promoting an experience of home for tenants.

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I INTRODUCTION

Tenants and owner-occupiers typically experience housing differently both in terms of wealth and consumption. An owner-occupied property often constitutes the owner's principal investment as well as the place they live. While tenants have a roof over their heads, they do not share any increases in the value of the property they occupy. Owner-occupiers also enjoy non-financial benefits, including 'a sense of continuity and order in events' (ontological security),¹ but, due to relatively weak legal protections in Australia and New Zealand, tenants often experience ontological insecurity. The ability of landlords to increase rents at regular intervals exacerbates the uncertainty inherent in readily cancellable tenancies. Furthermore, the lack of affordable housing in the centres of major cities leads to a high proportion of renters facing high housing costs, and, not exceptionally, sub-standard accommodation. Finally, tenants may be denied features of home, such as having a pet or planting vegetables with confidence of harvesting them.

These different experiences particularly matter in countries where owner-occupation is a normal citizen aspiration and has traditionally been promoted through government policies, including tax concessions.² 'The "Great Australian Dream" and "The New Zealand Dream" are both centred on the acquisition of the family house.'³ Yet more than one-third of Australians and New Zealanders – over represented by young adults – do not own the property they occupy, and rates of owner-occupation are falling.⁴ If this significant minority of citizens cannot realistically become homeowners, equalising housing experiences between tenants and owner-occupiers should be a pressing concern for the governments of democracies in which real property ownership is a normal expectation, and is implicated in constructing perceptions of normality.⁵ In this article, the term 'synthetic owner-occupation' is used to describe a practicable, equalised housing experience for market rental tenants relative to owner-occupiers,⁶ but the term 'home' has similar import.

¹ Anthony Giddens, *Modernity and Self Identity: Self and Society in the Late Modern Age* (Stanford University Press, 1991) 243.

² See Ken Henry et al, *Australia's Future Tax System Report to the Treasurer* (AGPS, 2010) [6.2].

³ D Andrews and A Caldera Sánchez, 'Drivers of Homeownership Rates in Selected OECD Countries' (OECD Economics Department Working Papers, No. 849, 2011) 4 n 7 <<http://dx.doi.org/10.1787/5kgg9mcwc7jf-en>>.

⁴ See 'Table 1: Comparison of homeownership rates (%) for selected countries' below nn 79-88.

⁵ According to Lyn Richards, in Australia, 'the desire for single family home ownership is intricately bound up with the expectation that it is 'normal' to form a family, perhaps explaining the depth of the popularity of owning a home'. Lyn Richards, 'Family and Home Ownership in Australia: The Nexus of Ideologies' (1989) 14 *Marriage and Family Review* 173 cited by Sean Purdy, 'A Property-Owning Democracy?: Home Ownership and the Working Class in Canada' (1993) 31 *Labour/Le Travail* 341, 350.

⁶ Carolyn Whitzman and her co-authors construct a continuum of housing between emergency shelters and market home ownership. See Carolyn Whitzman, Clare Newton and Alexander Sheko, *Transforming Housing: Affordable Housing for All: Partnership options for policy, investment and demonstration projects* (University of Melbourne, 2015) 4. Government subsidy is very high at the emergency end of the continuum (supportive housing) but ostensibly non-existent at the other end (market housing). In Whitzman et al's model, market rental and market home ownership fall outside government subsidy, but may enjoy the benefits of tax concessions. This article is primarily concerned with equity between renters and owners in the market.

Taxes could neutralise the different wealth experiences of tenants and owner-occupiers but, because they tend to level the circumstances of the majority downwards,⁷ are politically implausible.⁸ However, while taxes cannot be effective alone, they may supplement regulatory measures in closing the experiential gap of housing consumption between owner-occupiers and tenants.

This study of tenancy is the third part of a triptych of articles on taxation and contemporary housing issues,⁹ which may be profitably read together. The Australasian jurisdictional context may be characterised as encompassing traditional property-owning democracies in which poorly protected tenancies are increasingly normal. In this context, it is pertinent to consider tax and other policies that might equalise experiences of housing between tenants and owner-occupiers.

The article is structured as follows: after this Introduction, the concept of a property-owning democracy is outlined. A distinction is drawn between ideologically-informed and pragmatic approaches.¹⁰ Claims for social and individual benefits of homeownership are considered. Returning to the different experiences of owner-occupiers and tenants, consideration is given to ways of converging those experiences. The proposal of a model of synthetic owner-occupation tenancy is made as a way of ensuring tenants experience *home* in ways similar to owner-occupiers. How taxes could close the gap in wealth experiences between homeowners and tenants is noted, but the principal research aim is to consider how taxes might contribute to achieving synthetic owner-occupation tenancies.

II HOMEOWNERSHIP IN A PROPERTY-OWNING DEMOCRACY

This part of the article outlines the concept of property-owning democracy and interrogates claims for the social benefits of owner-occupation. The aim here is to demonstrate that homeownership does not need to be the housing priority for government.

A. *Property-Owning Democracy*

⁷ Compare with the concept of ‘loss aversion’ in behavioural economics. See, for example, Nathan Novemsky and Daniel Kahneman, ‘The Boundaries of Loss Aversion’ (2005) 42(2) *Journal of Marketing Research* 119.

⁸ The interests of ‘mum and dad’ residential property investors also need to be taken account. Some 2 million Australian taxpayers own investment properties. See The Hon Scott Morrison, *Address to the Australian Housing and Urban Research Institute, Melbourne* (10 April 2017) <<http://sjm.ministers.treasury.gov.au/speech/005-2017/>>.

⁹ See also Jonathan Barrett, ‘Property Taxes as a Policy Response to Foreign Investment as a Perceived Cause of Housing Unaffordability’ (2018) 13(1) *Journal of the Australasian Tax Teachers Association* 1, and Jonathan Barrett, ‘Taxation and the Human Right to Adequate Housing’ (2018) 20(1) *Journal of Australian Taxation* 123.

¹⁰ For a discussion of the development of different versions of property-owning democracy, see Ben Jackson, ‘Property-Owning Democracy: A short history’ in Martin O’Neill and Thad Williamson (eds) *Property-Owning Democracy; Rawls and Beyond* (Wiley-Blackwell, 2012) 33.

Conservative politicians, notably Anthony Eden and Margaret Thatcher in the United Kingdom,¹¹ have extolled the benefits of a property-owning democracy with the aim, in Eden's words, 'to spread the private ownership of property as widely as possible to enable every worker to become a capitalist'.¹² But the egalitarian liberal philosopher John Rawls also supported widescale property ownership as a means of promoting justice,¹³ and communitarians may support owner-occupation on the grounds that communities are strong when people are stable in their homes.¹⁴ From a contemporary progressive position, Marc Stears argues '[T]he stable patterns of social interaction that are associated with communities of ownership are preconditions for the kind of social reciprocity that the left champions'.¹⁵

For Rawls, property-owning democracy is one of five 'kinds of regime viewed as social systems, complete with their political, economic, and social institutions'.¹⁶ A property-owning democracy realises 'all the main political values expressed by the two principles of justice, whereas capitalist welfare does not'.¹⁷ These two principles of Rawlsian justice are:

...each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar scheme of liberties for others' and 'social and economic inequalities are to be arranged so that they are both: (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all'.¹⁸

In Rawls' view, 'the wide dispersal of property ... is a necessary condition, it seems, if the fair value of the equal liberties is to be maintained'.¹⁹ Rawlsians may therefore view homeownership as a matter of justice.²⁰

¹¹ The Thatcher government sold thousands of state houses to tenants, many of whom, overnight turned Tory. See Marc Stears, 'Why the Left Should Aspire to a "Property Owning Democracy"' *The New Statesman* (19 June 2012) <<https://www.newstatesman.com/blogs/politics/2012/06/why-left-should-aspire-property-owning-democracy>>. Conversely, people who receive United States Federal Housing Administration-backed mortgages often turn Democrat. See Andrew B Hall and Jesse Yoder, 'Does Homeownership Influence Political Behavior? Evidence from Administrative Data' Department of Political Science, Stanford University (7 August 2018) 25 <www.andrewbenjaminhall.com/homeowner.pdf>.

¹² Cited by David Howell, 'The property-owning democracy: Prospects and policies' (1984) 4(3) *Policy Studies* 14, 14.

¹³ See John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001) 135-38. Rawls attributes the phrase to James Meade. *Ibid.*, 135 n 1, but it was apparently coined by Noel Skelton, a Scottish Unionist, and friend of Eden in 1923: see Aaron Bastani, 'Property Owning Democracy' (4 April 2014) *LRB Blog* <<https://www.lrb.co.uk/blog/2014/04/04/aaron-bastani/property-owning-democracy/>>.

¹⁴ See, for example Thomas A Spragens Jr, 'The Limits of Libertarianism' in Amitai Etzioni (ed) *The Essential Communitarian Reader* (Rowman & Littlefield, 1998) 21, 36.

¹⁵ Stears, above n 11.

¹⁶ Rawls, above n 13, 136. The other regimes are laissez-faire capitalism, welfare-state capitalism, state socialism with command economy, and liberal (democratic) socialism.

¹⁷ *Ibid.* 135.

¹⁸ John Rawls, *A Theory of Justice* (rev ed, Belknap Press of Harvard University Press, 1999) 53.

¹⁹ *Ibid.* 245.

²⁰ Under the Clinton administration (1993-2001), which manifested some features of Rawlsian thinking, rates of homeownership, particularly among African-Americans, who had been historically excluded from proprietorship

In welfare-state capitalist systems, including those of Australia and New Zealand,²¹ homeownership is not a constitutive principle or a matter of justice. Despite government policies promoting owner-occupation, it is a pragmatic means of achieving other goals. Whether the goal is providing a property stake in society as a bulwark against socialism or developing stable communities, homeownership is an instrument for achieving those ends. If they can be achieved otherwise, a policy preference for homeownership becomes less important.

Georg Hegel, from whom Margaret Radin loosely derives her theory of property,²² persuasively argued that some property ownership is necessary for the realisation of autonomy,²³ but it is moot whether that necessity extends to owning the real property one occupies. For most people, it is reasonable to assume that the realisation of autonomy requires some degree of ontological security. Few would consider themselves fully autonomous if, say, they were subjected to the danger and insecurity of living on the streets. Having ‘a room of one’s own’ does not, however, necessarily mean owning that room.²⁴ The critical consideration is the security owner-occupation typically provides but tenancy often does not. People need spaces in which they feel sufficiently secure to engage in commonplace activities, such as planting a vegetable garden they are confident of harvesting, and developing local social connections. The concept of home is neither straightforward nor uncontested,²⁵ but it is generally thought to incorporate psychological features, notably ‘a sense of security, stability, privacy, safety, and the ability to control living space’.²⁶

through mechanisms such as redlining, increased significantly. Unfortunately, sub-prime mortgages contributed to the Global Financial Crisis (‘GFC’). For a discussion of causality between expansion of homeownership and the GFC, see Mervyn K Lewis, ‘The Origins of the Sub-prime Crisis: Inappropriate Policies, Regulations, or Both?’ 33 (2009) *Accounting Forum* 114.

21 On traditional Australasian socio-economic systems, see, generally, Francis G Castles, *The Working Class and Welfare: Reflections on the Political Development of the Welfare State in Australia and New Zealand 1890-1990* (Allen and Unwin, 1985); Gøsta Esping-Anderson, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990).

22 See Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press, 1993). Radin’s thinking is relevant to this article because she provides some philosophical justification for restriction of rent increases, which is a component of synthetic owner-occupation tenancies. See IV A below.

23 G W F Hegel, *Philosophy of Mind* (W Wallace and AV Miller, Clarendon Press, 2007) [trans of: *Phänomenologie des Geistes* (first published 1807)].

24 For Virginia Woolf, ‘[i]ntellectual freedom depends upon material things. Poetry depends upon intellectual freedom. And women have always been poor, not for two hundred years merely, but from the beginning of time ... That is why I have laid so much stress on money and a room of one’s own.’ See Virginia Woolf, *A Room of One’s Own* (Hogarth Press, 1929) 90. Woolf did not argue that the autonomous woman needed to own her room. Many houses and flats in London have traditionally been held under very long leases, rather than freehold.

25 For a discussion of different conceptions of ‘home’, see Shelley Mallett, ‘Understanding Home: A Critical Review of the Literature’ (2004) 52(1) *Sociological Review* 62.

²⁶ Australian Bureau of Statistics (‘ABS’), *A Spotlight on ‘Severe’ Crowding* (2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/2049.0Feature%20Article12011>>.

B. *Social Benefits of Homeownership*

Despite broad political support for homeownership, and its advantages for individual homeowners, the social benefits of owner-occupation are less certain.²⁷ OECD researchers Dan Andrews and Aida Caldera Sánchez argue that homeownership leads to greater community and political engagement.²⁸ But these assertions are debatable. For example, Switzerland, which has traditionally experienced relatively low rates of owner-occupation, is commonly considered to be the paragon of participative democracy.²⁹ Nevertheless, in a property-owning democracy, claims for greater democratic engagement on the part of homeowners, relative to tenants, is credible. Historically, proprietorship and the franchise were linked, especially at a local level.³⁰ Even today, people with low incomes are less likely to vote than those with high incomes.³¹ Homeownership appears to make people ‘pay attention and participate’ in the political process, often to protect their own property interests.³²

While homeowners are more likely to vote than tenants, they are not necessarily better citizens.³³ As Brian McCabe argues:

²⁷ See P Rossi and E Weber, ‘The social benefits of homeownership: Empirical evidence from national surveys’ (1996) 7 *Housing Policy Debate* 1; Daniel Aaronson, ‘A Note on the Benefits of Homeownership’ (2000) 47(3) *Journal of Urban Economics* 356.

²⁸ Dan Andrews and Aida Caldera Sánchez, ‘The Ownership of Homeownership Rates in Selected OECD Countries: Demographic and Policy Influence’ (2011) *OECD Journal: Economic Studies* 207, 210-11.

²⁹ See, for example, Kenrick Jones, *Swiss Democracy: A Model for Britain* (Arena Books, 2009). Swiss democracy, being markedly idiosyncratic, is difficult to compare with other voting systems. The country’s relatively low turnout in national and local elections may be attributable to direct voting on many issues of importance to voters. For a discussion of determinants of Swiss voter turnout, see Marc Bühlmann and Markus Freitag, ‘Individual and Contextual Determinants of Electoral Participation’ (2006) 12(4) *Swiss Political Science Review* 13.

³⁰ See Ryan Goss, ‘Voting Rights and Australian Local Democracy’ (2017) 40(2) *University of New South Wales* 1008. While compulsory voting in local elections is normal in Australia, Western Australia uses voluntary postal votes in local elections. In 2015, the overall voting rate in Western Australia was 27.5 per cent. See Antony Green, *Participation rates at Australia Voluntary Postal Ballot Elections* (2017) <<http://www.abc.net.au/news/2017-08-09/participation-rates-australia-voluntary-postal-ballot-elections/9022070>>. Local government elections in Switzerland tend to attract low voter turnout – around 45%. See Andreas Ladner, ‘What explains electoral turnout in Swiss municipalities?’ Working paper de l’IDHEAP 2/2009 Chaire Administration suisse et politiques institutionnelles, 2009) <https://serval.unil.ch/resource/serval:BIB_3ACEFE6604FB.P001/REF>.

³¹ Of 25 countries surveyed by the University of Michigan, in all but three countries, high income earners were far more likely to vote than low income earners. New Zealand was one of the three countries surveyed in which higher income citizens were marginally less likely to vote than lower income citizens. See Marcus E Etheridge and Howard Handelman, *Politics in a Changing World* (Cengage Learning, 2004) 99. In New Zealand, older people are much more likely to vote than younger people. It is therefore possible that asset rich, income poor voters outweighed younger income rich, asset poor voters.

³² Hall and Yoder, above n 12.

³³ Gary V Engelhardt, Michael D Eriksen, William G Gale and Gregory B Mills, ‘What are the social benefits of homeownership? Experimental evidence for low-income households’ (2010) 67(3) *Journal of Urban Economics* 249; D DiPasquale and E Glaeser, ‘Incentives and social capital: Are homeowners better citizens?’ (1999) 45 *Journal of Urban Economics* 354.

...the impact of homeownership on community life is not as clear-cut – and often, not as positive – as proponents claim. Rather than transforming citizens into better neighbours and engaged citizens, owning a home often leads them to participate in the politics of exclusion. Concerned about the value of their homes, they elevate concerns about property values above other issues in their communities. As a result, when they do engage in civic activities or participate in local politics, they often do so as a way of protecting their financial interests. This type of civic involvement can lead to fractured, segregated neighbourhoods, with homeowners working to exclude particular practices and people from their communities.³⁴

Furthermore, homeownership may have negative social effects, including stigma being conferred on those excluded from ownership,³⁵ especially social housing tenants.³⁶ Generally, social divisions may develop between owners and non-owners.³⁷ In their study conducted in the United Kingdom, Chris Foye and his co-authors found:

(1) the subjective wellbeing of owners and renters depends on the homeownership values of relevant others, thus implying that in the UK, home-ownership is a social norm, and (2) the subjective wellbeing of owners is also negatively related to the home-ownership rates of relevant others, implying that for owners, home-ownership is also a positional good. Together, these findings suggest that homeowners enjoy relative benefits at the expense of renters: first, through being considered ‘normal’ by society versus renters who are considered ‘abnormal’, and second through being considered wealthier than renters.³⁸

High rates of owner-occupation do not necessarily indicate high levels of economic development. Richard Florida demonstrates a correlation between ‘relatively high levels of economic development with relatively low levels of homeownership’.³⁹ He does not claim a

Brian J McCabe, *No Place Like Home: Wealth, Community and the Politics of Homeownership* (Oxford University Press, 2016) 144.

Vienna’s model for housing provision has long involved the city government taking a leading role: see Hanns Abele and Andrea Höttl, ‘Housing in Vienna’ in Ake E Andersson, Lars Pettersson and Ulf Strömquist (eds), *European Metropolitan Housing Markets. Advances in Spatial Science* (Springer, 2007) 241. In that city, living in municipality-owned accommodation does not carry the social stigma often encountered in Anglophone countries: see *Vienna’s Unique Social Housing Program* PD&R Edge <https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_011314.html>.

Craig Gurney argues ‘the normalisation of one form of housing consumption has been instrumental in legitimising the residualisation of social rented housing ... if policies to encourage social balance and area based regeneration are to be successful then strategies to challenge the power relationships constituted by these discourses are crucial’. See Craig M Gurney, ‘Pride and Prejudice: Discourses of Normalisation in Public and Private Accounts of Home Ownership’ (1999) 14(2) *Housing Studies* 163. See also Kath Hulse, Alan Morris and Hal Pawson, ‘Private Renting in a Home-owning Society: Disaster, Diversity or Deviance?’ (2018) *Housing, Theory and Society* 1.

³⁷ See Thad Williamson, ‘Realizing Property-Owning Democracy: A 20-Year Strategy to Create an Egalitarian Distribution of Assets in the United States’ in Martin O’Neill and Thad Williamson (eds) *Property-Owning Democracy; Rawls and Beyond* (Wiley-Blackwell, 2012) 235.

³⁸ Chris Foye, David Clapham and Tommaso Gabriel, ‘Home-ownership as a Social Norm and Positional Good: Subjective Wellbeing Evidence from Panel Data (2018) 55(6) *Urban Studies* 1290.

³⁹ Richard Florida, ‘Why the US Needs to Fall Out of Love With Homeownership’ *Citylab* (17 September 2013) <www.citylab.com/equity/2013/09/why-us-needs-fall-out-love-homeownership/6517/>.

causative connection between the two phenomena but suggests that greater urbanisation and broader investment opportunities may help to explain differences in homeownership rates between, say, urbanised Switzerland and relatively rural Romania.⁴⁰ Furthermore, just as individuals' preferences for purchasing real property lead to non-diversified investment portfolios, so 'numerous studies have found that excessive homeownership significantly distorts the economy, diverting investment away from much more needed areas like technology and knowledge'.⁴¹

This article is, in principle, agnostic about homeownership. However, the context of the neoliberal state's withdrawing from housing provision cannot be ignored.⁴² A principal feature of welfare-state capitalism in the decades after World War II was the provision of high quality state housing for working class people, effectively on a lifetime lease basis.⁴³ But 'the role of social housing in Australia is changing from a home for working class families to a place of last resort for only the most vulnerable households'.⁴⁴ If the state no longer recognises an obligation to provide decent social housing for everyone who needs and wants it, homeownership becomes more socially relevant, unless other providers step in to satisfy the need that social housing used to meet.

III INDIVIDUAL BENEFITS OF HOMEOWNERSHIP

Individual welfare benefits arise from the owner-occupied home representing a shelter from the market.⁴⁵ Furthermore, Andrews and Sánchez identify wealth accumulation and better outcomes for children as key individual benefits of homeownership.⁴⁶ These putative benefits warrant unpacking because they infer a link between homeownership and the capacity to live a full life.⁴⁷ Even if the social benefits of homeownership are moot, aggregate individual

⁴⁰ Ibid.

⁴¹ Ibid. Although it may be noted that the homeownership rate in Switzerland has increased in recent decades. Differences in international homeownership rates defy neat explanations.

⁴² Because the overall supply of social housing has been stable for the past 25 years, and so has fallen from six to four per cent of the Australian housing stock. Within the stock of social housing, community housing rentals doubled between 2006 and 2016. See *Report on Government Services 2016 Volume G: Housing and homelessness* (Productivity Commission for the Steering Committee for the Review of Government Service Provision, 2016) ch 17.

⁴³ See David Hayward, 'The Reluctant Landlords? A History of Public Housing in Australia' (1996) 14(1) *Urban Policy and Research* 5.

⁴⁴ Katrina Raynor, Matthew Palm and Melanie O'Neil, *The Barnett Model: Evaluating the outcome and scalability of an affordable homeownership model* (University of Melbourne, 2018) 9.

⁴⁵ See Tony Fahey and Michelle Norris, 'Housing' in Herbert Obinger et al (eds), *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010) 479, 491.

⁴⁶ Andrews and Sánchez, above 28, 210-11.

⁴⁷ Consideration of living a full life lies beyond the scope of this article. The concept of human development, as adopted by the United Nations Development Programme ('UNDP'), is used as shorthand for a flourishing human existence. See *Human Development Index (HDI)* <<http://hdr.undp.org/en/content/human-development-index-hdi>>.

benefits might justify pro-ownership policies. Such a policy focus might divert attention away from the need for home-like tenancies.

A. *Housing and Individual Wealth Accumulation*

At certain times, an owner-occupied home can be a lucrative investment: for example, between 2014 and 2017, the average Auckland house price increased by 46 per cent.⁴⁸ But, using United States data, Robert Shiller demonstrates that the inflation-adjusted return on housing between 1890-2005 was less than one per cent a year. That return does not take into account transaction and maintenance costs.⁴⁹ Shiller observes:

...homeownership is actually not a great idea from an investment standpoint. A better strategy would be to diversify as much as possible – put your money into stocks, bonds, many different geographies – and then use the income to rent whatever you like, which allows for greater flexibility and efficiencies.⁵⁰

Notwithstanding the apparent irrationality of homeownership for all, from a perspective of classical economics, Shiller notes that ‘behavioral economics tells us that the emotional lure of homeownership is strong and would be difficult to break completely, even if that were desirable’.⁵¹ Furthermore, simply because a renter has disposable income to invest, there is no guarantee they will in fact save. Conversely, the typical owner-occupier, who has been obliged to save for a deposit and then to make periodic mortgage payments, is forced to save.⁵² Over decades, even with only modest compounding returns, the homeowner is likely to accumulate a significant pool of capital.

Tenants cannot practicably share directly in the wealth experience of housing.⁵³ Indeed, they may suffer the disadvantage of rent increases when house prices increase. Overall

⁴⁸ See Auckland Council, *Updated Auckland property values available* (2017) <<http://ourauckland.aucklandcouncil.govt.nz/articles/news/2017/11/45-per-cent-average-increase-for-auckland-properties/>>.

⁴⁹ See Robert J Shiller, *Irrational Exuberance* (Princeton University Press, 3rd ed, 2015) 37.

⁵⁰ See Robert Shiller, ‘The Trouble With Homeownership’ *Newsweek* (20 October 2008) 40. According to Jordan Rappaport, ‘[F]or many households in many years, renting and investing the saved cash flow has built more wealth than homeownership. On the other hand, about half of the time, homeownership has built more wealth than renting.’ See Jordan Rappaport, ‘The Effectiveness of Homeownership in Building Household Wealth’ (2010) Q IV *Economic Review, Federal Reserve Bank of Kansas City* 35, 36.

⁵¹ Shiller, above n 49, 40.

⁵² Christopher E Herbert, Daniel T McCue, and Rocio Sanchez-Moyano, ‘Is Homeownership Still an Effective Means of Building Wealth for Low-income and Minority Households? (Was it Ever?)’ (Joint Center for Housing Studies, HBTL-06, Harvard University, September 2013) 3.

⁵³ Some kind of capital profit sharing scheme, such as a national trust for the benefit of tenants funded by the tax gains of homeowners, is not unimaginable but seems politically implausible. If capital gains on disposals of principal residences were taxed, some redistribution would occur.

homeownership rates were steady in Australia at around 70 per cent for almost half a century,⁵⁴ but have fallen sharply more recently.⁵⁵ More than one-third of the population is now excluded from the wealth benefits of homeownership.⁵⁶ Since that one-third is increasingly and disproportionately represented by the young, who will be expected to fund the retirement and health costs of their preceding, propertied generations, government needs to give deep consideration to the housing experiences of younger people.

B. *Ontological Security*

Following Anthony Giddens, ‘ontological security comprises a deep, internal and personal sense of self’.⁵⁷ Tenants typically experience diminished ontological security relative to homeowners, but occupational security for owner-occupiers is not absolute.⁵⁸ They typically borrow from a bank to purchase a property with the loan being secured by a mortgage. In the event of default, the bank can seize and sell the property. Mortgagors are vulnerable in the event of interest rates increases or a fall in the housing market leading them into negative equity. Unlikely as it may be in practice, a local authority may apply to court to take possession of a property to satisfy unpaid rates. Furthermore, compulsory purchase orders may be imposed on individual property owners to enable public infrastructure projects.⁵⁹ Nevertheless, under settled conditions, owner-occupiers generally enjoy a degree of occupational certainty that few tenants experience.⁶⁰ But Kath Hulse and Vivienne Milligan observe:

⁵⁴ Parliament of Australia, *Trends in home ownership in Australia: a quick guide* (28 June 2017) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/TrendsHomeOwnership>.

⁵⁵ Ibid.

⁵⁶ The 2016 Australian census showed that overall homeownership had fallen significantly below 70 per cent. Not only does owner-occupancy vary considerably by age group but also by region. While only 26.7 per cent of people rented in Perth, 44.4 per cent of the population of Darwin were tenants. See Michael Janda, ‘Home ownership rates continue to plunge, housing stress widespread: Census’ *ABC* (27 June 2017) <<http://www.abc.net.au/news/2017-06-27/home-ownership-rates-continue-to-plunge-census/8654534>>.

In New Zealand, the overall homeownership rate fell from a peak of 73.8 per cent in 1991 to 63.2 per cent in 2017. See Stats NZ, *Dwelling and Household Estimates: June 2017 Quarter – Tables* (2017) <http://m.stats.govt.nz/browse_for_stats/population/estimates_and_projections/DwellingHouseholdEstimates_HOTPJun17qtr.aspx>.

⁵⁷ Rosemary Hiscock, Ade Kearns, Sally MacIntyre and Anne Ellaway, ‘Ontological Security and Psycho-Social Benefits from the Home: Qualitative Evidence on Issues of Tenure’ (2001) 18(1-2) *Housing, Theory and Society* 50, 57.

⁵⁸ Moving from tenancy (especially in state housing) to market ownership can present considerable financial risks for renters. See Kath Hulse, Terry Burke, Lisa Ralston and Wendy Stone, *The benefits and risks of home ownership for low-moderate income households* (AHURI, 2010).

⁵⁹ While this would be unlikely in Australia or New Zealand, in the United States, notwithstanding an allodial land ownership system, the doctrine of eminent domain may permit a local authority to transfer land from one private owner to another for public benefit, including increased property tax yield. See *Kelo v City of New London* 545 US 469 (2005).

⁶⁰ See, for example, Hiscock et al, above n 57, 64.

...although *de jure* security of tenure from a property rights perspective is clearly important, this is too narrow a focus to understand to what extent tenants experience security, and feel secure, in their housing ... a variety of legal, market, policy and cultural factors ... shape aspects of security – *de jure*, *de facto* and perceptual – for tenants.⁶¹

A simple ownership/tenancy binomial is not therefore plausible. Rather, policy focus should lie with promoting a lived experience of ontological security. That outcome is more likely to be delivered by owner-occupation, but enhanced tenancy rights and benefits might provide similar outcomes.

C. Benefits for Children

The United Nations Human Development Index ('HDI') is a 'composite measure of development of a country introduced by the ... a combination of the indicators of health ... education ... and living standards'.⁶² While the HDI lacks moral or spiritual nuance, it aggregates objective factors that indicate a flourishing human existence, for children, in particular. If high levels of owner-occupation are shown to be associated with high levels of human development, then claims for children's benefits from parental owner-occupation should be taken seriously. Indeed, Richard White and Michelle Green argue that the benefits for children of parental homeownership are sufficiently significant to justify 'government policies to encourage low-income households to become homeowners'.⁶³

Australia and Switzerland are joint second in the HDI ranking,⁶⁴ but Australia's owner-occupation rate of 65.5 per cent⁶⁵ is significantly higher than Switzerland's rate of 44.5 per cent.⁶⁶ We cannot, therefore, draw reliable conclusions about human development in countries with different levels of owner-occupation. Indeed, Romania has the highest level of owner-occupation in Europe (96.4 per cent)⁶⁷ but is ranked 50th in the HDI.⁶⁸ However, worse outcomes for children living in rented accommodation are likely in traditionally high homeownership countries. Donald Haurin and his co-authors conclude:

⁶¹ Kath Hulse and Vivienne Milligan, 'Secure Occupancy: A New Framework for Analysing Security in Rental Housing' (2014) 29(5) *Housing Studies* 638. See also Kath Hulse and Marietta Haffner, 'Security and Rental Housing: New Perspectives' (2014) 29(5) *Housing Studies* 573.

⁶² John Black, Nigar Hashimzade, and Gareth Myles, *A Dictionary of Economics* (Oxford University Press, online ed, 2017).

⁶³ Richard K Green and Michelle J White, 'Measuring the Benefits of Homeownership: Effects on Children' (1997) 41 *Journal of Urban Economics* 441, 460.

⁶⁴ See United Nations Development Program, *International Human Development Indicators* (2017) <<http://hdr.undp.org/en/countries>>.

⁶⁵ ABS, *2016 Census QuickStats* (2018) <http://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/036>

⁶⁶ Eurostat, *Distribution of population by tenure status, type of household and income group - EU-SILC survey* (2018) <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_lvho02&lang=en>.

⁶⁷ *Ibid.*

⁶⁸ United Nations Development Program, above n 64.

... owning a home leads the resident household to invest in their property and to produce a higher quality home environment ... in a well-controlled study, accounting for unobserved child characteristics, and accounting for unobserved parental characteristics that might lead to a spurious correlation between homeownership and child outcomes, we find substantial support for the hypothesis that homeownership increases child cognition and reduces behavior problems.⁶⁹

Insecure rented accommodation is one of a cluster of social disadvantages. ‘Doing well or poorly in one domain is likely to affect performance in other domains. For example, poor educational outcomes are associated with higher levels of unemployment and lower incomes, which in turn are linked to housing affordability problems, poorer health and lower levels of life satisfaction.’⁷⁰ ‘Losing a home can be devastating to health, education and other outcomes.’⁷¹ Johanna Lundberg and her co-authors observe:

...negative rental churn is a problem with financial and social implications for individuals as well as communities. We also know that very few people are not signing up for long-term leases – on average, people in Auckland rent their homes for 15 months.⁷²

A parent, who does not face the ‘work mobility barrier’ of homeownership,⁷³ may move from place-to-place searching for better wages and cheaper accommodation. And, of course, their children shift from school-to-school with the predictable educational consequences of serial transience.⁷⁴ Megan Sandel observes ‘housing instability, including chronically late rent payment, can affect the mental and physical health of family members of all ages’.⁷⁵ Indeed, despite having a roof over their heads, people with insecure tenure are recognised by

⁶⁹ Donald R Haurin, Toby L Parcel and R Jean Haurin, ‘Does Homeownership Affect Child Outcomes?’ (2002) 30(4) *Real Estate Economics* 635, 660.

⁷⁰ Ministry of Social Development, *The Social Report 2016* (2016) 15 <<http://socialreport.msd.govt.nz/documents/2016/msd-the-social-report-2016.pdf>>.

⁷¹ Alan Johnson, Philippa Howden-Chapman and Shamubeel Eaqub, *A Stocktake of New Zealand’s Housing* (New Zealand Government, 2018) 38. Experience in the United States indicates that evictions are associated with suicide. See Katherine A Fowler, R Matthew Gladden, Kevin J Vagi, Jamar Barnes and Leroy Frazier, ‘Increase in Suicides Associated with Home Eviction and Foreclosure During the US Housing Crisis: Findings From 16 National Violent Death Reporting System States, 2005–2010’ (2015) 105(2) *American Journal of Public Health* 311.

⁷² Johanna Lundberg and other authors, *Exploring Security of Tenure through Co-design* (2018) 7 <<http://www.mbie.govt.nz/publications-research/research/housing-and-property/Rental%20Tenure%20-%20Talkbook.pdf>>.

⁷³ Andrews and Sánchez, above n 3, 8 consider homeownership to be a barrier to job mobility. It is submitted that the ontological uncertainty that attends insecure tenure is a more significant economic and social concern than job mobility.

⁷⁴ See Marika Hill, ‘Schools lose half their students as poverty forces families to move’, *Sunday Star Times* (online), 29 May 2016 <<http://www.stuff.co.nz/national/education/80210599/Schools-lose-half-their-students-as-poverty-forces-families-to-move>>.

⁷⁵ See Megan Sandel and other authors, ‘Unstable Housing and Caregiver and Child Health in Renter Families’ (2018) 141(2) *Pediatrics* e20172199.

Australasian statistics agencies as being homeless.⁷⁶ Insecurity, it is submitted, is the critical issue for tenants, not lack of title.

D. Homeownership Comparisons

Conventional wisdom holds that Anglophone property-owning democracies have high rates of homeownership, while continental European countries have high rates of settled tenancies.⁷⁷ In 2004, Australia and New Zealand, as well as the United Kingdom, had overall homeownership rates of around 70 per cent, whereas Denmark (51.6 per cent), Germany (41.0 per cent) and Switzerland (38.4 per cent) had much lower rates.⁷⁸ A decade later, the rates in the Anglophone countries had fallen, whereas the rates in the continental European countries had increased. (See table 1 below.)

Country	Circa 1990s	2004	2014-16
Australia ⁸⁰	71.4	69.5	65.5 ⁸¹
New Zealand	73.8 ⁸²	67.8 ⁸³	64.8 ⁸⁴
United Kingdom	67.5	70.7	64.4 ⁸⁵

⁷⁶ See ABS, above n 26; New Zealand Parliament, *Homelessness in New Zealand* (2014) <<https://www.parliament.nz/en/pb/research-papers/document/00PLEcoRP14021/homelessness-in-new-zealand>>.

⁷⁷ C Martin, K Hulse and H Pawson, *The Changing Institutions of Private Rental Housing: an International Review*, AHURI Final Report No. 292 (2018) 5 <<http://www.ahuri.edu.au/research/final-reports/292>>.

⁷⁸ Andrews and Sánchez, above n 3, 9.

⁷⁹ *Ibid.* This study did not include New Zealand, and only provided figures for 1990 and 2004.

⁸⁰ Other sources indicate similar but different rates for Australia, i.e. 68.9 per cent (1991), 69.8 per cent (2006) and 67.1 per cent (2016), according to Parliament of Australia, above n 54. ABS recorded a total for owned of 67 per cent for the 2011 census. See ABS, *Housing tenure data in the Census (2016)* <<http://www.abs.gov.au/websitedbs/censushome.nsf/home/factsheetshtdc>>.

⁸¹ ABS, above n 65.

⁸² Stats NZ, *Owner-Occupied Households* <http://archive.stats.govt.nz/browse_for_stats/people_and_communities/Households/housing-profiles-owner-occupied.aspx>.

⁸³ The homeownership rate was 67.8 per cent in 2001 and 66.9 per cent in 2006. See William Cochrane and Jacques Poot, 'Homeownership and the New Zealand Labour Market' (2006) *Labour, Employment and Work* 416, 416 <<https://ojs.victoria.ac.nz/LEW/article/download/1607/1450>>.

⁸⁴ Stats NZ, *2013 Census QuickStats about housing* (2014) <<http://archive.stats.govt.nz/Census/2013-census/profile-and-summary-reports/quickstats-about-housing/home-ownership-households.aspx>>.

⁸⁵ Eurostat, above n 66.

Denmark	51.0	51.6	63.3 ⁸⁶
Germany	36.3	41.0	52.5 ⁸⁷
Switzerland	33.1	38.4	44.5 ⁸⁸

With the exception of Australia (joint 2nd), the Norse-Germanic countries (Switzerland joint 2nd, Germany 4th, Denmark 5th) ranked higher in the 2016 *Human Development Report* than the Anglo countries (New Zealand 13th and the United Kingdom 16th). No conclusion can plausibly be drawn beyond this: *between*, rather than *within*, OECD countries, higher rates of homeownership do not generally correspond with high levels of human development. In traditional property owning democracies, in which owner-occupation is falling, government should seek to close the overall experiential gap between ownership and tenancy.

IV TOWARDS SYNTHETIC OWNER-OCCUPATION TENANCIES

Owner-occupation provides considerable individual benefits, but not everyone who wants to a homeowner can become one under current conditions. Recognition of these facts leads to the proposal of synthetic owner-occupation, and the realisable possibility of synthetic owner-occupation tenancies ('SOO tenancies'). Tenants are practically excluded from sharing the wealth benefits of owner-occupation. They also forego the tax benefits of homeownership.⁸⁹ Government should, therefore, be alert to preferential tax treatment of home-owners which may unduly amplify the benefits of homeownership. However, a more practicable goal in the short to medium-terms lies with reducing the differences between the ways owner-occupiers and tenants experience housing. This can be done by promoting SOO tenancies; in other words, ensuring tenants experience home in a way similar to owner-occupiers.

Since Switzerland has been used in this article as a comparator for Anglophone property-owning democracies, it is pertinent to ask why, unlike most Australasians, have most Swiss traditionally rented?⁹⁰ Steven Bourassa and Martin Hoesli suggest that, in Switzerland, despite high incomes, houses are very expensive due to a lack of exploitable land.⁹¹ But this

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ For a discussion, see J Daley, B Coates and T Wiltshire, *Housing Affordability: Re-imagining the Australian dream* (Grattan Institute, 2018) 79.

⁹⁰ For a discussion of the traditionally low rates of homeownership, despite high incomes, in Switzerland see Elia Werczberger, 'Home Ownership and Rent Control in Switzerland' (1997) 12(3) *Housing Studies* 337.

⁹¹ Steven C Bourassa and Martin Hoesli, 'Why Do the Swiss Rent?' (Cahier de Reserches, Faculté des Sciences Économiques et Sociales, Université de Genève, 2009) 32.

explanation is not wholly plausible.⁹² Germany also has relatively low homeownership rates but no obvious shortage of land. Andrews and Sánchez observe, ‘rental market regulations impact homeownership by making renting more attractive’.⁹³ In other words, rented properties can be made more home-like. In Germany and Switzerland, on the one hand, stable tenancies are created by secure tenure and long leases,⁹⁴ and, on the other hand, tenants’ assume personal responsibility to maintain the interior of the place.⁹⁵ SOO tenancies could be structured similarly.

Many superannuitants are prepared to forego freehold in their own homes to take up licences to occupy specific units in retirement villages,⁹⁶ effectively trading-off ownership and potential capital gains for the greater ontological security presented by living in a community of peers with professional curation.⁹⁷ These occupational licences can be seen as an exemplary form of synthetic owner-occupation.⁹⁸ Occupants can typically keep a pet when taking up a licence, and may personalise the property to make it feel like their home. Significantly, government may consider licence-holding as tantamount to ownership and grant tax benefits traditionally reserved to owner-occupiers. In New Zealand, such licence-holders, unlike lessees, are deemed ratepayers and may apply for a low-income rates rebate.⁹⁹

⁹² See Florida, above n 39 on diversified investment opportunities in highly urbanised countries, such as Switzerland.

⁹³ Dan Andrews and Aida Caldera Sánchez, ‘The Evolution of Homeownership Rates in Selected OECD Countries: Demographic and Public Policy Influences’ (2011) *OECD Journal: Economic Studies* 207, 231 <http://dx.doi.org/10.1787/eco_studies-2011-5kg0vswqpmg2>.

⁹⁴ See Andreas Furrer and David Vasella, *Tenancy Law Project – Swiss Report* <<https://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawSwitzerland.pdf>>.

⁹⁵ Ibid. However, Hazel Easthope notes that ‘even in [Germany] a country that affords significant rights to private tenants regarding security of occupancy and the right to undertake maintenance and repairs, the right to personalise a dwelling remains contested’. She was referring to the right to hammer a nail into an internal wall in order to hang a picture that was not confirmed by a German court before 2010. See Hazel Easthope, ‘Making a Rental Property Home’ (2014) 29(5) *Housing Studies* 579, 588.

⁹⁶ In New Zealand, 12 per cent of those aged over 75 live in retirement villages. See Rob Stock, ‘People no longer want to live in fortress-like gated retirement villages’ *Stuff* (online), 24 August 2018 <<https://www.stuff.co.nz/business/money/106509545/people-no-longer-want-to-live-in-fortresslike-gated-retirement-villages>>.

⁹⁷ Rob Stock, ‘Retirement living comes at a high price’ *Sunday Star Times* (online), 8 February 2015 <<https://www.stuff.co.nz/business/money/65858484/retirement-living-comes-at-a-high-price>>.

⁹⁸ Traditionally a lease grants a legal interest in the land and the lessee’s interest binds the lessor’s successors in title (an action in rem), whereas a licence is a personal right that generally only binds the original licensor and original licensee (an action in personam). A licensee is therefore in a more precarious position legally than a lessee. A great deal of trust – and regulatory oversight – is therefore necessary for retirement villages to function. This system of occupational licences could prove disastrous should one or more of the major retirement village providers collapse.

⁹⁹ See *Rates Rebate (Retirement Villages Residents) Amendment Act 2018* (NZ), effective 1 July 2018.

A. *A Model for SOO Tenancy*

Reprising, and seeking to neutralise, the disadvantageous features of tenancy noted in the Introduction, it is proposed that a model for SOO tenancy would manifest the following basic characteristics:¹⁰⁰

- Affordability;
- Security of tenure;
- Some form of rent increase restrictions;
- Features of a home; and
- Decent living conditions.

1 *Affordability*

According to Judith Yates

...a high proportion of lower income households face high housing costs because of the overall shortage of affordable housing. They do not have the option of limiting their housing costs to 30 per cent of income by living in a small dwelling or by locating to the capital city fringe or in a non-metropolitan region. There are simply not enough low-rent dwellings available.¹⁰¹

The benchmark of 30 per cent Yates mentions is generally used to indicate unaffordable housing.¹⁰² Alan Johnson and his co-authors note, tenants often pay a greater proportion of their household income for accommodation than owner-occupiers.¹⁰³ Yates' analysis demonstrates that the long-term solution lies in an adequate supply of affordable, rental housing in the inner-city places where people need to live. In the interim, rent assistance must also be adequate.

2 *Security of Tenure*

Security of tenure laws in Anglophone jurisdictions are often weak relative to other OECD countries.¹⁰⁴ 'Only Australia, New Zealand, the United Kingdom (other than Scotland) and

¹⁰⁰ Tenants should also take personal responsibility for respecting the ultimate ownership of the landlord. However, current concerns lie with tenants' rights, rather than their duties. For a discussion of being or becoming a 'good tenant' see Cameron Parsell, Ornella Moutou, Eduardo Lucio and Sharon Parkinson, *Supportive Housing to Address Homelessness* AHURI Final Report No 240 (Australian Housing and Urban Research Institute at The University of Queensland, May 2015).

¹⁰¹ Judith Yates, 'Why Does Australia Have an Affordable Housing Problem and What Can Be Done About It?' (2016) 49(3) *Australian Economic Review* 328, 331.

¹⁰² See, for example, Matthew Thomas and Alicia Hall, *Housing affordability in Australia* Parliament of Australia <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/HousingAffordability>.

¹⁰³ Alan Johnson, Philippa Howden-Chapman and Shamubeel Eaqub, *A Stocktake of New Zealand's Housing* (Ministry of Building and Housing, 2018) 10. The authors' research relates to New Zealand but Australian tenants would have a similar experience.

¹⁰⁴ Daley et al, above n 89, 127.

some US jurisdictions allow termination without grounds.¹⁰⁵ Chris Martin and his co-authors observe ‘[T]he foremost approach to assuring tenants’ security is to allow landlords to terminate on prescribed grounds only. This is the situation currently in Germany, Sweden, Scotland, most of the Canadian provinces and some major US cities.’¹⁰⁶ In the light of falling homeownership rates, low-protection jurisdictions have taken tentative steps towards alleviating the precarious position of tenants. The United Kingdom’s Conservative government has proposed mandatory three year leases, whereas the country’s Labour opposition has called for an end to no fault evictions.¹⁰⁷ New Zealand’s Labour-led government has also promised improved tenancy protections, including an end no fault terminations, and extending notice periods from 42 to 90 days.¹⁰⁸ The Victorian government’s *Heading for Home* inquiry took an in-depth look at the *Residential Tenancies Act 1997* (Vic),¹⁰⁹ and made various recommendations including the removal of ‘termination for no specified reason end the end of the first fixed term of an agreement’.¹¹⁰

3 *Rent Increase Restrictions*

Of the ten jurisdictions Martin et al analysed, ‘[r]ent increases are regulated in four countries – Belgium, Germany, Spain and Sweden – most of the Canadian provinces and some major US cities by limiting them to a stated guideline or reference rent. Ireland and Scotland do so in designated “rent pressure zones”.’¹¹¹ The British Labour Party has proposed rent restrictions,¹¹² whereas New Zealand’s Labour-led government has more modestly promised to restrict rent increases to once, as opposed to the currently permitted twice, a year.¹¹³ In her analysis of rent controls in the United States, Radin acknowledges the classical economic arguments against rent controls but asks: ‘Might the level of efficiency losses be outweighed by other gains? Might some right of tenants “trump” the utility analysis?’¹¹⁴ Restricting the frequency or magnitude of rent increases may not conform with orthodox theories of market efficiency but might provide tenants with enhanced ontological security.

4 *Features of Home*

¹⁰⁵ Martin et al, above n 77, 5.

¹⁰⁶ Ibid.

¹⁰⁷ Mattha Busby, ‘Labour says government plans to provide renters with greater stability are “meaningless”’ *The Independent* (online), 1 July 2018 <<https://www.independent.co.uk/news/uk/home-news/conservative-renters-security-three-year-tenancies-labour-meaningless-a8425456.html>>.

¹⁰⁸ Labour, *Our plan to start fixing the housing crisis* (2017) <<https://www.labour.org.nz/housing>>.

¹⁰⁹ Victoria State Government, *Heading for Home: Residential Tenancies Act Review Options Discussion Paper* (2016) <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/4714/8660/2001/Publication_-_External_-_FSH_Residential_Tenancies_Act_Options_Paper_final_-_December_2016.pdf>.

¹¹⁰ Martin et al, above n 77, 5.

¹¹¹ Ibid.

¹¹² Busby, above n 107.

¹¹³ Labour, above n 108.

¹¹⁴ Margaret Jane Radin, ‘Residential Rent Control’ (1986) 15(4) *Philosophy & Public Affairs* 350, 352.

Security of tenure and rent increase restrictions provide tenants with a degree of ontological certainty but do not, in themselves, constitute a home. Home is different from the particular legal concept of real property ownership, which is demonstrated in the most extreme form by *ius abutendi* (the right to destroy).¹¹⁵ The owner-occupier of a house can prove their proprietorship by wantonly smashing holes in a drywall with a hammer, without sanction, but it would be untenable to propose that a tenant should have a similar freedom. A better indication of a home or homeliness is the right to put a nail in a wall to hang a picture – or to be able to plant flowers and vegetables, and to have a pet.¹¹⁶ Hazel Easthope emphasises ‘the importance of home in housing policy that takes into account the importance for residents of having both security of occupancy and the ability to make changes to their dwellings’.¹¹⁷

5 *Decent Living Conditions*

While some homeowners may also live in substandard homes, tenants are particularly vulnerable: for example, in New Zealand, ‘36% of renters have insulation compared to 73% of home owners and renters are less likely to have double glazing, a heat pump, or a ventilation system’.¹¹⁸ Regulation is the primary tool for ensuring decent living conditions; for example, the *Healthy Homes Guarantee Act 2017* (NZ) introduces healthy homes standards (on matters such as heating, insulation and ventilation) to the *Residential Tenancies Act 1986* (NZ),¹¹⁹ but tax signals and concessions may help.

V TAXES TO PROMOTE SOO TENANCIES

Tax measures, such as including a person’s primary residence in the capital gains tax (‘CGT’) net, could narrow the differences in wealth outcomes of tenants and homeowners, but are politically implausible. Besides, this article is principally concerned with the consumption experiences of housing. In part IV, a model of SOO tenancy was proposed which requires: affordability; security of tenure; some form of rent increase restrictions; features of a home; and decent living conditions. These are, in the main, regulatory issues, but tax measures may also contribute to realisation of the model.¹²⁰

¹¹⁵ See A M Honoré, ‘Ownership’ in A G Guest (ed), *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford University Press, 1961) 107, 118.

¹¹⁶ Jonathan Hair and Brendan Arrow, ‘Victorian tenants given right to have a pet under sweeping changes to rental laws’ *ABC* (8 October 2017) <<http://www.abc.net.au/news/2017-10-08/victorian-tenants-allowed-pets-in-rental-properties/9027000>>.

¹¹⁷ Easthope, above n 95, 594.

¹¹⁸ Findings from the *HRV State of the Home Survey 2017* in ‘The renter vs landlord war wages on’ *Scoop* (2 August 2017) <<http://www.scoop.co.nz/stories/AK1708/S00049/the-renter-vs-landlord-war-wages-on.htm>>.

¹¹⁹ As ratifying countries of the International Bill of Rights, Australian governments are also obliged to ensure that low-income owner-occupiers also live in decent accommodation: see, in particular, article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

¹²⁰ Barrett, above n 9 examines relevant tax issues in greater detail.

A. AHURI Recommendations

In addition to reform of residential tenancy law, in their research for the Australian Housing and Urban Research Institute ('AHURI'), Sharon Parkinson and her co-authors identify three other 'key institutional areas that have direct impact for the sustainability and growth of the PRS [private rental sector] in Australia', these are: negative gearing; capital gains tax; and the Commonwealth Rent Assistance ('CRA').¹²¹

1 Negative Gearing

This article is concerned with the differential position of owner-occupiers and tenants, rather than differences between property investors and others. Nevertheless, negative gearing may impact on levels of homeownership, and consequently the number of people who must rent. According to the centre-right think tank Onward, more than two million families in the United Kingdom are denied homeownership because of buy-to-rent tax concessions.¹²²

Provided a taxpayer can show an intention to generate income through an investment in a rental property, it is not obvious why, in terms of general income tax principles, deductions should not be allowed against their other income. Nevertheless, New Zealand has announced plans to disallow negative gearing.¹²³ Adopting a more subtle approach, Parkinson et al suggest that the concession should be used as a signal to encourage landlords to invest in areas of need, and to enter into long-term tenancies.¹²⁴ Following this idea, it is proposed that negative gearing could be used to promote SOO tenancies.

2 CGT

According to Parkinson et al, policy in the key areas, including CGT, 'has been unremarkable and has failed to respond to key changes and challenges in housing provision and housing trajectories over successive decades in Australia.'¹²⁵ It would be a matter of speculation to predict whether the changes to CGT taxed announced by the Turnbull government in the 2017 Budget will be effective,¹²⁶ but it is significant that CGT concessions are seen as a means of promoting affordable housing. In addition to the usual 50 per cent discount on capital gains for

¹²¹ Sharon Parkinson, Amity James and Edgar Liu, *Navigating a Changing Private Rental Sector: Opportunities and Challenges for Low-Income Renters*, AHURI Final Report No 302 (2018) 78 <<https://www.ahuri.edu.au/research/final-reports/302>>. See, also Martin et al, above n 77. CRA is not a tax but is a relevant benefit.

¹²² See Jim Pickard and Aime Williams, 'Conservative think-tank seeks end to buy-to rent tax break' *Financial Times* (online), 24 June 2018 <<https://www.ft.com/content/be0d8b7c-7635-11e8-b326-75a27d27ea5f>>.

¹²³ See Hon Grant Robertson, *Budget 2018: Future Proofing New Zealand's Economy* (1 May 2018) <https://www.beehive.govt.nz/sites/default/files/2018-05/Grant%20Robertson%20pre-Budget%20speech%201%20May_0.pdf>.

¹²⁴ Parkinson et al, above n 121, 81.

¹²⁵ Ibid 78.

¹²⁶ Commonwealth of Australia, *Budget 2017–18: budget overview* (9 May 2017) <<http://www.budget.gov.au/2017-18/content/glossies/overview/download/Budget2017-18-Overview.pdf>>.

assets held for at least 12 months, individuals will be entitled to a discount of up to 10 per cent for capital gains on gains attributable to disposal of dwellings used to provide affordable housing for three years or more.¹²⁷ Similar concessions will apply for individuals investing in qualifying trusts or managed investment trusts that invest in dwellings that provide affordable housing for at least three years.¹²⁸ If the aim of these concessions is to promote long-term investment in affordable rental properties, three years seems an unduly short period to promote that outcome.¹²⁹

New Zealand does not currently levy a general CGT but, at the time of writing, the possibility of introducing such a tax is under investigation by the Tax Working Group. In its interim report, the Group notes the likely connection between housing affordability and capital taxation but observes '[t]here is an open question as to whether an extension of capital income taxation would have a material effect on the housing market. A concern for the Group is to understand these impacts further.'¹³⁰ A particular issue for the Group relates to 'assumptions about the elasticity of supply [as these are] are critical to an assessment of the distributional impacts of tax changes in the housing market': the absence of a capital gains tax may have benefitted low-income renters through lower rents.¹³¹

3 CRA

CRA 'is a non-taxable income supplement payable to eligible people who rent in the private rental market or community housing'.¹³² Accommodation Supplement is the New Zealand equivalent of CRA.¹³³ The critical feature of any such benefit is that it should relate to 'a meaningful affordability measure'.¹³⁴

¹²⁷ See the explanatory memorandum to the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No 2) Bill 2017.

¹²⁸ The dwelling must pass conditions relating to: residential premises; property management; the National Rental Affordability Scheme; and MIT membership. *Ibid.*

¹²⁹ Compare with the short affordability period under the abandoned National Rental Affordability Scheme, relative to the United States' Low Income Housing Tax Credit scheme. See Anita Blessing and Tony Gilmour, 'The Invisible Hand? Using Tax Credits to Encourage Institutional Investment in Social Housing' (2011) 11(4) *International Journal of Housing Policy* 453, 466.

¹³⁰ Tax Working Group, *Future of Tax: Interim Report* (September 2018) 6 <<https://taxworkinggroup.govt.nz/sites/default/files/2018-09/twg-interim-report-sep18.pdf>>.

¹³¹ *Ibid* 56.

¹³² See Australian Government, *Housing Support* (2018) <<https://www.dss.gov.au/housing-support/programmes-services/commonwealth-rent-assistance>>.

¹³³ See Ministry of Social Development, *Accommodation Supplement* <<https://www.workandincome.govt.nz/products/a-z-benefits/accommodation-supplement.html>>.

¹³⁴ Parkinson et al, above n 121, 79. See also Productivity Commission, *Introducing Competition and Informed User Choice into Human Services: Reforms to Human Services* (Inquiry Report No 85, 27 October 2017) <<https://www.pc.gov.au/inquiries/completed/human-services/reforms/report/human-services-reforms.pdf>>.

B. *Other Possibilities*

Alan Holmans and his co-authors identify numerous international policies aimed at promoting affordable rentals.¹³⁵ For tenants, the main concessions are: tax deduction of rents; tax credits for low-income tenants; housing allowances; government guarantees of rent payments for low-income households. For landlords, the main concessions are: income tax exemptions for providers of social housing; depreciation for rental units; deductibility of interest on loans, and operating expenses; negative gearing; reduced CGT rates; tax relief for interest from mortgage-backed securities for housing; setting off of capital outlays against rental income. Potential landlords may be encouraged by: taxation of vacant properties to bring them back into use; property tax discounts for new or renovated houses; reduced rates of value added tax on conversions or new builds; subsidised loans for developers of affordable housing; land provided for affordable housing at below market value; grants to refurbish empty homes. Finally, investors may be incentivised by: tax relief on investment in construction of affordable housing; preferential tax treatment for housing-finance institutions; preferential tax treatment for employer-provided housing; grants for construction or renovation of affordable housing; taxation of empty land to encourage housebuilding.

Given this plethora of possibilities, questions need to be asked about the likely effectiveness of tax concessions. Since a lack of supply of landlords offering SOO tenancies is the principal problem,¹³⁶ how could taxes encourage the ‘right’ kind of landlord?

C. *Landlords*

Who does government want to be landlords? Perhaps it is not a matter whether SOO tenancies are offered by ‘mum and dad’ private landlords, community housing providers or institutional investors, provided all are subject to appropriate regulation.¹³⁷ However, it is widely believed that ‘mum and dad’ property owners lack professionalism,¹³⁸ and do not – and, perhaps, cannot – take the long-term perspective of a large corporation, for-profit or otherwise.¹³⁹

¹³⁵ Alan Holmans, Kathleen Scanlon and Christine M E Whitehead, *Fiscal policy instruments to promote affordable housing* (Research Report VII, Cambridge Centre for Housing and Planning Research, 2002) 19. The authors also identify various measures designed to help low to medium income owners buy their own homes.

¹³⁶ Yates, above n 101, 331 notes: ‘The supply of affordable private rental housing, however, has declined steadily over the past 25 years, both in absolute terms and in relation to the growing number of lower income households in private rental.’ Affordability is a key feature of SOO tenancies.

¹³⁷ See Martin et al, above n 77 on the strictly regulated German market which is dominated by private landlords.

¹³⁸ Ibid 124-26. Property managers must also develop as a profession. See Anglican Advocacy, *A Decade Overdue: The need for regulation of property management in New Zealand* (August 2018) <http://www.anglicanadvocacy.org.nz/wp-content/uploads/2018/08/AA_Property-Management-Report_WEBVIEW.pdf>.

¹³⁹ Daley et al, above n 89, 72.

As Treasurer, Scott Morrison outlined the structure of the Australian rental market, and thereby implied its weaknesses.¹⁴⁰ In Australia, 27 per cent of rental residential properties are owned by private investors, whereas the corresponding figure for the United Kingdom is 18 per cent. Conversely, 18 per cent of rental properties are owned by public or community organisations in the United Kingdom, compared to five per cent in Australia. Some 2 million Australian taxpayers own a rental property, with 72 per cent owning one property, and 90 per cent owning no more than two properties. Investor demographics are similar in New Zealand. According to the Ministry for Building, Innovation & Employment, almost 80 per cent of investors own one property, and 97.5 per cent fewer than six properties.¹⁴¹ Generally, unlike their United Kingdom counterparts, private Australasian investors are principally seeking capital gains, rather than a steady flow of rental income.¹⁴² Reducing CGT concessions or negative gearing is, therefore, politically implausible. Mass exit of small investors from the rental market might benefit those currently excluded from homeownership, but is unlikely to benefit tenants. Nevertheless, achieving more balance among providers, over time, is clearly in the public interest.

John Daley and his co-authors support institutional landlords.¹⁴³ But, as Martin et al observe, large corporate landlords are unusual internationally, and, while they ‘are now a standing item on the Australian housing policy agenda’, they do not yet exist, and how they should be structured is unclear.¹⁴⁴ Not-for-profit providers seem uncontroversial. In New Zealand, for example, qualifying community housing entities, which assist low-income people into the housing market,¹⁴⁵ have donee organisation status,¹⁴⁶ and their income of is tax exempt.¹⁴⁷ The provision of social services by for-profit companies has not largely been successful.¹⁴⁸ Social enterprises, such as the United Kingdom community interest company (‘CICs’), may be better placed to provide affordable rental housing than traditional charities,¹⁴⁹ or for-profit companies.

¹⁴⁰ Morrison, above n 8.

¹⁴¹ MBIE Official Information Act Request (OIA 1538, 9 July 2015). Even allowing for different methodologies, the Reserve Bank’s conclusion that more than a quarter of investors in residential properties hold seven or more properties seems implausible. Reserve Bank of New Zealand, *Financial Stability Report* (May 2015) 14 <<https://www.rbnz.govt.nz/-/media/ReserveBank/Files/Publications/Financial%20stability%20reports/fsr-may2015.pdf>>.

¹⁴² Morrison, above n 8.

¹⁴³ Daley et al, above n 89, 72.

¹⁴⁴ Martin et al, above n 77, 4.

¹⁴⁵ Section 225D of the *Tax Administration Act 1994* (NZ) provides for a regulation to be set describing who can be a client or beneficiary of a community housing entity.

¹⁴⁶ *Income Tax Act 2007* (NZ) s LD (3)(1)(ab).

¹⁴⁷ *Ibid* s CW 42B.

¹⁴⁸ See, for example, Gill Plimmer, ‘Serco and Home Office criticised over Yarl’s Wood failures’ *Financial Times* (online), 8 July 2016 <<https://www.ft.com/content/6243e22c-441f-11e6-9b66-0712b3873ae1>>.

¹⁴⁹ Robert Coffey, Judith Smyth and Max Hogg, *Using the Community Interest Company model in the housing sector: A marriage in the making?* (Joseph Rowntree Foundation, 2007).

While CICs do not themselves attract tax concessions,¹⁵⁰ since social enterprises fudge the traditional distinctions between charities and for-profit companies, tax rules might be changed to accommodate their dual purposes.

D. *Investors*

According to Anita Blessing and Tony Gilmour:

Within the context of recoil from public spending and private debt, a quest has emerged for what has become the ‘Holy Grail’ of contemporary social housing policy: steady streams of large-scale institutional equity investment. The target investors are banks, insurance companies, investment vehicles and pension funds.¹⁵¹

One of the key aims of the policy changes announced in 2017 Australian Budget was to guide investments, particularly from overseas property investors, into the affordable rental market. Other measures could be taken.

1 *Real Estate Investment Trusts (‘REITs’)*

A social or affordable housing REIT can be a tax efficient mechanism for investment in social or affordable housing properties. (Tax efficiency for REITs lies with their usual tax transparency.) However, according to Margie Carlson

REITs typically generate returns for their investors by driving cost efficiencies through the use of professional management, by making property improvements which generate higher rents and by property sales in high growth markets. These methods make REITs successful in the private market but may make them ill-suited for affordable housing purposes because affordable housing will generate a lower return for investors.¹⁵²

2 *Superannuation Funds*

The lower return from affordable housing REITs may not be a problem for superannuation funds that require predictable returns in the long-term. For Graeme Newell and his co-authors, the ‘unlisted wholesale affordable housing fund is the most effective model to enhance the supply of affordable housing’; they argue that ‘re-shaping the policy setting on taxation to encourage the development of this affordable housing fund model is paramount’, notably providing a company tax exemption.¹⁵³

3 *Investment Tax Relief*

¹⁵⁰ But see HMRC, *Social investment tax relief factsheet* (2016) <<https://www.gov.uk/government/publications/social-investment-tax-relief-factsheet>>.

¹⁵¹ See Blessing and Gilmour, above n 129, 454.

¹⁵² Margie Carlson, *Alternative Sources of Capital for the Social/Affordable Housing Sector in Canada* (Housing Services Corporation/BC Housing, 2014) 8 <<https://www.refbc.com/sites/default/files/S13-Alternative-Sources-of-Capital-for-Social-Affordable-Housing-Sector.pdf>>.

¹⁵³ Graeme Newell, Chyi Lin Lee and Valerie Kupke, *The opportunity of unlisted wholesale residential property funds in enhancing affordable housing supply* (AHURI Final Report No 249, October 2015) 74.

The United Kingdom operate two kinds of investment tax relief. Community Investment Tax Relief is designed ‘to promote private investment in disadvantaged communities by providing a tax incentive to individuals and companies that invest in not-for-profit and profit-seeking enterprises in or serving those communities’.¹⁵⁴ Furthermore, investments in social enterprises and charities may qualify for Social Investment Tax Relief which allows income tax relief and CGT deferral.¹⁵⁵

The challenge for government lies in using tax concessions to promote effective investment in the most capable providers of SOO tenancies. It is not clear that governments in Australia or New Zealand have as yet formulated a coherent response to that challenge.

VI CONCLUSION

This article has noted the sharp decline in homeownership in Australia and New Zealand but, in principle, is agnostic on whether government should seek to reverse that trend, despite owner-occupation remaining a normal expectation. The Rawlsian proposal of property ownership as a basic principal of justice has not informed Australasian welfare-state capitalism, even in the neoliberal era. However, falling levels of homeownership lead to greater pressure on the affordable rental market, and this should be government’s principal policy focus.

It is proposed that policy efforts should be directed to ensuring that, to the extent practicable, tenants should experience *home* in similar ways to owner-occupiers. Differences in wealth experiences of housing between owners and tenants can be reduced, but radical equalising downwards is politically implausible. A more achievable goal is to use regulation, primarily, but also tax signals and incentives to promote similar consumption experiences of housing. This approach would level upwards.

A basic model of synthetic owner-occupation is proposed. SOO tenancies would ensure tenants enjoy affordability, security of tenure, some rent increase restrictions, elements of home, and decent housing conditions. Governments in New Zealand and Victoria, in particular, are already taking appropriate regulatory measures towards this end. AHURI researchers, among others, have indicated the types of tax signals and incentives that might promote adoption of a more professional and long-term approach by landlords. This article suggests greater involvement and development of social enterprise should also be investigated.

Younger people who, on the one hand, are increasingly excluded from homeownership, but, on the other hand, are expected to fund the retirement and health costs of preceding, propertied generations must be provided with housing options that are experientially similar to homeownership. Government should, therefore, use its powers of taxation to foster SOO tenancies.

¹⁵⁴ HMRC, *Community investment tax relief manual* (2016) <<https://www.gov.uk/hmrc-internal-manuals/community-investment-tax-relief-manual/citm1010>>.

¹⁵⁵ See HMRC, above n 150.

THE FIRM: RE-THINKING TUTORIALS TO PROVIDE GREATER AUTHENTICITY FOR FUTURE TAX PROFESSIONALS

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ABSTRACT

Professional identity and business awareness are seen as key generic skills that graduates need in their professional careers. However, a number of studies demonstrate that such skills are lacking in graduates, with students not always appreciating their importance. Creating curriculum and learning opportunities for such skill development can be challenging in an already crowded curriculum. This article reports a simulated work integrated learning scenario – The Firm – which was integrated into tax tutorials. The findings of the outcomes of the firm case study are reported, including observations about the advantages and disadvantages of the approach. It is argued that with a re-think of tax tutorials, it is possible to provide a learning environment with greater authenticity that can assist to enhance the students' professional identity, as well as their technical knowledge; although it is not without its challenges. It is with such enhancement, that students will be better placed to commence their careers as tax advisors.

Keywords: generic skills, work integrated learning, professional identity, business awareness, tax

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I INTRODUCTION

The way we structure teaching and learning activities can have a fundamental influence on students' learning. In this design there are many competing considerations and practical realities that may impede innovative practices being adopted. Additionally, the context of advances in technology and changes in the way people work, can lead to criticism of the content of our courses as being largely redundant for the future. Although change is not a new phenomenon and for decades there has been calls our teaching to focus on the basic knowledge and enhance students' capability to use this knowledge flexibly, as well as how to keep on learning.¹ To deal with this dynamic future it has been argued by CA ANZ that what is required is a 'greater focus on the skills gained, and their portability between different roles and projects'.² From across Australia and New Zealand 1,207 business leaders have identified that the most important skills in the future as communication skills; problem solving and adaptability and agility, but also skills around 'relationships', such as collaboration and the ability to build relationships quickly.³ Tax is no different, as research as demonstrated the importance of communication for tax advisors.⁴ Tan and Veal researched the level of conceptual knowledge and technical ability required in terms of tax in New Zealand and considered the perspective from educators and an industry prospective.⁵

In terms of university education, Dall'Alba & Sandberg have argued that there needs to be 'a substantial shift away from a traditional focus on transfer of knowledge and skills to developing understanding of, and in, professional practice'.⁶ This is supported by consistent evidence of a skills gap between industry expectations and their graduates;⁷ and this can be especially the case in terms of 'generic skills' and 'professional awareness'.⁸ This gap can make it hard for graduates as they transition to the work place; which can lead to academically successful

¹ Paul Ramsden, *Learning to Teach in Higher Education* (Routledge, 1992).

² Chartered Accountants Australia and New Zealand (CA ANZ), *The Future of Talent: OPPORTUNITIES UNLIMITED* (CA ANZ, 2017), 18.

³ *Ibid.*

⁴ Sharon Hayes, Brett Freudenberg and Debbie Delaney, 'Role of Tax Knowledge and Skills: What are the graduate skills required by small to medium Accounting firms' (2018) 13(1) *Journal of Australasian Tax Teachers Association* 152,

⁵ Lin Mei Tan and John Veal, 'Tax Knowledge for Undergraduate Accounting Majors: Conceptual v Technical' (2005) 3(1) *eJournal of Tax Research* 28.

⁶ Gloria Dall'Alba and Jörgen Sandberg, 'Unveiling Professional Development: A Critical Review of Stage Models' (2006) 76(3) *Review of Educational Research* 383, 401.

⁷ Binh Thanh Bui and Brenda Porter, 'The Expectation-Performance Gap in Accounting Education: An exploratory study' (2010) 19(1-2) *Accounting Education: An International Journal* 23; Paul De Lange, Beverley Jackling and Anne-Marie Gut, 'Accounting graduates' perceptions of skills emphasis in undergraduate courses: an investigation from two Victorian universities' (2006) 46(3) *Accounting and Finance* 365.

⁸ AC Nielsen Research Services, *Employer satisfaction with graduate skills – Research Report* (Department of Education, Training and Youth Affairs, 2000); Precision Consultancy, *Graduate employability skills*, Prepared for Business, Industry and Higher Education Collaboration Council (Precision Consultancy, 2007); Marie H. Kavanagh and Lyndal Drennan, 'What skills and attributes does an accounting graduate need? Evidence from student perceptions and employer expectations' (2008) 48 *Accounting and Finance* 279.

students struggling in a work environment with different expectations.⁹ Part of this adjustment for students to their professional careers, can relate to the extent that students identify and internalise professional values during their degrees.¹⁰ This can be seen as ‘professional socialisation’ where students start developing and sharing professional values that can aid their success in their careers.¹¹

In terms of the accounting curriculum O’Connell et al. noted recommendations from industry that to assist accounting graduates over the next decade there needs to be greater use of work integrated learning (WIL) initiatives and related learning strategies including integrated case studies; the integrate professional skills development across curricula; and greater focus in curricula on social, environmental and ethical aspects of accounting.¹² This does not appear to be new as at the end of the last millennia Adler and Milne summarised the skills gap literature as demonstrating ‘the failure of accounting educators to promote students’ communication, problem solving and interpersonal skills’.¹³ It is suggested that the literature since this statement would continue to support these deficiencies, for example, Bui and Porter state that:

Regarding the skills accounting graduates should possess, all of the employer interviews considered communication skills (oral, written and interpersonal) to be essential...also teamwork skills.¹⁴

Similarly, in asking accounting and finance employers the most desired selection criteria for new graduates the top two nominated were ‘interpersonal and communication skills (written and oral); followed by ‘critical reasoning and analytical skills/problem solving/lateral thinking/technical skills’.¹⁵ This includes awareness of the industry they are about to enter and how to solve real-world problems.¹⁶

However, it should be acknowledged that sitting above technical and generic skills can be the notions of attitude and cultural fit,¹⁷ as the third ranked criteria by employers was

⁹ Douglas R Ewing and Randall I Ewing, ‘Leveraging experiential learning to encourage role transition from ‘student’ to ‘professional’: insights from identity theory’ (2017) 39(3) *Journal of Marketing Education* 132.

¹⁰ Samantha Sin, Anna Reid and Alan Jones, ‘An exploration of students’ conceptions of accounting work’ (2012) 21(4) *Accounting Education: an International Journal* 323.

¹¹ Sumantra Ghoshal, ‘Bad management theories are destroying good management practices’ (2005) 4(1) *Academy of Management Learning & Education* 75; Dirk C. Moosmayer, ‘A model of management academics’ intentions to influence values’ (2012) 11(2) *Academy of Management Learning & Education* 155.

¹² Brendan O’Connell, Garry Carnegie, Christopher J Carter, Paul de Lange, Phil Hancock, Christine Helliard and Kim Watty, *Shaping the future of accounting business education in Australia* (CPA Australia, 2015) 57.

¹³ Ralph William Adler and Markus Milne, ‘Participative learning’, (1997) 75 *Chartered Accountants Journal of New Zealand* 9, 191.

¹⁴ Bui and Porter, above n 7, 34.

¹⁵ E Lindsay and N Edge, *Graduate outlook 2013. The report of the graduate outlook survey: employers’ perspectives on graduate recruitment* (Graduate Careers Australia, 2014) 28.

¹⁶ Beverley Oliver, ‘Redefining graduate employability and work-integrated learning: Proposals for effective higher education in disrupted economies’ (2015) 6(1) *Journal of Teaching and Learning for Graduate Employability* 56.

¹⁷ Lindsay and Edge, above n 15, 28

‘passion/knowledge of industry/drive/commitment/attitude’.¹⁸ This notion is supported by others,¹⁹ and can encompass attitudes towards constructive feedback that a graduate may get, meeting deadlines and their overall approach to work which can be seen as ‘establishing a professional credibility’.²⁰

Of course, these attitudes and skills can be in a way inter-related,²¹ and in total could be comprehended as ‘employability’ which ‘sits within, but is not identical to ‘graduate attributes’.²² Yorke defined employability as:

...a set of achievements – skills, understandings and personal attributes – that makes graduates more likely to gain employment and be successful in their chosen occupations, which benefits themselves, the workforce, the community and the economy.²³

While these recommendations can resonate with educators it can be difficult to determine how to incorporate these into the curriculum.²⁴ One difficulty in enhancing professional knowledge and skills in the curriculum is whether modern academics have professional practice knowledge themselves.²⁵ There has been exponential growth of accounting (including tax) academics being PhD qualified from approximately 15% in the early 1990s²⁶ to now the PhD being seen as essential for an academic career;²⁷ with estimates that it is more in the vicinity of 80% of accounting academic staff.

Additionally, there is the question of the ‘balance’ between technical knowledge and generic skill development.²⁸ Also there can be a tension between industry and academics about

¹⁸ Ibid.

¹⁹ Rob Jones, ‘Bridging the Gap: Engaging in Scholarship with Accountancy Employers to Enhance Understanding of Skills Development and Employability’ (2014) 23(6) *Accounting Education* 527, 533.

²⁰ Id, 537.

²¹ Bui and Porter, above n 7, 46.

²² Irene Tempone, Marie Kavanagh, Naomi Segal, Phil Hancock, Bryan Howieson and Jenny Kent, ‘Desirable generic attributes for accounting graduates into the twenty-first century: The views of employers’ (2012) 25(1) *Accounting Research Journal* 41, 42.

²³ Mantz Yorke, ‘Employability in Higher Education: What it is What it is Not’, The Higher Education Academy, Series 1, (Heslington, 2006), 8.

²⁴ O’Connell, Carnegie, Carter, de Lange, Hancock, Helliard and Watty, above n 12, 59.

²⁵ Vivien Beattie and Sarah Jane Smith, Today’s PhD students – is there a future generation of accounting academics or are they a dying breed? A UK perspective (Institute of Chartered Accountants of Scotland, 2012).

²⁶ R Matthews, P Brown and M Jackson, Accounting in higher education: report of the review of the accounting discipline in higher education (Australian Government Publishing Service, 1990).

²⁷ Angus Duff and Neil Marriott, Teaching and research: partners or competitors? (The Institute of Chartered Accountants of Scotland, 2012); Beattie and Smith, above n 25.

²⁸ Hollis Ashbaugh and Karla M Johnstone ‘Developing Students’ Technical Knowledge and Professional Skills: A Sequence of Short Cases in Intermediate Financial Accounting’ (2000) 15(1) *Issues in Accounting Education* 67; Gay Crebert, ‘Institutional research into generic skills and graduate attributes: constraints and dilemmas’ Proceedings of the International Lifelong Learning Conference (Yeppoon, June 16 – June 19, 2002).

responsibility for this development, and the purpose of university education.²⁹ Furthermore, it should be acknowledged that the focus on graduates ‘generic skills’ may due to the graduate interview process with industry eliminating those students with inadequate technical knowledge, as well as the difficulty (and confidence) for tax employers to develop generic skills as opposed to technical knowledge.³⁰

Another impediment in developing these skills is that students appear to not appreciate the skills that employers consider important, and for example students can be unaware that ‘business awareness’ is a desired attribute.³¹ This lack of awareness could affect their motivation towards their studies and activities designed to assist students develop these skills. Also, once they enter the workforce there can be ‘reality shock’ for graduates as their professional identity is under-developed.³² Such professional identity for a student has been identified by Jackson as integral to employability.³³ While such professional identity might be expected to emerge ‘naturally’ as students progress through their degree,³⁴ it is argued that it is preferable for the curriculum to be intentionally designed and scaffolded to foster its development.³⁵

Overall this can mean that even when academics are aware of the skills gap, there are many issues that can make it a ‘real challenge’ for them to effectively address it.³⁶

This article describes such a curriculum development which was designed to aid the development of students’ professional identity as a tax advisor, but also the development of key generic skills of communication, problem solving, research and team skills. This was sought to be achieved through the design of The Firm in tutorials. These firms involved students being appointed to professional tax advisory firms in tutorials, where they were treated as employees working on client case studies each week, with their boss (the tutor) mentoring them as they developed their advice. The client case studies were designed to enhance the students’ professional identity and business awareness, as they had to extend beyond the traditional ILAC method (Issue; Law; Application and Conclusion); and formulate: (a) further facts required from the client; (b) possible solutions to assist the client; and (c) recommendations about what the client should do in the future. Through online submissions with random checks, students were encouraged to prepare prior to tutorials, with time then

²⁹ Bui and Porter, above n 7; c.f. Robert Inglis and Gloria Dall’Alba, ‘The re-design of a Management Accounting course based upon principles for improving the quality of teaching and learning’ (1998) 7 (3) *Accounting Education* 193.

³⁰ Hayes, Freudenberg and Delaney, above n 4.

³¹ Kavanagh and Drennan, above n 8, 294.

³² Bui and Porter, above n 7, 37.

³³ Denise Jackson, ‘Re-conceptualising graduate employability: the importance of pre-professional identity’ (2016) 35(5) *Higher Education Research & Development* 925.

³⁴ Franziska Trede, ‘Role of work-integrated learning in developing professionalism and professional identity’ (2012) 13(3) *Asia-Pacific Journal of Cooperative Education* 159

³⁵ David Boud and Nancy Falchikov, ‘The Role of Assessment in Preparing for Lifelong Learning: Problem and Challenges’ in A. Havnnes and L. McDowell (eds), *Balancing Dilemmas in Assessment and Learning in Contemporary Education* (Routledge, 2008) 87.

³⁶ O’Connell, Carnegie, Carter, de Lange, Hancock, Helliard and Watty, above n 12, 55.

allocated in tutorials for the firm’s employees to finalise and refine their answers. Then one employee would present on behalf of the tax advisory firm their findings and recommendations. Consequently, this client case study activity involved a rich learning environment with notions of active learning, team work, problem solving, researching, oral presentation, and overall - professional identity as tax advisors.

The remainder of this article is as follows. Section 2 will discuss the literature that supports how generic skills and professional identity can be developed through case studies, active learning and co-operative learning. Section 3 will provide a detailed overview of the innovations adopted for the creation of the tax advisory firm. Section 4 will outline the research methodology, prior to the results being collated in Section 5. Possible avenues for future research will be outlined in Section 6, before the article concludes.

II LEARNING

To assist students learning, particularly the development of generic skills and professional identity, Adler and Milne argue that educators ‘need to challenge students to do their own learning, but they also need to support students in their endeavours.’³⁷ This includes trying to challenge that learners are ‘responsible for their own learning’³⁸ rather than the teacher being responsible. Additionally, it requires students moving from being passive learners to active which can be problematic. This can involve all parties, including students and academics moving out of their comfort zone.

To develop generic skills the accounting professional bodies suggest:

Ways in which generic skills can be developed in the core curriculum include the use of case studies, small group discussions, debates, group assignments, problems solving tasks, and simulated decision-making in complex and ambiguous situations..³⁹

These recommendations involve the notions of WIL, active learning and cooperative learning, which can have their benefits and challenges, each of which is explored below.

A. *Work Integrated Learning (WIL)*

³⁷ Adler and Milne, above n 13, 196.

³⁸ Graham Gibbs, *Improving the Quality of Student Learning* (Technical and Educational Services Ltd, 1992), 7.

³⁹ The Institute of Chartered Accountants and CPA Australia, *Professional Accreditation Guidelines for Higher Education Programs* (ICAA and CPA Australia, 2009) 12.

While WIL⁴⁰ undoubtedly holds opportunities to address generic skill and professional identity development it can be problematic.⁴¹ For example, in the accounting context when WIL involves outside placements (such as internships) there can be issues in terms of scalability due the generally large number of students, the need for industry partners and whether all students are eligible or just those high performing students.⁴² As a compromise, a simulated WIL experience can try to replicate the work environment and thus provide potentially the opportunity to develop skills.⁴³ There a number of examples of simulated WIL experiences in law and business degrees, including an ‘Office Project’ set up by an Australian Law School to provide students the office environment to apply the theory learnt to hypothetical clients.⁴⁴ There is also the capstone course in an Accounting Degree where the course attempted to simulate the real world as ‘the professional advisor is confronted with unstructured, multi-disciplined problems on a day-to-day basis’ with their tutor acting as the client.⁴⁵ Or the capstone course for marketing students, where learners assume the role of associate consultants contracted on a pro bono by a real company to address an ill-structured marketing issue.⁴⁶ There is also the integrated case study and business simulation to develop professional skills in South African Accountancy students.⁴⁷ Blissenden has described a WIL experience designed for tax students through participating in the Tax Help program with students assisting the public with their tax returns.⁴⁸ Such educational activities can address the calls for ‘educators to move to case-based methods, seminars, role plays, simulations and other techniques for actively involving students in the learning process’.⁴⁹

Such simulated WIL experiences can involve case studies, with active and cooperative learning – each of which is discussed below.

⁴⁰ The practice of Work Integrated Learning (WIL) in its various forms (placement, internship, apprenticeships, client-based projects, mentoring or simulated learning environments).

⁴¹ Oliver, above n 16; Trede, above n 34; Mark Brimble, Craig Cameron, Brett Freudenberg, Campbell Fraser and Kirsten MacDonald, ‘Collaborating with industry to develop Financial Planning education’ (2012) 6(4) *Australasian Accounting Business and Finance Journal* 79.

⁴² O’Connell, Carnegie, Carter, de Lange, Hancock, Helliard and Watty, above n 12.

⁴³ Nava Subramaniam and Brett Freudenberg, ‘Preparing Accounting Students for Success in the Professional Environment: Enhancing Self-efficacy through a Work Integrated Learning Programme’ (2007) 8(1) *Asia-Pacific Journal of Cooperative Education* 77.

⁴⁴ Sally Kift and Geoffrey Airo-Farulla, ‘Throwing Students in the Deep End or Teaching Them How to Swim: Developing ‘Offices’ as a Technique of Law Teaching’ (1995) 6 *Legal Education Review* 53.

⁴⁵ Trevor Stanley and Stephen Marsden, ‘Accountancy capstone: Enhancing integration and professional identity’ (2013) 31(4) *Journal of Accounting Education* 363, 364.

⁴⁶ Philippe Vande Wiele, Darren Morris, Vincent Ribi re and Jean-Louis Ermine, ‘Project Based Learning for professional identity: A case study of collaborative industry projects in Marketing’ (2017) 12 (2) *The Independent Institute of Education* 44.

⁴⁷ Nico Van der Merwe, ‘An evaluation of an integrated case study and business simulation to develop professional skills in South African Accountancy students’ (2013) 12(10) *The International Business & Economics Research Journal* 1137.

⁴⁸ Michael Blissenden, ‘Service Learning: An example of experiential education in the area of taxation law’ (2006) 16(1) *Legal Education Review* 183.

⁴⁹ Adler and Milne, above n 13, 192.

B. Case Studies

Ballantine and McCourt Larres describe case studies are a learning method which:

... place emphasis on students' preparation and discussion of real business situations, culminating in the requirement to make a ... decision. The case study method requires students to identify relevant issues, perform necessary computations from ... information, identify appropriate arguments, exercise judgement in order to arrive at a conclusion, defend a particular position in the classroom situation, evaluate the position or perspectives of other students and modify their position, if necessary.⁵⁰

For undergraduate students who may have little work environment experience it has been recommended to combine case studies with traditional lectures and tutorials.⁵¹ If designed well such case studies can be an explicit bridging activity for their studies to the future employment.⁵² Such case studies can address criticism of de-contextualised pedagogy, as they demonstrates when it is appropriate to use knowledge and skills, how to use them, and to what purpose they serve.⁵³ If case studies can provide contextualised knowledge this can 'provide motivation for practicing abilities that in isolation might seem purposeless or meaningless'.⁵⁴ Kift and Airo-Farulla argue that it is important with such simulated case studies that they be 'closely integrated with a subject rather than running independently'.⁵⁵

Case studies are enhanced if they contain authentic learning activities, which can have the following characteristics of real world relevance; ill-defined, requiring students to identify all tasks and sub-tasks to be completed; consist of complex tasks requiring significant time and intellectual resource; allow competing solutions and diversity of outcome, provide opportunity for students to analyse the task from different perspectives, promote collaboration, provide opportunity for reflection and decision-making, can be integrated and applied across disciplines, are integrated or closely aligned with assessment.⁵⁶

Through the process of problem solving, the case study can provide for experiential learning as students learn by doing which has been adopted by a number of tax academics.⁵⁷ This can

⁵⁰ Joan Ballantine and Patricia McCourt Larres, 'A critical analysis of students' perceptions of the usefulness of the case study method in an advanced management accounting module: the impact of relevant work experience' (2004) 13(2) *Accounting Education* 171, 173 quoting Kenneth R.N Anthony, 'The case method in accounting' in JD Edwards (ed.), *Accounting Education: Problems and Prospects* (American Accounting Association, 1974) 329.

⁵¹ *Ibid*, 174.

⁵² Murray Saunders and Joan Machell, 'Understanding emerging trends in higher education curricula and work connections' (2000) 13(3) *Higher Education Policy* 287, 297.

⁵³ Dall'Alba and Sandberg, above n 6, 403.

⁵⁴ Lauren B. Resnick, 'Introduction' in L Resnick (ed) *Knowing, Learning and Instruction* (Lawrence Erlbaum, 1989) 3.

⁵⁵ Kift and Airo-Farulla, above n 44, 60.

⁵⁶ Oliver, above n 16.

⁵⁷ Adrian J Sawyer, Stephen R Tomlinson and Andrew J Maples, 'Developing essential skills through case study scenarios' (2000) 18(3) *Journal of Accounting Education* 257, 257; Heather Field, 'Experiential learning in a lecture class: Exposing students to the skill of giving useful tax advice' (2012) 9(1) *Pittsburgh Tax Review* 1

be enhanced by the ability for students to formulate questions for further details required to be able to provide fuller advice or formulate a solution.⁵⁸

Such case studies can facilitate active learning and cooperative learning which are explored next.

C. Active Learning

By its very nature, WIL experiences (including simulated WIL) will generally involve active learning, as students are situated in a learning activity that requires them to actively participate. Such active learning can provide a rich learning environment, but can see students challenged as they move out of their comfort zone.

A benefit of the case study method used in a simulated WIL experience, is that by viewing theoretical issues through a practical lens it can lead to deeper learning through an active approach.⁵⁹ This is likely to occur if the case study necessitates ‘student activity, problem solving, and cooperative learning’.⁶⁰ However, to this end it is important to make explicit the links between the theoretical and practical aspects.⁶¹ Such active learning is supported by the Accounting Education Change Commission (AECC) which encourages educators to engage students as ‘active participants in the learning process, not passive recipients of information’.⁶² It is possible for active learning to lead to better learning outcomes as compared to the traditional lecture, student engagement has been found to promote deeper levels of thinking and better facilitate encoding, storage, and retrieval.⁶³

For students undertaking an outside placement with their WIL experience (i.e. internship) in industry, their experience will generally involve active learning as students are faced with real issues in the work place that they will need to address, even if it just dealing with other colleagues in a work environment. For a simulated WIL experience to be able to replicate this rich learning environment, it is important that the case studies developed try to emulate to some extent the issue that would be occur with an outside placement.

Active learning can also facilitate students being more responsible for their learning which can lead to more sophisticated conceptions of learning and teaching, which then may provide the

⁵⁸ Stanley and Marsden, above n 45, 371.

⁵⁹ Gordon Boyce, Sarah Williams, Andrea Kelly and Helen Yee, ‘Fostering deep and elaborative learning and generic (soft) skills development: the strategic use of case studies in accounting education’ (2001) 10 (1) *Accounting Education: An International Journal* 37.

⁶⁰ Ramsden, above n 1, 101.

⁶¹ National Committee of Inquiry into Higher Education, *Higher education in the learning society* (HMSO, 1997), sc. 8.2.

⁶² Accounting Education Change Commission (AECC), ‘Objectives of education for accountants: position statement number one’ (1990) 5(2) (Fall) *Issues in Accounting Education* 307, 309.

⁶³ Angela Provitera McGlynn, ‘Teaching millennials, our newest cultural cohort’ (2005) *Educational Digest* 12; Andrew C. Peck, Rahan S. Ali, Max E. Levine and Robert L. Matchock, ‘Introductory psychology topics and student performance: Where’s the challenge?’ (2006) 33(3) *Teaching of Psychology* 167.

opportunity to develop a deep understanding of the material.⁶⁴ Additionally, if the educator is able to be an effective facilitator and advisor on the side during the active learning process this can allow for timely (consequential) feedback, which can be important due to its formative nature.⁶⁵ Also, such active in-class activities can improve student comprehension and application,⁶⁶ and their perception of teaching⁶⁷ and motivation.⁶⁸ This can be important given the link of motivation to academic performance.⁶⁹

Furthermore, when such case studies involve students working with others, then cooperative learning can also arise.

D. Cooperative Learning

Cooperative learning essentially involves students being allocated to small groups to collaborate together on a group task. However, for cooperative learning to be effective it has been observed that:

... groups must be structured so that they achieve five basic elements, namely positive interdependence where group members perceive that they need each other in order to complete the group task; individual accountability whereby each member of the group must be held accountable for completing the group task; face to face interaction where group members support each other's productivity; the development of interpersonal and small group skills; and group processing where group members are responsible for monitoring the group's performance.⁷⁰

The discussion that can occur in cooperative learning can generate deeper learning and cognitive skills.⁷¹ Such cooperative learning can lead to peer assisted learning with students assisting in teaching other students which improve interpersonal and communication skills.⁷²

⁶⁴ Graham Gibbs, Alistair Morgan and Elizabeth Taylor, 'The world of the learner' in F Marton, D Hounsell and N Entwistle (eds) *The Experience of Learning* (Scottish Academic Press, 1984); Adler and Milne, above n 13.

⁶⁵ Boris Handal, Leigh Wood and Michelle Muchatuta, 'Students' expectations of teaching: The business, accounting and economics experience' (2011) 5(1) *e-Journal of Business Education & Scholarship of Teaching* 1, 11.

⁶⁶ Jana Hackathorn, Erin D Solomon, Kate L Blankmeyer, Rachel E Tennial and Amy M Garczynski, 'Learning by Doing: An Empirical Study of Active Teaching Techniques' (2011) 11(2) *Journal of Effective Teaching* 40.

⁶⁷ Geoff Scott, *Accessing the student voice: Using CEQuery to identify what retains students and promotes engagement in productive learning in Australian higher education* (Commonwealth of Australia, 2005), available at: https://www.uws.edu.au/data/assets/pdf_file/0010/63955/HEIPCEQueryFinal_v2_1st_Feb_06.pdf, ix.

⁶⁸ Joan Benek-Rivera and Vinitia E. Mathews, 'Active learning with jeopardy: Students ask the questions' (2004) 28 *Journal of Management Education* 104.

⁶⁹ Thomas C Wooten, 'Factors influencing student learning in introductory accounting classes: a comparison of traditional and non-traditional students' (1998) 13(2) *Issues in Accounting Education* 357.

⁷⁰ Ballantine and McCourt Larres, above n 50, 390.

⁷¹ Michael Jackson and Michael Prosser, 'De-lecturing: A case study of the implementation of small group teaching' (1985) 14 *Higher Education* 651.

⁷² Philip C Candy, Gay Crebert and J O'Leary, *Developing Lifelong Learners through Under-graduate Education* (Australian Government Publishing Service, 1994), 134.

However, despite the potential benefits of case studies involving active and cooperative learning there are a number of potential inhibitors that need to be considered, such as students characteristics, physical constraints, and the educators involved.

E. *Potential inhibitors*

A factor that can impede the learning experience is students' attitude towards a simulated WIL is that can involve active learning compared to passive learning. Particularly as students may be more accustomed to passive styles and feel less threaten, this may sometimes be due to their shyness. Consequently, there needs to be processes to motivate and assure students of the benefits of the activities. Kift and Airo-Farulla argue that you need to explain the context of the task and why it is worthwhile.⁷³ For example, activities that require students to talk in front of others can cause them to feel 'foolish', or even the opposite of 'showing-off'.⁷⁴ In such circumstances, the benefit and the fears that can be involved of developing oral communication skills need to be openly discussed.

Student's approach to learning (such as deep vs surface learning) can vary and may be influenced by such variables as age, gender, motivation and uncertainty/low self-esteem/anxiety and failure.⁷⁵ Studies have found that *age* can be positively related to deep approach and negatively to a surface approach, whereas studies on gender vary or find no significant relationship.⁷⁶ Besides intellectual ability, personality is another factor that can influence students approach to learning. Studies have showed that openness to experience was positively related to a deep approach, and negatively to a surface approach.⁷⁷

In effect the success of active learning may depend on whether students use the surface approach to learning who exhibit both fear of 'failure and a motivation to avoid failure' or if the students are 'more self-confident and have a higher *self-efficacy*' are inclined to be deep learners and less use of a surface approach.⁷⁸

In some ways group activities can ease anxiety, with public speaking compared to open discussion to the whole class;⁷⁹ as well as ice breaker activities and humour.⁸⁰

However, even if students engage with discussion, a potential negative is that discussion can elicit incorrect information, which can (even if corrected by the educator) 'throw-off

⁷³ Kift and Airo-Farulla, above n 44, 70.

⁷⁴ W Ray Crozier, 'Shyness and students' perceptions of seminars' (2005) 4(1) *Psychology Learning & Teaching* 27, 28.

⁷⁵ Marlies Baeten, Eva Kyndt, Katrien Struyven and Filip Dochy, 'Using student-centred learning environments to stimulate deep approaches to learning: Factors encouraging or discouraging their effectiveness' (2010) 5 *Educational Research Review* 243.

⁷⁶ *Ibid*, 250.

⁷⁷ *Ibid*, 251.

⁷⁸ Baeten, Kyndt, Struyven and Dochy, above n 75, 251.

⁷⁹ Crozier, above n 74, 33.

⁸⁰ Handal, Wood and Muchatuta, above n 65, 9.

students'.⁸¹ This is because even seeing an incorrect answer can impair one's ability to learn the correct answer.⁸²

Other problems can be the resources (including time) available to the educators. As Adler and Milne highlight:

Such approaches are potentially more time consuming, and may require greater commitment. With reward and incentive structures that emphasize research rather than teaching; a lack of adequate materials, room layouts, and staff training; and a resistance on the part of students to take responsibility for their own learning, such reluctance may come as no surprise to many.⁸³

The timetabling can also be critical and it may or not may allow interaction.⁸⁴ Additionally, a key feature for success of this method can be the skill and attitude of the educators, including commitment to the case study model, which by its nature can be more involved than traditional passive methods of teaching. Kift and Airo-Farulla observed that the educators 'must be fully committed to the program and be prepared to lay the ground work for Offices in class.'⁸⁵ This includes the realisation of how if the educators use a 'few ill-judged words' or have an 'apparent lack of interest' this 'can quick slay students' confidence in' participating.⁸⁶ The language and tone used by the educator can be critical when asking questions to students, as students can 'shut down' if educators are perceived as dismissive and pushy, and students can be left with a feeling of 'being picked on'.⁸⁷ In contrast, open ended questions can be more effective, particularly if followed up by affirmations by the educator (both verbal and non-verbal).⁸⁸

Additionally, given that case studies should involve ill-defined and complex tasks the educator requires a level of expertise that may not be apparent in a more passive learning environment. The educator can find it difficult to judge interpretations provided by students, whereas pure recall questions can be easier to judge.⁸⁹ Furthermore, with cooperative learning the educator needs to be able facilitate group interactions to take account of cohesion, social loafing, and silent versus talkative students.⁹⁰

Given this insight, a case study was developed to try to improve students' professional identity and generic skills as a tax advisor, which is discussed next.

⁸¹ Ibid, 9.

⁸² Lisa K Fazio, Pooja K Agarwal, Elizabeth J Marsh and Henry L Roediger, 'Memorial consequences of multiple choice testing on immediate and delayed tests' (2010) 38(4) *Memory and Cognition* 404.

⁸³ Adler and Milne, above n 13, 192.

⁸⁴ Kift and Airo-Farulla, above n 44, 73.

⁸⁵ Ibid, 70.

⁸⁶ Ibid, 74.

⁸⁷ Handal, Wood and Muchatuta, above n 65, 9.

⁸⁸ Ibid, 10.

⁸⁹ Carl Bereiter and Marlene Scardamalia, 'Expert like Learners', in *Surpassing ourselves: An inquiry into the nature and implications of expertise* (Open Court, 1993), 175-176.

⁹⁰ Crozier, above n 74, 33.

III INNOVATION – ADVANCED TAX

This innovation occurred to a third year course, advance tax, which is part of an accounting degree, which involved a case study involving active and cooperative learning.

A. *Course design*

The key objective was to assisting in developing students’ professional identity as a tax advisor which involved a number of strategic alterations to the delivery of the tutorial. This re-configuration of the tutorial provided subtle changes to provide for a more authentic formative learning environment, as well as the opportunity to develop professional identity. Additionally, it was hoped that a number of generic skills such as communication, problem solving and research skills would be improved. This was seen as particularly relevant given that students studying an advance tax course are generally in their last year of study.

B. *The time*

To allow students to have time to address the case study in a meaningful way two hours was allowed for tutorials, rather than the normal one hour. To make this revenue neutral for the university, one hour tutorials of 25 students were converted to two hour tutorials of 50 students. This allowed for additional time for group (firm) activities (including additional research and clarification); presentations and summaries. This was based on previous experience where one hour, even with the most basic of case studies, could be insufficient to allow time for critical reflection and discussion to occur. This additional time would provide the opportunity for greater learning and reflection to occur.

C. *The firm*

Furthermore, rather than being allocated to ‘groups’, students were allocated to tax advisory ‘firms’ within tutorials. To complement this, the tutor took the role of the ‘boss’ of the firm, to provide guidance and mentoring to his/her employees. Google shared drives were created for each firm to facilitate the sharing of resources between firm employees.

Within the one tutorial there were approximately six or seven firms of five to six employees each. Students remained in the same firm throughout the semester. Students in their first tutorial would name their tax firm, and keep a register of the firms’ employees, as well as the sick leave of employees who failed to attend later tutorials. For students who missed being allocated to a firm in the first tutorial, these students would in later tutorials have to apply for a position with one of the existing firms by having a quick interview with the firms explaining what they could bring to the tax advisory firm as an employee.

The ‘professional context’ of students working in tax advisory firms was seen as critical. It was important that the narrative in the tutorials centred on the students being advisors working for a professional tax advisory firm who were seeking not only to identify the current application of the tax law to a client’s situation, but also to formulate solutions going forward. The role of the tutor was as the ‘boss’ of the firm to provide guidance and ensure that the advice going out to the client is professional and correct.

D. *Case studies*

Also, tutorial questions were altered so they became cases studies which explicitly discussed a client's situation in terms of a current tax issue that they were facing. This included explicit statements in the case studies referring to students as employees of a professional tax advisory firm. This continual contextualisation of being an employee of a professional advisory firm was seen as making explicit the authentic nature of the case study, as well as how then it related to the theoretical course material that had been covered in the lecture in the prior week.

To provide a structure of how tax advisory firms should address their client's issues, firms were provided a Professional Advice Checklist that outlined an extended ILAC method (referred to as the *ILAC ++ Method*). Traditionally, the ILAC method focuses on identifying the Issue, the relevant Law that applies, Application of the law to the facts, and then coming to a preliminary Conclusion of how the law applies to the given circumstances. In addition to this, the ILAC ++ Method required firms to also consider (a) What further facts from the client would assist them in being more definitive with their conclusion; (b) Some solutions that could be put forward to the client to try to improve their legal or practical outcome; and (c) Recommendations to the client about what they should do in the future about this issue. In this way the ILAC ++ Method was designed to provide more of professional context to the problem solving that professional tax advisors would need to develop in their future careers.

E. *The preparation*

It was critical that students came prepared to tutorials with a draft solution. To encourage students to do this, students were required to upload electronically onto the learning management system (Blackboard) their prepared answers by 10am of the relevant day of the tutorial. Of the ten tutorials uploaded, five were randomly selected for 'spot checks' which were marked up to 2% per checked tutorial depending upon the level of work the student had put into their attempt. This link to assessment provided students the motivation to ensure that they did prepare for their upcoming tutorials.

F. *The structure*

The structure of these tutorials largely followed: Firm Time, Presentation and Bosses Summary.

(i) *Firm time*

At the beginning of the tutorial, there would be firm time of approximately 20 minutes. Within this time, employees would have the opportunity to learn from each other as they consider their case study. In this time employees would be able to compare and contrast their answers with each other: 'what did I get – what did you get?' And then they could work together to determine what was the best advice for the client using the ILAC ++ method (that is a model answer). As part of this, firms not only had to discuss the current application of the tax law to the client's situation, but also to consider potential 'solutions' that the client could consider, as well as recommending to the client about what they should do in the future regarding the issue. The case studies and the discussion around them were about the 'client' and how as professional tax advisors we could assist them both now, as well as into the future. During this firm time,

the boss (tutor) would walk amongst the different firms to provide clarification and direction as to some of the issues that firms were struggling with. This was done to minimise the possibility of incorrect answers being presented to the class.

(ii) Firm Presentation

After working together, one employee from each firm would present their client recommendations to the other firms and their boss (for approximately 5 to 10 minutes). Each firm were allocated different parts of the case study or different questions, so that there was no duplication, thus aiding the ability to progress through the case study in a timely manner. In the event that two firms address the same case study, then a member of each firm would present together. During the semester each firm member had at least one opportunity to present, if not two.

(iii) Boss' Summary

At the end of the firm presentations, the boss would deliver a short summary of the client issue and what it means. Additionally, during the firm presentations, the boss would interject to clarify points, or to tease out possible alternatives. Also, the boss would take the opportunity to congratulate employees on work well done.

By providing this narrative throughout the tutorials, it was hoped that it would infused the notion that students were professional tax advisors in training, and that the material they were learning is relevant to their future tax careers. It also, aimed to provide them the context that their role as tax advisors is not just about identifying current issues, but to provide tangible solutions to their clients.

Note midway through the semester one of the tutorials, rather than having a case study, contained reflective professional practice activities, including looking at a recent graduate job advert in terms of the skills and knowledge required, development of a LinkedIn profile (including a critical assessment of other profiles), and a review of an article about the skills gap of accounting graduates, and whether the advance tax course assisted with this.

IV METHODOLOGY

This study employed a survey methodology to examine the potential impact of the firm on students. The instrument was administered at end of the last tutorial in the semester. The survey was conducted four times to different cohort of students who undertook the course over a two year period. For Cohorts 2 to 4 the teaching staff was the same, whereas Cohort 1 was taught by a different experienced teaching member.

The survey contained a number of questions measuring the effectiveness of different aspects of the firm on a five-point Likert scale (1: Very Poor; 3: Acceptable; 5: Excellent). At the end of the survey, students had the opportunity to write open responses in terms of their learning for the semester.

A. Demographics

Table 1: Demographics

Attribute		Cohort 1 (C1) n = 19 (N = 40)	Cohort 2 (C2) n = 28 (N = 44)	Cohort 3 (C3) (n = 28) (N = 51)	Cohort 4 (C4) (n = 9) (N = 33)	Total n = 84
Gender	Male	6 (32%)	10 (36%)	12 (43%)	4 (44%)	32 (38%)
	Female	13 (68%)	18 (64%)	16 (57%)	5 (56%)	52 (62%)
Age	<20 years	1 (5%)	3 (11%)	2 (7%)	0 (0%)	4 (5%)
	20 – 30 years	16 (84%)	22 (79%)	20 (71%)	6 (67%)	64 (78%)
	31 – 40 years	1 (5%)	3 (11%)	4 (14%)	0 (0%)	8 (10%)
	>40 years	1 (5%)	0 (0%)	2 (7%)	3 (33%)	6 (7%)
Nationality	Domestic	17 (89%)	22 (79%)	25 (89%)	7 (78%)	71 (84%)
	International	2 (11%)	6 (21%)	3 (11%)	2 (22%)	13 (16%)
First in family (parent not university graduate)	Yes	11 (65%)	21 (75%)	20 (71%)	7 (88%)	59 (73%)
	No	6 (35%)	7 (25%)	8 (29%)	1 (13%)	22 (27%)
Professional work experience (> 500 hrs/3mths)	Yes	10 (53%)	10 (36%)	14 (50%)	5 (63%)	39 (47%)
	No	9 (47%)	18 (64%)	14 (50%)	3 (38%)	44 (53%)

Over the survey period a total of 84 students were surveyed, with 38% male and 62% female: Table 1. The vast majority were domestic students (84%), and almost three-quarter (73%) were the ‘first in family’ as their parents had not graduated from university. Also, about half (53%) had less than three months professional work experience.

V RESULTS

Students rating of the effectiveness of the course in terms of format, professional authenticity, learning, team and communication skills are detailed in

Table 2.

Table 2: Effectiveness Rating

Please rate 'How effective' the following aspects of the course in terms of your learning ...	C1 Cohort 1 n = 19 (N = 40) *	C2 Cohort 2 n = 28 (N = 44) ##	C3 Cohort 3 (n = 28) (N = 51) ##	C4 Cohort 4 (n = 9) (N = 33) *; ##	Over all Aver age
Format					
Uploading your tutorial preparation prior to tutorials is effective to improve my learning?	3.53	4.14	4.18	3.89	3.99
The 2 hour tutorials with 50 students (compared to one hour tutorials with 25 students) is effective to improve my learning?	3.21	3.89	4.18	3.44	3.78
Professional/Authentic					
How 'authentic' to real professional life is the course and assessment for this course?	3.78	3.71	4.00	3.78	3.83
How effective has the 2 hour tutorials in developing your professional identity?	3.05	3.54	3.59	3.44	3.43
Learning					
Working with your firm members to address your client issues is effective to improve my learning?	3.05	3.74	3.74	3.11	3.51
How effective are the 2 hour tutorials in developing your problem solving skills?	3.32	3.93	3.61	3.33	3.62
How effective are the 2 hour tutorials in developing your researching skills?	3.11	3.50	3.11	3.67	3.30
How effective are the 2 hour tutorials in improving your understanding of the material taught?	3.26	4.25	4.29	3.56	3.96
Thinking ahead to solve your client's future issues is effective to improve my learning?	3.74	4.04	4.00	3.89	3.94
Team					
Being allocated to professional firm (groups) in tutorials is effective to improve my learning?	2.95	3.79	4.11	3.00	3.62
How effective are the 2 hour tutorials in developing your team skills?	3.53	4.00	3.61	3.33	3.69
Working with your firm members is effective in allowing me to get to know my follow students?	3.78	3.93	4.18	3.89	3.98
Communication					
Presenting on behalf of your firm your firm's answer is effective to improve my learning?	3.06	3.71	3.71	3.67	3.57
How effective are the 2 hour tutorials in developing your oral presentation skills?	3.26	3.93	3.46	3.67	3.60
Overall Average	3.33	3.86	3.84	3.55	3.77

5-point scale: 1= Very Poor, 2 = Poor, 3 = Acceptable, 4 = Good, 5 = Excellent.

* = Late night class from 6pm to 10pm

= Same teaching staff member

An immediate result that becomes apparent is that two cohorts (C1 and C4) had consistently lower rankings than the other two cohorts (C2 and C3). While one of these cohorts (C1) had a different teaching staff than the others, Cohort 4 had the same teaching staff as Cohorts 2 and 3. What may be a cause of the lower overall ranking is that Cohorts 1 and 4 had very late timetabling, with lectures from 6pm to 8pm, and then the tutorials from 8pm to 10pm. In comparison, Cohorts 2 and 3 while they also involved a four hour teaching block (i.e. 2 hour

lecture followed by 2 hour tutorial) they had daytime delivery. Also Cohorts 1 and 4 had low student attendance; which may be attributed to the late class time. This finding could re-enforce how important timetabling is to the teaching and learning experience.

A. *Tutorial format*

In terms of uploading their tutorial preparations before class, this was generally seen as effective by students from all four cohorts for their learning:

Uploading work each week is good, it made me revise each week content. (Student Quote Cohort 1)

Cohorts 2 and 3 particularly thought the two hour tutorial to be effective in improving their learning (C2:3.89; C3:4.18):

Overall the format of the tutorial was excellent and found it very useful in my learning. (Student Quote C2)

Although Cohorts 1 and 4 were not as convinced of the effectiveness of the two hour tutorial (C1:3.21; C4: 3.44). Particularly the two hour tutorial following immediately after a two hour lecture was seen by some students as exhausting, even if the tutorials contained active learning activities:

The 2 hour tutorial is draining after a 2 hour lecture. Perhaps spread out would be more effective... (Student Quote Cohort 1)

Timetabling is a quandary faced by teachers, as some students prefer that their contact time for a courses to be 'blocked' so they get a sense of being more efficient with their time on-campus, while others prefer breaks. This would be particularly the case for night classes as teaching to 10pm can be exhausting. Although the problem faced is that when a course is scheduled to be timetabled at 'night' there are only so many 'night hours (5pm to 10pm = 5 hours), compared to 'day hours' (8am to 5pm = 9 hours). Even then there is debate about whether 5 to 6pm is 'night', especially for students who need to transit from work to university:

The timing of the tutorial made it difficult. 2 hours tutorial was very beneficial to helping understand the topics covered but 8pm-10pm made the class less desirable. Understanding it was useful to part time/ working students as myself included but the late time made it difficult. (Student Quote Cohort 1)

B. *Learning*

In terms of their learning, Cohorts 2 and 3 thought the two-hour tutorial improved their understanding of the material taught (C2:4.25 and C3:4.29), compared to a substantial lower ranking by Cohorts 1 and 4 (C1:3.26 and C4:3.56). The next strongest learning outcome appeared to be '*thinking ahead to solve the clients future problems*' (C2:4.04; C3:4), and even cohorts 1 and 4 had stronger indicators here (C1:3.74; C4:3.89). This would suggest that the *ILAC++* method used with the case studies of not only solving the current client issue, but then reflecting and thinking about what the client should do in the future meant students had more engagement with the material that made them project about future issues. This is consistent with the next highest ranking that the 2 hour tutorials developed students problem solving skills, although with Cohorts 1 and 4 are not as strong as the two other cohorts (C1:3.32; C2:3.93; C3:3.61; C4:3.33).

It could be that students' interaction with their firm members influenced their learning as Cohorts 2 and 3 responded strongly (3.74 each) that working with firm members to address client issues was effective in improving learning, compared to the substantial lower ranking by Cohorts 1 and 4, which were some of the lowest rankings (C1:3.05; C4:3.11). This is reinforced by the responses to '*being allocated to professional firms (groups) in tutorials is effective to improve my learning*' which was rated very low by Cohorts 1 and 4 (C1:2.95; C4:3.00); whereas Cohorts 2 and 3 had much higher rankings (C2:3.79; C3:4.11). This could reflect that students' learning is affected by the cohesiveness and commitment of firm members:

Engaging studying, connect knowledge with real experience. Working in a group is better for critical thinking (Student Quote Cohort 2)

Overall the format of the tutorial was excellent and found it very useful in my learning. (Student Quote Cohort 2)

I am not enjoying being stuck in a single "firm" for all of the tutorials, as my group members are not as engaged and are not doing much work. They would prefer to try and copy off my work or see what I've done than do it themselves. (Student Quote Cohort 1)

The group 'firms' tended to produce the same problems all group work encounters and that is some students do more and others rely on those students to produce the work. (Student Quote Cohort 4)

Although this can be compared to a student who felt less knowledgeable than their firm members that resulted in them feeling that they could not effectively participate:

I was put into a group with 3 other people who knew so much more than I did about the subject and this discouraged me from engaging in group activities and I ended up not going to any workshops because I really didn't like the fact that I had to be in a group. (Student Quote Cohort 1)

Alternatively, surface learners may remain in the firm, but not contribute to active learning, but instead copy the deep learners' solutions:

This is frustrating, and the fact that I am stuck with them all semester is not helping my learning experience at all. I would prefer the groups were switched around each week so you had the opportunity to work with different people that I could actually have the experience of learning off some of my peers who are more engaged in the course. (Student Quote Cohort 1)

Therefore, the success for the firms could depend on each member's learning approach to problem based learning. This highlights how when there is cooperative learning group dynamics and commitment is critical; and could require more skill from the teacher to keep things together. Additionally, some students expressed a preference for a passive learning environment where the teacher would deliver the tutorial answer with minimal (or no) student input:

1 hour tutorial where the tutor goes through the answer would have been better. (Student Quote Cohort 1)

Also have a guide that answers the seminar questions (possibly in detail). (Student Quote Cohort 3).

Also, there was concern about ‘confusion’ when students’ discussion was based on a misunderstanding of the material and its application to the clients in the case studies:

Although the idea of the tutorials were good, I am unsure whether they were effective. Sometimes, I felt by going through each firm's results, although they were good attempts, it seemed as though I was comparing my wrong answers to someone else wrong answers, and was unsure at the end of the tutorial of what the correct answer actually was. (Student Quote Cohort 1)

Seminar questions would be better answered as a class rather than in separate groups. Summarised answers of the seminar would assist students in learning what is expected of them in answering the questions. (Student Quote Cohort 2)

I did not think presenting answers was the best way to learn complex tax issues. (Student Quote Cohort 2)

In terms of developing research skills in the tutorials this had mixed effect (ratings of 3.11 to 3.67), with it up and down between all four cohorts. This in part may be attributed to the wording of the question and may be it should have been worded the ‘research work in *preparing* for the tutorial’ instead as little research occurred in the tutorials themselves.

C. Team skills

As discussed above a critical part to the success of a firm is how students interact with their other firm members. Regardless of their firms success, students thought that the firms developed their ‘team skills’ (C1:3.53; C2:4.00; C3:3.61; C4:3.33). That is, even when a firm is not functioning as well as might be desired; members have to learn how to deal with this and more forward. In reflection a non-functioning team may represent the reality of professional life at times with people with different strengths, commitment and skills.

What the firms appeared to do well across all cohorts was to allow students to get to know each other (C1:3.78; C2:3.93; C3:4.18; C4:3.89), which given the low engagement modern students can have with each other could be extremely positive outcome of the curriculum design. This is especially the case as students are getting to know each other, and they will potentially become part of their future professional network.

D. Authenticity

Another important aspect to the success or otherwise of the firms was how ‘authentic’ to real professional life students perceived the case study – especially as the case study was a simulated WIL experience. Across all cohorts there was strong agreement that students thought that the course and its assessment was authentic to real professional life (C1:3.78; C2:3.71; C3:4.00; C4:3.78).

A far weaker result was whether the tutorials developed professional identity for the students, for Cohort 1 this was lower (3.05), with the other cohorts fairly consistent around 3.5 (C2:3.54; C3:3.59; C4:3.44). This would indicate that in terms of professional identity more work needs to be done.

E. *Communication*

Three-quarters of the cohorts thought that presenting on behalf of their firms was effective in improving their learning (C2:3.71; C3:3.71; C4:3.67 *c.f.* C1:3.06). Additionally, there was strong agreement that students had developed their oral presentation skills (C1:3.26; C2:3.93; C3:3.46; C4:3.67):

The presentations have made me more confident with presenting in front of groups. Also helped with my written and oral skills. (Student quote, C3)

Although the variation in students' ability present clearly could inhibit other students learning:

I did however find it a little hard to understand other students when they were presenting as some students communications were not clear ... (Student quote, C4)

VI OVERALL OBSERVATIONS AND RECOMMENDATIONS

Overall the evidence gathered demonstrates how there can be a variance of experience between students when such a case study method is implemented. This is consistent with prior literature about how important it is to think about the physical environment, timetabling, the instruction to students and commitment of staff.⁹¹ While it is hoped these results don't disparage others to think of ways to innovate their classes, it is important to acknowledge the challenges and to implement strategies to address them. Given the results below are some recommendations to improve the learning experience.

The overall blocking of four hours of teaching is problematic (that is the structure of the 2 hour lecture and 2 hour tutorial in one block of teaching). A possible solution is an allowance for a one-hour break between lecture and tutorial time. Alternatively, it might be preferable to reduce it to a total of 3 hours, with the first hour a lecture format and then followed by a two hour tutorial. The reduced lecture time could be supplemented by flipped learning, such as pre-recordings and other online activities that students need to complete prior to attending the shorter lecture.⁹²

It is important to address and understand students' different approaches to learning, especially surface vs. deep, and passive vs. active learners. It is important upfront to engage students to get them to understand the benefit to their future professional careers. Of course, a challenge for the educator is knowing their students' approach to learning.

A possible way to improve the cohesiveness and commitment of firm members (and to the course overall) could include having past students present about the usefulness of the firm structure to their learning. Alternatively, marks for firm attendance could be given, or that for students to be eligible to sit the final exam they must attend at least 75% of firm meetings.

⁹¹ Kift and Airo-Farulla, above n 44.

⁹² Craig Cameron and Jenny Dickfos, 'Peer Review of Teaching Law to Business Students in Traditional and Flipped Lecture Environments' in *Teaching for Learning and Learning for Teaching: Peer Review of Teaching in Higher Education* (2015) 99.

To have a stronger effect on the development of students' professional identity, a requirement could be for students to dress professionally for tutorials. Another recommendation could be for the inclusion of having a coffee at some time during the trimester with an industry mentor to discuss case study activities, and or the course.

VII LIMITATIONS AND FUTURE RESEARCH

The findings of this study should be viewed in light of several limitations, including the preliminary nature of the evidence, its case study nature in terms of its external validity, and the short-time frame of the analysis. One of the problems is that the effectiveness of the practices has been self-reported by students, and students may not accurately assess how the firm activity has affected them. Also, it would have been good to have a control group of students not exposed to the prior tutorial design to see if there was any difference. Additionally, having different teaching staff makes it problematic in comparisons between the cohorts. Future research could measure self efficacy measures, also interview students after graduation. Also, the influence of students' work experience could be considered.

VIII CONCLUSION

A key challenge for educators is how they can design and deliver their curriculum to not only allows students to learn the technical knowledge but also develop their generic skills; including their professional identity. In the context of tax and accounting, key generic skills that students need consistently over many studies includes the development of oral communication skills, problem solving and professional identity.

This article described the development of student firms within tutorials that aimed to allow for the development of not only technical knowledge, but also through a case study with authentic items, to provide for experiential and cooperative learning. To allow the 'time' for this to occur one hour tutorials of 25 students were converted to two hour tutorials of 50 students. The results demonstrate that while the case studies were seen as professionally authentic by students, there were some issues with certain cohorts which may be more attributed to late timetabling and group dynamics. Nevertheless, there seems to be some strong learning outcomes in terms of improving understanding of material taught, solving client's future issues to improve learning, and getting to know fellow students.

Any moves away from the traditional format of a two hour lecture with a one hour tutorial based on a more passive learning experience can be a challenge for educators. This 'challenge' is paradoxically one of the potential benefits of WIL (including simulated WIL), as it moves students (and educators) out of their comfort zone into an environment which can allow for growth, but there needs to be planning, resources and support. Particularly, timetabling can be issue allow for the right time and space for the activity. Additionally, there needs to be support and guidance about how to navigate the dynamics of a group activity. With a simulated WIL what is central to the potential success is the authenticity of the activities and how they are approached by both educators and students. The authors encourage others to think about what ways they may do small changes to their courses to deliver more authentic case studies to try

to improve the learning outcomes for students. But be prepared, as your eyes need to be wide open to both the potential learning benefits and challenges you could face.

UNIVERSAL BASIC INCOME: THE POTENTIAL IMPACT ON THE AUSTRALIAN TAX SYSTEM

MYLES BAYLISS *

Due to changes in the labour force and the effects of growing income inequality, sustenance payment policies such as Universal Basic Income (UBI) are increasingly being looked to as possible solutions. Typically, tax law concerns the extraction of money from individuals to fund government spending, however the idea of a UBI provides a different way of conceptualising the transfer system. This paper examines if UBI legislation would be valid under the Australian Constitution and the potential impacts it may have on Australian tax law.

* This paper was awarded the 2017 Forsyth-Pose Scholarship by the Law Council of Australia. The author would like to thank Dr. Brett Freudenberg for his advice and guidance in the preparation of this paper. Any mistakes are attributable solely to the author.

I INTRODUCTION

Tax law is generally about extracting money from citizens to fund government spending. However, a recent idea is for the government to provide its citizens a tax-free sustenance payment (often referred to as a Basic Income or Universal Basic Income) with tax only applying to income earned above this payment. Thus, a Universal Basic Income (‘UBI’) is a different way of conceptualising the transfer system of tax. However, in the Australian context, is a UBI constitutionally possible and what would it mean for Australian tax law?

For the purposes of this paper, it is important to note that UBI policies can vary greatly in structure and substance;¹ making it impossible to totally analyse the specific impacts of a specific system without knowledge of its structure. As such this paper will focus on the general impacts that a UBI system would have on the Australian taxation system if the government has a constitutional power to disburse money in such a way as mandated by the UBI philosophy. The structure of this paper is as follows: firstly, a UBI will be explained, as well as the benefits it can provide. Then it will be determined if a UBI is constitutionally possible. This will then be followed by a consideration of what impact a UBI would have on the Australian tax system; including its administration. Other areas of further research will be outlined before the paper’s conclusion.

It will be argued that a UBI should be constitutionally valid and that the introduction of a UBI would have benefits for the tax system; including simplification of legislation and administration.

II WHAT IS A UBI?

The idea of a UBI has existed in various forms for hundreds of years. It first appeared as a satirical critique of 16th century crime deterrent in Thomas Moore’s *Utopia*² before gaining a pragmatic structure in the work of Johannes Vives.³ In the 20th century, various forms of UBI policies were debated at several times in the United States and much of Europe before being pushed to the fringes of political policy.⁴ UBI and other welfare concepts are again appearing in political and economic discussions as a response to deepening income inequality across the globe⁵ and changes to the labour force arising from technological advancements.⁶ Wealth inequality can impact in a number of areas; with research suggesting that inequality is a cause

¹ For example, contrast Milton Friedman’s Negative Income-Tax proposal for households with incomes falling below a certain level with Charles Murray’s proposal of an annual \$10,000 cheque to all citizens over the age of 21.

² Thomas More, *Utopia* (1st Latin edition, Louvain, 1516), English translation by Paul Turner, (Harmondsworth: Penguin Classics, 1963) 43-44.

³ Juan Luis Vives, *De Subventionem Pauperum, Sive de humanis necessitatibus*, English translation of part II by Alice Tobriner: *On the Assistance to the Poor*. Toronto & London: University of Toronto Press (“Renaissance Society of America Reprints”), 1998, 62p.

⁴ For a brief historical overview of Basic Income see <http://basicincome.org/basic-income/history/>.

⁵ Deborah Hardoon, Ricardo Fuentes-Nieva and Sophia Ayele, *An Economy for the 1%: How privilege and power in the economy drive extreme inequality and how this can be stopped* (Oxfam, 2016).

⁶ Richard Reeves, ‘Time to take Basic Income seriously’, Brookings Institution (online), 23 February 2016, <<https://www.brookings.edu/opinions/time-to-take-basic-income-seriously/>>.

of poor health⁷ and impacts on success and performance at school.⁸ This in turn impacts on the macroeconomic level; individuals that performed poorly at school are less likely to become higher-skilled workers and have lower productivity compared to their peers.⁹ This effectively traps the individual and their future family in the poverty cycle, perpetuating inequality.

These issues can also be linked to the impacts of technology on the labour force. Economists suggests that technological advances are one driving factor for increasing unemployment and joblessness rates.¹⁰ Automation significantly impacts routine intensive occupations such as manufacturing¹¹ forcing a shift of labour supply to other occupations less susceptible to automation. According to Frey and Osborne, this represents a hollowing out of the middle-income routine-based labour market; and a proliferation of high-income cognitive-based and low-income service-based markets.¹² Education plays a role here as the lower-skilled workers are unable to access higher-income cognitive occupations and either experience a reduction in, or a total loss of their income. This may lead economic instability due to a reliance on borrowing to maintain consumption by individuals that have experienced income loss or reduction.¹³

A UBI may be able to address some of these issues. For example, several trial UBI programs in India showed positive impacts on health and labour participation with the most significant impacts occurring within traditionally disadvantaged classes such as women and the disabled.¹⁴ A trial in Kenya found citizens receiving automatic payments had lower stress, improved psychological health, and lowered spending on ‘temptation goods’ such as alcohol and tobacco.¹⁵ In Iran, a subsidy program beginning in 2010 has resulted in a sharp decline in the

⁷ Martin Karlsson, Therese Nilsson, Carl Hampus Lyttkens and George Leeson, ‘Income Inequality and Health: Importance of a Cross-Country Perspective’ (2009) *Social Science and Medicine* 70(6) 875-885 <<http://www.sciencedirect.com/science/article/pii/S0277953609007655>>.

⁸ It is important to note that investment in a child’s education is not purely monetarily driven but can also be influenced by parental time and attention investment. Families that can invest more time and attention are typically more affluent and comprised of two biological parents whereas less involved families were typically lower income, single-parent households: Robert Bradley, Robert Corwyn, Harriet McAadoo, and Cynthia Garcia Coll, “The home environments of children in the United States Part 1: Variations by age, ethnicity, and poverty status,” (2001) *Child Development* 72 1844-1867; Jonathan Guryan, Erik Hurst, and Melissa Kearney, “Parental education and parental time with children,” (2008) *Journal of Economic Perspectives* 22.

⁹ Anne Holmes, ‘Some economic effects of inequality’ (Research Paper, Parliamentary Library, Parliament of Australia 2013).

¹⁰ Erik Brynjolfsson and Andrew McAfee, *Race against the machine* (Digital Frontier Press, 2011).

¹¹ Kerwin Charles, Erik Hurst and Matthew Notowidigdo, ‘Manufacturing decline, housing booms, and non-employment’ (Technical Report/ Working Paper No. 18949, National Bureau of Economic Research, 2013) and N. Jaimovich, Siu H.E, ‘The trend is the cycle: job polarization and jobless recoveries’ (Technical Report/ Working Paper No. 18334, National Bureau of Economic Research, 2012).

¹² Carl Frey and Michael Osborne, ‘The Future of Employment: how susceptible are jobs to computerisation’ (2017) *Technological Forecasting and Social Change* 114.

¹³ Michael Kumhof and Romain Ranciere, ‘Inequality, Leverage and Crises (Working Paper no WP/10/286, International Monetary Fund, November 2010) 3 <<http://www.imf.org/external/pubs/ft/wp/2010/wp10268.pdf>>.

¹⁴ Guy Standing, ‘India’s experiment in basic income grants’ (2013) 3(5) *International Sociological Society Global Dialogue*.

¹⁵ Johannes Haushofer and Jeremy Shapiro, ‘Household Response to Income Changes: Evidence from an Unconditional Cash Transfer Program in Kenya’ (2013) *Princeton Working Paper* 36.

percentage of individuals living below the poverty line¹⁶ as well as wealth inequality.¹⁷ These trials also showed increases in spending on education and business ventures.

In contrast, a basic income experiment in the Canadian province of Manitoba (colloquially known as the ‘Mincome’) in the 1970’s generated a 11.3 percentage point reduction in labour market participation amongst program participant.¹⁸ This is somewhat explainable due to social interaction effects¹⁹ such as pregnant women, or mothers with young children taking the opportunity to take a break from the workforce or individuals nearing retirement age taking an early retirement, but is still a significant consideration for any future policy. The contrast in results from the above could be attributed to the Mincome being the first guaranteed income experiments that did not feature a recipient group comprised solely of impoverished or poor individuals.²⁰ At this time the Mincome is the only extended and expansive study on guaranteed incomes in Western economies and is thus the most informative for policy makers in Western countries. The results of the Finland Basic Income experiment will further inform the effects of guaranteed income programs in the West.

Proponents also argue that UBI offers solutions for several of the ‘issues’ often attributed to the current welfare system. For example, UBI disincentives not working by eliminating the benefits of receiving welfare payments as opposed to the benefits of working. This in turn can reduce welfare program expenditure by a government and avoid the poverty trap of traditional welfare systems.²¹ Having a UBI system in place may also provide an economic stimulus as citizens would have more disposable income due to basic needs expenditure being met by the UBI.²²

¹⁶ Djavad Salehi-Isfahani, and Mohammad Mostafavi-Dehzoeei, ‘Cash Transfers and Labour Supply: Evidence From a Large-Scale Program in Iran’, (Working Paper No. 1090, 2017, Economic Research Forum, May 2017) <<http://erf.org.eg/publications/cash-transfers-and-labor-supply-evidence-from-a-large-scale-program-in-iran/>>.

¹⁷ Pouneh Soleimaninejadian, and Chengyu Yang, ‘Effects of Subsidy Reform on Consumption and Income Inequalities in Iran’ (2016) 10(12) *International Journal of Economics and Management Engineering*.

¹⁸ David Calnitsky and Jonathan Latner, ‘Basic Income in a Small Town: Understanding the Elusive Effects on Work’ (2017) *Social Problems*; Wayne Simpson, Greg Mason and Ryan Godwin, ‘The Manitoba Basic Annual Income Experiment: Lessons Learned 40 Years Later’ (2017) 43(1) *Canadian Public Policy* 85.

¹⁹ Calnitsky and Latner estimate about 30% of the 11.3 percentage decrease can be explained by these effects, see Calnitsky and Latner above n 18.

²⁰ This has been a criticism of unconditional welfare experiments as early as the late 1960’s where economist Hyman Minsky noted that many unconditional welfare experiments either exclusively or predominately involved very poor or impoverished individuals and families and thus did not give an accurate representation of what impact an unconditional payment would have on the population at large. These types of experiments could also produce overly optimistic or artificially inflated results due to the ‘catch-up effect’ associated with sudden increases of capital to very poor individuals as opposed to the provision of capital to already financially stable individuals. See: Hyman Minsky, ‘The Macroeconomics of a Negative Income Tax’ (1969) <http://digitalcommons.bard.edu/cgi/viewcontent.cgi?article=1428&hx0026;context=hm_archive>

²¹ Wolfgang Muller, *Does an unconditional basic income provide higher effectiveness and efficiency? An Analysis of the social security systems of Germany, Sweden and the United Kingdom* (Anchor Academic Publishing, 2013).

²² Erik Olin Wright, ‘Basic Income as a Socialist Project’ (paper presented at US-BIG Congress, University of Wisconsin, 4–6 March 2005).

However, UBI is not without its criticism, primarily the methods of funding a UBI program²³ and the possible economic ramifications.²⁴

Before beginning any analysis, it is important to properly understand what UBI is. As the form and substance of a UBI can vary greatly depending upon the proposed system, for the purposes of this paper, UBI will be referred to in a broad and general sense. Generally, as a proposal, a UBI is a ‘tax-free subsistence income [disbursed] to every adult citizen, whether he or she is employed or unemployed, wealthy or poor, healthy or sick, active or idle, and...young or old, with basic incomes [including] children replacing existing child benefits’.²⁵ From this definition we can see that a UBI would act in a similar way to most welfare payments less means testing or other qualifying criteria such as age or veteran status. Consequently, it can be said that a UBI acts in reverse of the normal understanding of tax; as instead of extracting money, the government is providing funds. Of course, a government would need to be able to fund a UBI; which would likely be from tax revenue.

At present, only trial UBI programs for research or testing purposes have been implemented.²⁶ Most of these trial programs have involved automatic monthly or weekly payments to the recipients who were then left to spend the money as they wished. The only established and on-going cash transfer program in the UBI mould is the Alaskan Permanent Fund in the American State of Alaska.²⁷ The Fund is a constitutionally established permanent fund administered by a state-owned board providing an annual payment to Alaskan residents that qualify under the Fund’s eligibility criteria.²⁸ The Bolsa Familia program of Brazil²⁹ is also suggested to be a UBI type program, however this program is more similar to already existing traditional welfare programs assisting poor families with children. The effects of the Bolsa Familia do however emphasise the highly positive impacts a cash transfer program can have on economically disadvantaged families.³⁰

²³ Olivia Goldhill, ‘We talked to five experts about what it would take to actually institute Universal Basic Income’, *Quartz* (online), 6 February 2016 per Kevin Milligan <<https://qz.com/611644/we-talked-to-five-experts-about-what-it-would-take-to-actually-institute-universal-basic-income/>> and Charles Sampford, ‘Paying for Basic Income’ in Jennifer Mays, Greg Marston and John Tomlinson (eds.), *Basic Income in Australia and New Zealand: Perspective from the Neoliberal Frontier* (Palgrave Macmillan, 2016) 133–156 Note Professor Sampford’s chapter explores potential methods of funding but also details the criticisms and issues of funding a UBI.

²⁴ For example, Minsky argued that even when a guaranteed income program ‘balances’ the policy will still have an inflationary effect on the economy, see above n 20, pp 4 - 5.

²⁵ Robert Van Der Veen, ‘Real Freedom versus Reciprocity: Competing Views on the Justice of Unconditional Basic Income’ (1998) *Political Studies* 141.

²⁶ Uganda, Finland, Canada, the Netherlands and Kenya have all implemented trial programs in 2017.

²⁷ *Alaska State Constitution*, Article 9, Section 15.

²⁸ To qualify an individual must be: a resident of Alaska, intending to remain in the state indefinitely, not claimed residency in another state or country or received a benefit from another state or country, been physically present in Alaska for at least 72 consecutive hours during the calendar year and was not; sentenced as a result of a felony conviction or incarcerated during the relevant calendar year Alaska Department of Revenue, Permanent Fund Division, *Eligibility Requirements* (2017) <<http://pfd.alaska.gov/Eligibility/Requirements>>.

²⁹ The Economist, ‘Happy Families’, *The Economist* (online), 7 February 2008 <<http://www.economist.com/node/10650663>>.

³⁰ Deborah Wentzel, ‘Bolsa Familia: Brazil’s Quiet Revolution’, *The World Bank* (online), 4 November 2013 <<http://www.worldbank.org/en/news/opinion/2013/11/04/bolsa-familia-Brazil-quiet-revolution>>.

Many Western nations have begun either debating the practicalities of, or preparing to introduce UBI programs.³¹ In Australia, a UBI concept was recommended during the 1970's through the Henderson Inquiry into Poverty.³² More recently, there have been several calls from both the academic³³ and political spheres,³⁴ for the introduction of a BI or UBI in some form. The introduction of a UBI may also be able to address the concerns about inequities within the Australian tax system.³⁵ With arguments for the introduction of a UBI in Australia, it is pertinent to ask that while the Federal Government has a power to tax under the constitution, does this extend to having the power to provide a UBI?

III CONSTITUTIONAL CONSIDERATIONS

The powers of the Federal Government are governed by the Australian Constitution, which provides powers as well as limitations. For the potential implementation of a UBI there are a number of provisions that may be relevant. The Constitution provides the Commonwealth the power to make laws in respect to taxation: but so as not to discriminate between States or parts of States.³⁶ Revenues collected under the s 51 taxation powers formed part of the Consolidated Revenue Fund (CRF). These funds may then be disbursed by way of s 83 which provides that CRF funds may only be withdrawn under appropriation made by law. The appropriation of money under law is provided by s 81 which allows the federal government to appropriate money out of the CRF 'for the purposes of the Commonwealth'. The s 83 appropriation power is often

³¹ Most notably Finland is currently concluding a UBI experiment. The experiment was originally slated to run for two years with an option for extension, however the extension was not granted with the Finnish Government wishing to explore alternative options such as a universal credit system due to the expense and public 'discomfort' associated with the experiment. Elsewhere, the Work and Pensions Committee of the UK Parliament conducted oral hearings of UBI evidence, Sweden held an ultimately unsuccessful referendum on UBI introduction in 2016, the provincial government of Ontario, Canada has stated it has concluded the 'enrolment' phase for a study across four towns, American Company Y Combinator launched a small pilot program in the city of Oakland.

³² The Inquiry's suggestion was a guaranteed minimum income that was made in the context of supporting access to work: Australian Government, Commission of Inquiry into Poverty, *Poverty in Australia, Interim Report* (1974) <<https://digitised-collections.unimelb.edu.au/handle/11343/62381>>.

³³ Charles Sampford, 'Reconceiving the good life: the key to sustainable globalisation' (Paper presented at The Good Life Conference, Griffith University, Brisbane Australia 12 February 2009) <<https://eprints.qut.edu.au/43380/1/Sampford-Reconceiving-the-Good-Life-HL.pdf>>. Professor Sampford is leading author on BI/UBI in Australia but has not considered whether a UBI or BI would be constitutionally valid.

³⁴ The leader of the Greens Party the Hon, Richard Di Natale has proposed a UBI, amongst other things such as a 'people's bank', as part of a large-scale reform of the Australian welfare system, see Adam Creighton, 'Greens' income plan to cost extra \$254bn a year', *The Australian* (online) 5 April 2018 <<https://www.theaustralian.com.au/national-affairs/treasury/greens-income-plan-to-cost-extra-254bn-a-year/news-story/7e330391575e9f9787e0d0293c426127>>.

³⁵ An example of these concerns is the Hon, Bill Shorten citing issues of negative gearing, trusts, CGT and tax rates for Australian taxpayers; Katherine Murray, 'Bill Shorten says inequality threatens Australia's economy and social cohesion', *The Guardian Australia* (online) 21 July 2017 <<https://www.theguardian.com/australia-news/2017/jul/20/bill-shorten-says-inequality-threatens-australias-economy-and-social-cohesion>>.

³⁶ *Australian Constitution* (Cth) 1900 s 51(ii).

referred to as the ‘spending power’.³⁷ The limitations of the ‘spending power’ are uncertain³⁸ with three prior cases — the *Pharmaceutical Benefits*,³⁹ the *AAP Case*⁴⁰ and *Davis v Commonwealth*⁴¹ — examining the power, but not providing a clear indication of the scope or limitations of the power. The 2009 case of *Pape v Commissioner of Taxation*⁴² (*Pape*) did however address the uncertainty of the ‘spending’, the executive powers as well as the power to tax. It is argued that the case of *Pape* is of particular relevance to a UBI.

Pape concerned the *Tax Bonus for Working Australians Act (Bonus Act)*,⁴³ which was passed in 2009 in response to the Global Financial Crisis (GFC). The *Bonus Act* created a tax bonus payment entitlement of \$250, \$600 or \$900 for a limited class of individual Australian resident taxpayers who had lodged an income tax return for 2007–08.⁴⁴ Membership of the class was defined by reference to a person’s adjusted tax liability (which had to be greater than nil) and taxable income (which had to be less than or equal to \$100 000).⁴⁵ The sum that would be received would be determined by reference to an individual’s taxable income for the 2007-08 income year.⁴⁶ Generally, the *Bonus Act* provided for payments to be made to (rather than extracted from) taxpayers, and for this reason shares some similarity to a UBI system.

Mr. Pape disputed the validity of the *Bonus Act*’s tax bonus disbursement on the basis that the bonus was not a proper exercise of the Commonwealth’s taxation powers but was instead a gift, which the Commonwealth does not have to power to appropriate CRF funds for under ss 81 and 83.⁴⁷ In response, the Commonwealth relied on six grounds to support the *Bonus Act*’s validity with the first three grounds forming the primary basis of the argument:

- (a) legislative power, founded in s 81 of the Constitution, to authorise the spending of appropriated funds, combined with s 51(xxxix);
- (b) the executive power of s 61 read with ss 51(xxxix), 81 and 83;
- (c) an implied ‘nationhood’ power;
- (d) the trade and commerce power (s 51(i));
- (e) the taxation power (s 51(ii)); or
- (f) the external affairs power (s 51(xxix)).

³⁷ Cheryl Saunders, ‘The Development of the Commonwealth Spending Power’ (1978) 11 Melbourne University Law Review 369.

³⁸ *Ibid.*

³⁹ *Attorney-General (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237.

⁴⁰ *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338.

⁴¹ *Davis v Commonwealth* (1988) 166 CLR 79.

⁴² *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

⁴³ *Tax Bonus for Working Australians Act* (No 2) 2009 (Cth).

⁴⁴ *Ibid* ss 5, 6. An Australian resident for the purposes of the Act holds the same meaning as s 6(1) Income Tax Assessment Act 1936 (Cth): see the Act s 4(1); Income Tax Assessment Act 1997 (Cth) s 995.1(1).

⁴⁵ *Tax Bonus Act* s 5(1)(c), (d).

⁴⁶ *Ibid* s 6.

⁴⁷ This section states that no money can be withdrawn from the Treasury of the Commonwealth except under appropriation made by law.

The Court’s analysis and decision primarily concerned grounds (a) and (b) although the taxation power was also discussed. Ground (a) was unanimously rejected on the basis that s 81 did not confer a power to spend only a power to appropriate. The majority (French CJ, Gummow, Crennan and Bell JJ) found that the validity of the *Bonus Act* could be upheld under ground (b). In dissent, Hayne and Kiefel JJ held that the *Bonus Act* was invalid but could be read down to fall within s 51(ii) — the basis of ground (e) — whilst Heydon J held the *Bonus Act* was entirely invalid. From this decision, we can see that the principles contained in grounds (a) and (b) are the most important for constructing constitutional validity for any potential UBI legislation. The Court’s analysis of ground (e) is also relevant for characterising the relationship between the payment of money and extraction of money. As such, these grounds will be examined individually to fully understand the reasoning of the court. Following the examination, the reasoning will be applied to a potential *UBI Act*.

A. Ground A

The analysis of ground (a) can be divided into two sub-issues; 1) does s 81 provide a substantive spending power, and 2) did the *Bonus Act* satisfy the ‘for the purposes of the Commonwealth’ requirement of s 81.

In their analysis of the first sub-issue, the Court was of the view that neither the section itself, nor the chapter it appears in contained words that concerned or expressed a conferral of power to the executive,⁴⁸ but instead served as regulating provisions or stipulations on the methods of government spending.⁴⁹ In coming to this interpretation, the Court favourably cited previous characterisations of appropriations such as; ‘[a] provisional setting apart’,⁵⁰ ‘earmarking of’⁵¹ or ‘[a means of] legally segregating [money] from the general mass’⁵² of funds in the CRF as a basis of jurisprudence to emphasise the limitations of the scope of appropriation. This finding is significant as it overturns the assertion that s 81 is the source of a ‘spending power’.⁵³

With the characterisation of s 81 as a power to set aside money rather than spend, the process of government spending effectively becomes a two-part process: 1) the setting aside of money for a purpose (an appropriation under s 81); and 2) a legislative or executive action to spend the appropriated funds to achieve a purpose. As such, an appropriation under s 81 is by itself insufficient to support the spending of money. By way of this characterisation, the second part of the ground (a) submission — that s 51(xxxix) in conjunction with s 81 would validate the

⁴⁸ *Pape* at [606] per Heydon J.

⁴⁹ *Ibid* [80] per French CJ and [291] per Hayne and Kiefel JJ.

⁵⁰ *New South Wales v Commonwealth* (1908) 7 CLR 179 at [191] per Griffith CJ, cited at [78] per French CJ, [292] per Hayne and Kiefel JJ and [602] per Heydon J.

⁵¹ *AAP Case* (1975) 134 CLR 338 at [411] per Jacobs J, cited at [177] per Gummow, Crennan and Bell JJ, [177] per Hayne and Kiefel JJ and [602] per Heydon J.

⁵² *New South Wales v Commonwealth* (1908) 7 CLR 179 at [200] per Isaacs J cited at [79] per French CJ, [176] per Gummow, Crennan and Bell JJ, [292] per Hayne and Kiefel JJ and [602] per Heydon J.

⁵³ There are some similarities to the finding of Mason J in the *AAP Case*. Mason J also found that appropriation of CRF funds by the legislature should be distinguished from the actual spending of appropriated funds by the executive. The views of the Court in *Pape* and that of Mason J in *AAP* diverged at this point as Mason J seemed to be of the view that the payment of appropriated money to third parties did not require any further power to be valid (unless the spending of the money involved action by a Commonwealth actor) which the Court rejected.

spending of money — is also defeated as s 51(xxxix) allows the Commonwealth to act on matters incidental to an enumerated head of power. As s 81 does not confer a head of power to spend, s 51(xxxix) cannot provide authority to act.

The second sub-issue concerned the phrase ‘for the purposes of the Commonwealth’ as contained in s 81. This phrase was seen as a potential limiting factor of the power to spend. From the prior cases of *Pharmaceutical Benefits* and the *AAP Case*, two interpretations emerged: 1) there are no limitations on what purposes for which an appropriation can be made;⁵⁴ and 2) an appropriation will be valid if the purpose to which it is directed may be the subject of a valid law.⁵⁵ Mr. Pape submitted that the second, narrower appropriation should be preferred. The majority however preferred a broader interpretation for varying reasons.⁵⁶ From this, it can be inferred that an appropriation will be valid so long as it relates to a constitutionally valid law.⁵⁷ Consequently, a valid power needs to exist.

B. *Ground B*

As s 81 was held not to confer a power making it insufficient to support the validity of the *Bonus Act* by itself, the Court turned to the second ground. The majority (French CJ, Gummow, Crennan and Bell JJ) held that the bonus provision could be supported through the executive power in s 61, along with the express incidental power in s 51(xxxix). The executive power of s 61 authorised the expenditure of appropriated funds, whilst the incidental power of s 51(xxxix) would support the remainder of the act as it was incidental to the expenditure of funds. Whilst the majority reached the same conclusion, the reasoning of French CJ and Gummow, Crennan and Bell JJ differed.

Gummow, Crennan and Bell JJ applied the validity of executive action test established in the case of *Davis v Commonwealth*⁵⁸: ‘is the impugned action an enterprise or activity that is peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation?’⁵⁹ Their Honours answered this test by identifying ‘[a] need for an immediate fiscal stimulus to the national economy’⁶⁰ that was of such severity to amount to a ‘global financial and economic crisis’.⁶¹ Their Honours then went on to conclude that as the GFC affected Australia as a nation, an appropriate response could be likened ‘to determining a

⁵⁴ *Pharmaceutical Benefits Case* (1945) 71 CLR 237 at [254] - [256] per Latham CJ and [273] – [274] per McTiernan J and *AAP Case* (1975) 134 CLR 338 at [396] per Mason J.

⁵⁵ *AAP Case* (1975) 134 CLR 338 at [362] per Barwick CJ and [375] per Gibbs J and *Pharmaceutical Benefits Case* (1945) 71 CLR 237 at [269] per Dixon J.

⁵⁶ Gummow, Crennan and Bell JJ likened ‘purposes of the Commonwealth’ to ‘public service’ in the UK which does not place limitations of the purposes which the parliament can make an appropriation for, French CJ concluded that the ‘purposes of the Commonwealth’ are the purposes authorised by the *Constitution* or statutes made under the *Constitution*, Heydon J concluded that the power to appropriate is limited to purposes of valid enactments under the *Constitution*.

⁵⁷ *Pape* (2009) 238 CLR 1 at [75] per French CJ and [608] per Heydon J.

⁵⁸ *Davis v Commonwealth* (1988) 166 CLR 79 at [111] per Brennan J formulating the principle outlined by Mason J in the *AAP Case* (1975) 134 CLR 338 at [397].

⁵⁹ Test cited with approval in *Pape* at [228].

⁶⁰ *Pape* (2009) 238 CLR 1 at [232].

⁶¹ *Ibid* at [229] and [233].

state of emergency in circumstances of a natural disaster⁶² which would engage the executive power.

French CJ agreed with Gummow, Crennan and Bell JJ that '[t]he executive power extends ... to short-term fiscal measures to meet adverse economic conditions affecting the nation as a whole ...',⁶³ however he did not support the likening of the GFC to a natural disaster nor the assertion that s 61 explicitly extended a power to respond to national emergencies.⁶⁴ French CJ also did not use the executive action test of *Davis* as Gummow, Crennan and Bell JJ did, but instead stated that, under established authority, the test was; whether it was peculiarly within the capacity and resources of the Commonwealth and affected the nation as a whole.

French CJ went on to conclude that the executive power of s 61 encompassed (i) a power to engage in activities peculiarly adapted to the position of a national polity; and (ii) a power to manage the national economy. On this basis, s 61 would cover short-term fiscal measures addressing economic conditions affecting the nation. As only the Commonwealth had the resources to respond to the financial crisis, the express incidental power of 51(xxxix) would give authorisation to the *Bonus Act*. This reasoning could be applied to a UBI on the grounds of the impacts of income inequality and labour force changes on the national economy. This will be discussed after the analysis.

C. Ground E

Ground (e) did not receive a significant amount of analysis compared to grounds (a) and (b), however the Court's analysis of the *Bonus Act* as a tax rebate/refund is significant. Prior to *Pape*, the prospect that legislation that provided payments to taxpayers was a law with respect to taxation had been examined in the case of *Mutual Pools*.⁶⁵ *Mutual Pools* concerned the *Swimming Pools Refund Act (Refund Act)*⁶⁶ that had been enacted to refund the revenue of a sales tax that had been ruled invalid prior to the litigation.⁶⁷ The *Refund Act* provided the refund by way of s 4 which also imposed several limitations on who could receive the refund.

The Commonwealth sought to characterise the *Bonus Act* as a rebate or refund of tax by drawing an analogy with the *Refund Act*. Several differences between the acts existed: the amount payable under the *Bonus Act* was determined by recipients' taxable incomes as opposed to income tax liabilities under the *Refund Act*; and recipients were defined by several criteria, only one of which was that they had paid income tax. The Court rejected this analogy; Gummow, Crennan and Bell JJ held the *Bonus Act* was not a rebate nor a refund as the amounts received were not related to tax paid in the relevant income year.⁶⁸ Hayne and Kiefel JJ reached

⁶² *Ibid* at [233].

⁶³ *Pape* (2009) 238 CLR 1 at [133].

⁶⁴ *Ibid* at [9].

⁶⁵ *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155.

⁶⁶ *Swimming Pools Tax Refund Act 1992* (Cth).

⁶⁷ The tax was ruled invalid under s 55 of the *Constitution* as the tax was determined to not be a sales tax, but to be a tax on land as the swimming pools, which the act concerned, were constructed on site and thus deemed to form part of the land. As a sales tax is technically an excise, the tax was invalid as under s 55, laws imposing duties of excise shall deal with duties of excise only and the act imposed a tax: *Mutual Pools & Staff Pty Ltd v Commonwealth* (1992) 173 CLR 450.

⁶⁸ *Pape* (2009) 238 CLR 1 at [254]– [255].

a similar conclusion, stating ‘[there needs to be a] direct connection ... between the amount of the bonus [received] and the amount that has been paid in tax’.⁶⁹ Consequently, this ‘nexus’ between paying tax and receiving an entitlement is critical for the tax power. In relation to a UBI, it is argued that it cannot be characterised as a tax refund or rebate as there would likely not be a sufficient and direct connection to the amounts received and tax paid (if any in some cases). For this reason, it is argued that the tax power alone would not be sufficient to support a UBI.

The reasoning of *Mutual Pools* contained analysis of the taxation power that may be significant for the purposes of constructing a valid *UBI Act*. Under the *Refund Act*, pool builders could claim a refund of the tax paid provided they declared to the Commissioner for Taxation whether the tax was passed on wholly or in part to a pool purchaser. If a purchaser had paid an increased price, but not received a refund adjustment from the pool builder, the Commonwealth would pay the refund direct to the purchaser. When the Commissioner declined to pay a refund, the plaintiff — a pool builder — challenged the validity of the *Refund Act* on the basis of that under s 51(xxxi) the denial of the refund was an acquisition of property and s 55 which was abandoned in argument. The Court unanimously upheld the *Refund Act* rejecting this argument on the basis that the *Refund Act* was a law with respect to taxation and therefore not a law for the purposes of s 51 (xxxii).⁷⁰ It was concluded that the *Bonus Act* was valid under s 51(ii) and (xxxix) in conjunction with s 61. This decision is similar to the decision in *Pape* in which validity for the *Bonus Act* was constructed through ss 51(xxxix) and 61; the provision was held to be a law concerning a matter incidental to the execution of the *Constitution*, the enforcement of taxation.⁷¹

D. Constructing UBI Validity

As such, from the decision of *Pape*; it is apparent that the power to appropriate does not confer a power to spend, either explicitly or incidentally, merely the power to set aside funds from the CRF for purposes specified by valid laws. As such, s 81 cannot be relied upon to validate spending for any purposes, and the Commonwealth would have to rely on other powers to establish validity. Whilst it does appear that the executive power under s 61 can be relied upon, the Commonwealth would have to provide sufficient grounds for UBI legislation to come under this head of powers. As shown by *Pape*, the power of s 51(xxxix) was engaged due to the impacts of the GFC on the national economy. A UBI may be justified on a similar basis due to the impacts of labour market changes and income inequality on the national economy. These impacts could be likened to those experienced during the GFC as income inequality, as mentioned in section II, can lead to economic instability which could also be considered as a precursor to a financial crisis.⁷² Income inequality may also lead to slowing or breaking effects on the economy⁷³ which can also drive lower income households towards borrowing as a means to finance their consumption. With these economic considerations, it may be possible to

⁶⁹ *Pape* (2009) 238 CLR 1 at [387].

⁷⁰ *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at [12] per Mason CJ.

⁷¹ *Ibid* at [14].

⁷² Michael Kumhof and Romain Ranciere, ‘Inequality, Leverage and Crises (Working Paper no WP/10/286, International Monetary Fund, November 2010) 3. <<http://www.imf.org/external/pubs/ft/wp/2010/wp10268.pdf>>.

⁷³ ‘How inequality affects growth’ *The Economist* (online) 15 June 2015 <<https://www.economist.com/blogs/economist-explains/2015/06/economist-explains-11>>.

construct an argument that draws an analogy to the *Bonus Act* on the basis of a need to manage the national economy to prevent financial crisis.

Whilst *Pape* does give an indication of the constitutional validity of short-term fiscal policy, uncertainty regarding long-term policy such as that that would be created by a *UBI Act* still exists. It appears that the *UBI Act* could also not be found valid under the taxation power of s 51(ii) as there would likely not be a sufficient or direct connection to the amounts received and tax paid. Alternatively, if a nationwide UBI cannot be found valid, a narrower scope UBI or BI for towns or regions that have been impacted by economic downturn⁷⁴ like the model proposed in Ontario, Canada.⁷⁵ As this model is more focused, and narrow in membership scope, it can be more likened to current welfare legislation than a more general UBI.⁷⁶ Due to the similarity of UBI to other welfare provisions, it can be said that a UBI Act would come under the same head of power.⁷⁷ A second alternative method of introducing a UBI is through constitutional amendment, similar to the Alaskan Permanent Fund. However, this is particularly unlikely considering the historical lack of success constitutional amendments have experienced in Australia.⁷⁸

Whilst there is some uncertainty around the constitutional validity of a UBI, it is argued that a UBI Act would be valid pursuant to ss 61 and 51(xxxix) and potentially s 51(xxiiiA). If this is the case; what impact could a UBI have on Australia's tax system; including legislation and its administration? This is addressed next.

IV IMPACTS ON TAX LEGISLATION

The existing taxation legislation has been criticised as overly complex and rigid in application.⁷⁹ These criticisms have come from tax professionals,⁸⁰ the legislature⁸¹ and the judiciary.⁸²

⁷⁴ Examples of these areas include: Yabulu in Northern Queensland following the closure of the Queensland Nickel refinery, mining towns in Perth and areas affected by the closure of car manufacturing plants such as Altona, Broadmeadows, Elizabeth and Geelong.

⁷⁵ Rebecca Fortin, 'Canada is betting on a universal basic income to help cities gutted by manufacturing job loss', *Quartz* (online) 20 February 2017 <<https://qz.com/914247/canada-is-betting-on-a-universal-basic-income-to-help-cities-gutted-by-manufacturing-job-loss/>> and Hugh D Segal, 'Finding a Better Way: A Basic Income Pilot Project for Ontario' <<https://www.ontario.ca/page/finding-better-way-basic-income-pilot-project-ontario>>.

⁷⁶ This may however raise an issue of non-discrimination between states, Gummow, Crennan and Bell JJ suggested this to be a significant consideration, see *Pape* (2009) 238 CLR 1 at [237] - [238].

⁷⁷ The power to make laws in respect to welfare is provided by s 51(xxiiiA).

⁷⁸ Benefits of a fund include; extra legal protections for recipient's due the fund being administered by a board of appointed trustees and more efficient policy changes due to it's being administered by a dedicated board.

⁷⁹ See for example, *AAT hearing of Trustee for the Estate of EV Duke v FCT* (2002) 50 ATR 1060, quoted in David Wallis, 'The tax complexity crisis' (2006) 35 *Australian Taxation Review* 274, 278.

⁸⁰ Colin Brinsden, Australian tax system complex: survey, *Sydney Morning Herald* (online) 19 June 2008 <<http://www.smh.com.au/national/australian-tax-system-complex-survey-20080619-2tgj.html>>.

⁸¹ Examples include: Commonwealth, *Parliamentary Debates*, House of Representatives, 9 October 2006, 111 (Hon A Cadman MP) and Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 2006, 1 (Hon P Costello MP, Treasurer).

⁸² *FCT v Scully* [2000] HCA 6, 43 per Kirby J.

Perhaps once of the most descriptive criticisms of the tax law was delivered by Justice Hill where he described a provision he was ruling on as being drafted “with such obscurity that even those used to interpret the utterances of the Delphic oracle might falter in seeking to elicit a sensible meaning from its terms”.⁸³ The tax law has also been likened to a ‘jungle’ that only specialist could navigate.⁸⁴ Approximately 72.4 per cent of Australians tax filers lodged their tax return through a tax agent⁸⁵ which is one of the highest percentages of usage in the world and could support assertions of the complexity of the existing legislation.⁸⁶ McKercher also found that the level of complexity was directly related to taxpayer compliance costs and accordingly a taxpayers' commitment to compliance.⁸⁷

However, as noted by the Commonwealth Ombudsman, in some cases, complex and nuanced tax laws are necessary to deal with the diverse pool of tax filers.⁸⁸ A recent parliamentary report on UBI acknowledged that introducing a UBI would not be possible without significant changes to government programs and/or the taxation system.⁸⁹ These changes could serve to decrease tax legislation complexity. There are several suggestions on how to reduce tax legislation complexity, the most relevant to a UBI are perhaps; elimination of the tax-free threshold and offsets, and the elimination or reduction in number of deductions. The elimination or reduction of these may also assist in the funding of the UBI due to reduced tax expenditure.

If a UBI is introduced, it could be argued that the tax-free threshold would no longer be necessary as the UBI would instead effectively be providing the income, making the threshold redundant.⁹⁰ If the threshold were to be eliminated, it is important to consider what amount the UBI payment would be set at to prevent issues similar to those of effective marginal tax rates occurring.⁹¹ The actual amounts paid under a UBI vary from policy to policy⁹² but generally fall between \$10,000 and \$20,000 per annum. If the tax-free threshold were to be eliminated,

⁸³ *FCT v Cooling* (1990) 90 ATC 4472, 4488 per Hill J.

⁸⁴ *Hepples v FCT [No. 2]* (1991) 65 ALJR 650, 657 per Deane J.

⁸⁵ Australian Taxation Office 2014, Taxation Statistics 2011-12, Australian Taxation Office, Canberra.

⁸⁶ This figure could also suggest that taxpayers want to ensure the accuracy of their returns and access to all entitlements they are eligible for.

⁸⁷ Margaret McKerchar, *The Impact of Complexity upon Tax Compliance: A Study of Australian Personal Taxpayers*, (Australian Tax Research Foundation, Sydney, 2003).

⁸⁸ Joint Committee of Public Accounts and Audit, Office of the Commonwealth Ombudsman, submission 38, Report 410 - Tax Administration, 2008, 4.

⁸⁹ Don Arthur, Parliament of Australia, *Basic Income: a radical idea enters the mainstream* (2016) 6.

⁹⁰ Generally, it is suggested that the tax-free threshold be increased to promote equity: Jeff Pope, 'reform of the Personal Income Tax System in Australia' (2005) 24 *Economic Papers: A journal of applied economics and policy* 316. A UBI may also provide the same benefits that are suggested to arise from increasing the threshold.

⁹¹ This refers to proportion of an additional dollar of earnings that is lost to both income tax and the reduction of welfare benefits which can promote a disincentive to working: Guyonne Kalb, 'Interaction of the Tax and Social Security Systems in Australia: The Effect on Effective Marginal Tax Rates' (2007) 40 *The Australian Economic Review* 186. A UBI may result in a similar experience for low income earners as they will no longer receive welfare support/income subsidisation and would no longer have their income 'protected'.

⁹² Compare Charles Murray's \$10,000 per annum payment to the suggestion of Peter Hartcher where a UBI is set at approximately \$20,000 per year: Peter Hartcher, 'A basic income isn't the answer to jobs panic', *Sydney Morning Herald*, 7 June 2016, 16 <<http://www.smh.com.au/comment/the-basic-wage-isnt-an-answer-to-the-jobs-panic-20160606-gpcuwv.html>> .

perhaps it would ideal to set the payment amount around \$18,200 to replace the previously ‘protected’ income.

Creedy, Hérault and Kalb found that such a modification is possible whilst maintaining approximate revenue neutrality⁹³ and not adversely effecting low income earners so long as they were adequately subsidised.⁹⁴ Similarly, tax offsets, such as those available to low income earners, could also be eliminated due to the UBI payments effectively making them redundant. It may also be pertinent to review the current tax brackets to address any issues effective tax rate issues occurring in higher brackets. However one issue with this review is a necessity to move middle and high-income earners to higher tax rates. Social Researcher Ben Phillips modelled a proposal for The Australian under which all Australian residents aged 15 and over would receive \$23,000 a year with children additionally receiving \$5,500 a year. Phillips analysis found that such a proposal would require all marginal income tax rates, including the tax-free threshold, to rise by 33 percentage points to pay for the proposal, bringing the top tax rate on incomes above \$180,000 to 78 percent. Phillips noted that ‘[O]ne of the claims of UBI advocates is that they remove the high effective marginal tax rate. To some extent that’s true but the majority of taxpayers move to even higher effective rates’.⁹⁵

The elimination of, or reduction of available personal deductions has been the subject of significant debate.⁹⁶ Advocates state that deductions increase tax system complexity and reduce potential tax revenue. In a recent speech⁹⁷ Taxation Commissioner Chris Jordan expressed concern for the amount being claimed in deductions. It was stated that in 2014-15 approximately \$22 billion was claimed for work related expenses. As such it is apparent that deductions are a significant source of tax expenditure; whilst some of this, as noted by the Commissioner, is likely the result of legitimate mistake owing to tax complexity,⁹⁸ it is possible tax deductions are being exploited. With the introduction of a UBI, it may be possible to either reduce or eliminate deductions, with the tax revenue instead being used to fund the UBI.⁹⁹ As noted by Eccleston, the removal of deduction could be met with significant disapproval and

⁹³ John Creedy, Nicolas Hérault and Guyonne Kalb, 'Abolishing the Tax-Free Threshold in Australia: Simulating Alternative Reforms' (2009) 30 *Fiscal Studies* 219.

⁹⁴ John Creedy, Nicolas Hérault and Guyonne Kalb, 'Tax Policy Design and the Role of a Tax-Free Threshold' (2011) 11 *Public Finance and Management* 338.

⁹⁵ Adam Creighton, 'Greens' income plan to cost extra \$254bn a year', *The Australian* (online) 5 April 2018 <<https://www.theaustralian.com.au/national-affairs/treasury/greens-income-plan-to-cost-extra-254bn-a-year/news-story/7e330391575e9f9787e0d0293c426127>>.

⁹⁶ Richard Eccleston, 'Confronting the sacred cow: the politics of work-related tax deductions', (2006) 21 *Australian Tax Forum* 4.

⁹⁷ David Chau, 'ATO tax deductions warning for small businesses and individuals', *ABC News* (online) 5 July 2017 <<http://www.abc.net.au/news/2017-07-05/ato-coming-after-small-businesses-and-individuals/8680948>>.

⁹⁸ Evans notes that availability of too many deductions can increase compliance burden due to added complexity; Chris Evans, 'Taxation compliance and administrative costs: An overview' In Michael Lang, Christine Obermair, Josef Schuch, Claus Staringer and Patrick Weninger (eds.), *Tax Compliance Costs for Companies in an Enlarged European Community* (Kluwer Law International, The Netherlands. 2008).

⁹⁹ The tax reforms of New Zealand in the 1980's which eliminated work related deductions may provide insight here. Examples of others countries that have substantially or totally eliminated deductions include: Canada, Britain, The Netherlands, Spain and Switzerland; Adam Creighton, 'Deduct the tax deductions', *The Australian* (online) 7 July 2017 <<http://www.theaustralian.com.au/business/opinion/adam-creighton/deduct-the-tax-deductions/news-story/ed01d6e58326ec1fcd89095b717df362>>.

increase feelings of unfairness towards the tax system; an alternative method to total elimination of deductions is to instead roll the currently available deductions into a single standard deductible amount such as the model proposed by Tran-Nam and Evans.¹⁰⁰ This method may be preferable to a sudden total elimination of deductions and could also be used as a transitional measure toward the total elimination of deduction.

Another consideration that could assist in the funding of a UBI is the reduction or elimination of the CGT discount and negative gearing. The actual cost to tax revenue arising from the CGT discount and negative gearing is difficult, however it is estimated that the total cost is between \$8 billion to \$11 billion,¹⁰¹ with approximately \$6.2 billion attributable to the CGT discount.¹⁰² When the CGT discount was introduced, it was argued that the policy would result in greater revenue collection,¹⁰³ however an examination by Minas et al however concluded that this is not the case and that the 50% discount is a revenue-losing policy.¹⁰⁴ On this basis, it can be argued that the CGT discount could either be eliminated or reduced.

V IMPACTS ON TAX ADMINISTRATION

Typically, a UBI would replace existing income support/subsidy programs such as pensions or unemployment payments. Also, depending on the policy, a UBI may also partially or comprehensively replace other welfare services. Some UBI proponents also suggest the mass elimination of other government support programs such as agricultural and rail road subsidies.¹⁰⁵ A more moderate approach, such as the one advocated by Bruenig has the UBI program working in conjunction with target payments for disability, unemployment and childbirth.¹⁰⁶

A reduction or elimination of income support programs may also partially address the question of how the UBI would be funded. The cost of cash transfers and administration are quite significant in Australia. In the 2016-17 year, the Federal Government expected to spend \$158.6 billion on social security or welfare¹⁰⁷ which represented 35% of total expected government

¹⁰⁰ Binh Tran-Nam and Chris Evans, 'Tax Policy Simplification: An Evaluation of the Proposal for a Standard Deduction for Work Related Expenses' (2012) 26(4) *Australian Tax Forum* 719-735.

¹⁰¹ Matt Grudnoff, 'Top Gears: How negative gearing and the capital gains tax discount benefit the top 10 per cent and drive up house prices' (2015) *The Australia Institute* 3 and John Daley and Danielle Wood, 'Hot property: Negative gearing and capital gains tax reform' (2016) *Grattan Institute* 2.

¹⁰² John Daley and Danielle Wood, 'Hot property: Negative gearing and capital gains tax reform' (2016) *Grattan Institute* 2.

¹⁰³ John Minas, *The Implications of Capital Gains Tax Rate Preferences for Personal Taxpayers in Australia* (PhD Thesis, University of New South Wales, 2017) 49.

¹⁰⁴ Chris Evans, John Minas, and Youngdeok Lim 'Taxing personal capital gains in Australia: An alternative way forward' (2015) 30(4) *Australian Tax Forum* 735-761.

¹⁰⁵ For example, see Charles Murray, *In our hands: a plan to replace the welfare state*, American Enterprise Institute, Washington DC, 2006, 130-139.

¹⁰⁶ Matt Bruenig, 'A universal basic income approach', on Demos, *Policyshop*, (15 September 2015) <<http://www.demos.org/blog/9/15/15/universal-basic-income-approach>>.

¹⁰⁷ Australian Federal Government, Budget Overview, Budget 2016-17, Appendix B <<http://budget.gov.au/2016-17/content/glossies/overview/html/overview-13.htm>>.

spending. Forecasts predict this expenditure will raise to approximately \$191.8 billion by 2019-20.¹⁰⁸ Further the cost of administering Centrelink was estimated to be approximately \$3 billion in the 2012-13 year.¹⁰⁹

If, as proposed in section IV, the UBI were to be set around the current tax-free threshold maximum of \$18,200 to replace the previously tax-free income, this would cost the Federal Government \$333 billion per year to cover all adults in Australia. The current welfare expenditure would cover almost half of this cost (47%) whilst the 2019-20 estimate would cover 57% of the cost assuming the adult population stays somewhat static. Not all of the Centrelink administration costs would be eliminated as there would still be a need for a body to administer the UBI payments. Centrelink and other welfare departments could be formed into one administrative body due to the elimination of the various welfare payments. This could also further eliminate the administrative costs of these payments. As a UBI is universal, and therefore provided to all eligible recipients regardless of circumstance and characteristics, the administration of the payment is more simple than typical means tested payments. This would reduce the administrative burden and associated compliance costs.

The introduction of a UBI may also result in savings from other areas. Mason suggests that whilst a UBI may increase total welfare costs, the effects of a UBI on improving the health of lower socioeconomic recipients may ultimately result in significant savings from the health sector.¹¹⁰ These savings or reductions in spending, combined with the elimination of administrative costs, may work to partially fund the UBI directly and indirectly.

VI IMPACTS ON THE TAXATION SYSTEM

To fund a UBI, it has been suggested that deductions against income and deductions for capital gains should be removed.¹¹¹ This would decrease complexity as well as increase tax revenue to help fund the UBI. A decrease in complexity will also have positive impacts on the tax system overall.

High levels of tax complexity result in the taxation system being less transparent and being seen as unfair. A system perceived as being unfair has been shown to result in lower levels of compliance.¹¹² Being one of the more complex systems in the world¹¹³ coupled with steady

¹⁰⁸ Australian Government, *Budget strategy and outlook: budget paper no. 1: 2016–17*, pp. 5-25-5-29.

¹⁰⁹ Department of Social Services, *A New System for Better Employment and Social Outcomes*, Final Report (February 2015) <https://www.dss.gov.au/sites/default/files/documents/02_2015/dss001_14_final_report_access_2.pdf>.

¹¹⁰ Paul Mason, 'PostCapitalism' (Speech delivered at Talks at Google, London, December 2015) <<https://www.youtube.com/watch?v=cQyr9I22fLE>>.

¹¹¹ Referring to deductions of the cost base of a CGT asset.

¹¹² John Braithwaite, 'The Essence of Responsive Regulation' (2011) *University of British Columbia Law Review*, 44 (3); John Braithwaite, *Markets in Vice, Markets in Virtue* (Oxford, 2005); Valerie Braithwaite, *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate Publishing Ltd, Aldershot, 2003).

¹¹³ Australian Government, *Re:think Tax Discussion Paper March 2015* (2015), Australian Government, The Treasury, *Stocktake of Regulation Final Report March 2015* (2015) and World Bank Group and PricewaterhouseCoopers, *Paying Taxes 2015* (2015) 152-154.

increases in compliance costs¹¹⁴ would raise concerns as to the level of compliance by taxpayers in Australia.¹¹⁵ McKechar found that complexity of the tax system can also lead to unintentional non-compliance.¹¹⁶ The question of how to increase compliance with the tax system has long been asked by law and policy makers as well as governing bodies. Braithwaite suggests that non-compliance can be linked ‘to failure to see benefits, failure to see fairness in the system and failure to feel any moral obligation to pay tax’.¹¹⁷ With the proper framing of a UBI, the issue of lack of realisable benefit may be addressed. A UBI would provide a realisable and tangible benefit in the form of ‘free money’. With the addition of the benefit of the UBI payment being linked to tax system compliance, the issue of failure to see benefit may be addressed.

What may be insightful is to consider the mechanism used by the *Bonus Act*. Section 5(e) imposed the condition that an individual must lodge their income tax return no later to be eligible for receipt of the bonus. The inclusion of a similar condition in any UBI legislation could address the lack of realisable/foreseeable benefit issue suggested by Braithwaite. For instance, to be eligible for UBI payments in the coming financial year, an individual must lodge their tax return no later than a nominated date. Coupling the receipt of ‘free money’ with the condition of filing a tax return would give individuals an incentive to comply with the requirements of the tax system. As the key aspect of a UBI is its being universal, this condition would also serve to capture high wealth individuals. For example, the ATO experienced an increase in tax return lodgements in the 2008-9 year which was attributed to the Bonus Act payment.¹¹⁸ As such it is a realistic proposition that a UBI in conjunction with a tax return lodgement condition would lead to increased tax system participation.

VII FUTURE RESEARCH

Any future UBI legislation or policy would benefit substantially from further research into the impacts and outcomes of the introduction of a UBI. Possible areas of future research include; further financial modelling to determine what amount a UBI could be viably set at and the potential savings associated with some of the suggested tax amendments, further considerations as to what tax provisions could be removed or altered, consideration of taxpayer behaviour (including compliance with and attitude towards the tax system) under a UBI system. This research would lead to a better-informed policy and reduce risks and issues associated with its introduction.

Additionally, as noted section II, further research into the impact of UBI on Western economies is needed to more accurately inform policy makers on the potential impacts on more developed

¹¹⁴ Philip Lignier and Chris Evans, ‘The Rise and Rise of Tax Compliance Costs for the Small Business Sector in Australia’ (2012) 27(3) *Australian Tax Forum* 615-672.

¹¹⁵ As no statistics on rates of compliance from year to year are kept, this is a generalisation. A method of estimating the rate of compliance may be to compare the rates of litigation involving the ATO year to year.

¹¹⁶ Margaret McKechar, *The impact of complexity upon unintentional non-compliance for Australia personal income taxpayers*, Doctoral Dissertation (University of New South Wales, 2002).

¹¹⁷ Valerie Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy* (Edward Elgar, 2009).

¹¹⁸ Australian Federal Government, Final Budget Outcome Part 1: Australian Government Budget Outcome <http://www.budget.gov.au/2008-09/content/fbo/html/part_1.htm>.

economies. Furthermore, these experiments need to be broader in scope and not focus predominately on impoverished or very poor individuals and families. The results of experiments in developing economies, or experiments made up predominately of poor recipients may produce overly optimistic results due to the sudden increase in living condition as a result of the additional funds.

VIII CONCLUSION

A UBI potentially offers realisable benefits to the individual, government and nation as a whole, with a UBI possibly complimenting Australia's tax system. This paper has discussed what a UBI is and its potential benefits, such as the promotion of income equity leading to improved health and labour force participation amongst low income earners. This paper then explored whether a UBI would be constitutionally valid; including the Australian taxation power. Then the potential impact of a UBI was explored; including possible reductions in tax system complexity and increases in compliance. Overall it was argued that UBI legislation is worth further exploration as it could address current issues within the tax system and future issues arising from income inequality and changes to the labour market.

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