

The coherent principles approach to tax law design

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The Government is developing a new principles-based approach to the design of tax law, known as the *coherent principles approach*.

The approach is being phased in gradually, for amendments of existing provisions in the law that do not require extensive rewriting and for some new stand-alone measures.

This article explains how the coherent principles approach translates intended tax policy outcomes into principled rules in the tax law, and argues that the resulting law can be more certain, less complex and more flexible than the current black-letter tax law approach.

1 The author is from Tax Design Division, the Australian Government Treasury. This article has benefited from comments and suggestions provided by many people but, in particular, by Brenda Berkeley, Chris Leggett, Paul McCullough and Tom Reid. The views in this article are those of the author and not necessarily those of the Australian Government Treasury.

Introduction

Australia's tax laws are complex.² There are many good reasons why that is the case. In particular, tax laws deal with a complex commercial world and play many roles apart from raising revenue to pay for Government services: they are also used to advance other socially desirable goals such as providing financial benefits to particular sectors of society (for example, families with children and the aged) and incentives to engage in particular economic activities (for example, research and development).

However, another factor contributing to the current complexity of our tax laws has been the manner in which they have been developed and written.

Addressing this issue in its plan for a new tax system in 1998, the Government made a commitment to bring the tax laws together in a code that would use general principles in preference to long and detailed provisions.³

In pursuing that commitment, Treasury, together with the Office of Parliamentary Counsel (OPC) and the Australian Taxation Office (ATO), is developing a new approach to designing and drafting Australian tax laws that is called the *coherent principles approach*.

As foreshadowed in the Review of Aspects of Income Tax Self Assessment,⁴ the coherent principles approach is being used to draft as many new tax measures as possible. The coherent principles approach will not, however, be suited to all new measures. It may not, for example, be appropriate for those measures that simply amend existing black-letter structures in the law, especially if using it would require extensive rewriting of the existing law.

The coherent principles approach has been used on three new measures to date: to allow consolidated groups to be headed by corporate unit trusts and public trading trusts (see Subdivision 713-C of the *Income Tax Assessment Act 1997*); to divide the income tax position of life insurance companies into one position for their superannuation business and one for their other business (see Subdivision 320-D of that Act); and to allow employees with shares under an employee share scheme to continue to defer being taxed on the discount they got when the shares were issued,

2 For example, in *Hepples v Commissioner of Taxation* (1992) 173 CLR 492, Deane J said '[S]uccessive administrations have allowed the Act to become a legislative jungle in which even the non-specialist lawyer and accountant are likely to lose their way in the search to identify the provisions relevant to a particular case...', p. 511.

3 *Tax reform: not a new tax, a new tax system*, Commonwealth of Australia; 1998; p. 149.

4 See pages 88 to 89 of the *Review of Aspects of Income Tax Self Assessment Discussion Paper* released in March 2004 and pages 65 to 67 of the *Report on Aspects of Income Tax Self Assessment* released in December 2004.

when their employer is taken over or restructures (see Subdivision DA of Division 13A of Part III of the *Income Tax Assessment Act 1936*).

This article outlines the coherent principles approach, using the employee share scheme amendments to illustrate elements of the approach. It ends with an assessment of the benefits of the approach over black-letter drafting styles.

The coherent principles approach

Principles-based approaches to drafting Australia's laws, including our tax laws, are not new. Even where laws are drafted using a black-letter drafting style, drafters, and those instructing the drafters, refer to the principles underlying those laws in deciding what the legislation needs to do.

But the tax laws have tended not to articulate those principles, instead emphasising the technical model that is developed to implement them. The technical model is the set of conceptual building blocks and rules that creates rights and imposes obligations. It is a necessary part of a law but need not exist independently of the principles it serves. A source of the complexity of our existing tax laws comes from making the technical model an end in itself. This over-reliance on the technical model characterises the black-letter approach that has been commonly used to draft tax laws for several decades.

The aim of the coherent principles approach, on the other hand, is to emphasise the principles (and, in particular, to specify them in the law) and to place less reliance on the technical model.

What is a coherent principle?

A principle is a statement about an intended outcome in a general field. Some commentators have focused on the degree of specificity as the quality that separates a principle from the rules that usually make up black-letter law.⁵ But a principle is not just a less specific rule; it is a statement about the *essence* of all outcomes intended within its general field. When a principle works, it does so because the essence it captures appeals to readers at other than an abstract intellectual level; it *means* something to readers because it relates to their understanding of the real world.

5 For example, Joseph Raz said 'Rules prescribe relatively specific acts; principles prescribe highly unspecific actions.' in *Legal Principles and the Limits of Law* (1972) 81 Yale LJ 823 p. 838.

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The coherent principles approach aims to produce law expressed in such principles. A *principle* in this context:

- is an operative legislative rule;
- specifies the outcome, rather than the mechanism that achieves it; and
- expresses the outcome at the highest possible level rather than itemising a list of outcomes for every conceivable case.

The principles can only work together properly (ie can only be *coherent*) when they correctly identify the field in which they are intended to operate, and capture the essence of the intended outcomes in that field in a way that:

- helps the reader make sense and order out of the law; and
- is intuitive or obvious to someone who understands the law's context.

It also helps if the principles are drafted in a plain, non-technical style, avoiding the use of expressions that can only be understood by referring to definitions or other lower level rules.

Turning to the employee share scheme amendments, an example of a coherent principle can be found in subsection 139DQ(1) of the *Income Tax Assessment Act 1936*. It appears in Division 13A of Part III of that Act, which allows employees to defer tax on any discount they get when their employer issues shares to them under an employee share scheme. The deferral lasts for up to 10 years but is cut short if the employee (among other things) disposes of the shares or ceases employment with the company. Before the change in policy reflected in section 139DQ, the deferral was cut short by some company restructures. For example, if the employing company was taken over, and employees swapped their shares in it for shares in another company, they would have disposed of their original shares and so ended the deferral of tax on their discount. This outcome discouraged long-term participation in employee share schemes.

To resolve the issue, subsection 139DQ(1) says:

139DQ The effect of 100% takeovers and restructures on employee share schemes

Treating acquisitions as continuations of existing shares etc.

- (1) To the extent that:
- (a) a taxpayer acquires:
 - (i) shares in a company (the *new company*) that can reasonably be regarded as matching shares in another company (the *old company*) that the taxpayer had acquired under an employee share scheme; or
 - (ii) rights in a company (the *new company*) that can reasonably be regarded as matching rights in another company (the *old company*) that the taxpayer had acquired under an employee share scheme; and
 - (b) the acquisition occurs in connection with a 100% takeover, or a restructure, of the old company; and
 - (c) as a result of the takeover or restructure, the taxpayer ceased to hold the shares or rights in the old company;

then, if the conditions in section 139DR are met, the matching shares or rights are treated, for the purposes of this Division, as if they were a continuation of the shares or rights in the old company.

Note: In determining to what extent something can reasonably be regarded as matching shares or rights in the old company, one of the factors to consider is the respective market values of that thing and of those shares or rights.

This subsection treats the replacement shares the employees get as a continuation of their original shares. This means that the actual disposal of the original shares is ignored, so the deferral will continue.

To achieve the same result, a black-letter alternative to subsection 139DQ(1) would have needed rules to:

- itemise which replacement shares and rights were not to trigger a taxing point;
- turn off each of the possible triggers for a taxing point;
- set the time the replacement shares or rights were taken to have been acquired; and
- set the purchase price for the replacement shares or rights.

Most black-letter approaches would have also duplicated these rules for the takeover and demerger cases.

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Subsection 139DQ(1) is a principle because it tells you what the intended outcome is – that the original shares should continue despite the takeover – rather than detailing a mechanism to do that or specifying the outcome for each of a long list of takeover situations.

It works because it captures the essence of the intended outcome in a way that intuitively makes sense of the law (by treating the replacement shares as continuations of the original shares).

The principle is also the operative legislative rule. While principles do presently appear in the tax laws, most of them are not operative. Those that appear, for example in guide material in Acts that use the Tax Law Improvement Project⁶ drafting style, are not usually operative and so cannot be relied upon to achieve an outcome directly.

The design process under this approach

The coherent principles approach is not simply a drafting style. It is a design approach for developing tax legislation.

This diagram shows the hierarchy of steps in that design approach:

Policy outcome	Policy
Policy means	
Legislative purpose	Law
Coherent principle/s	
Lower level detail (unfolding)	
Interpretation/systems	Admin

Policy outcome

The first step in the hierarchy is to articulate the intended policy outcome. This will be a principled statement, at an economic, political or social level, of the outcome the Government intends.

The intended policy outcome of the employee share scheme provisions in Division 13A of Part III of the *Income Tax Assessment Act 1936* is to encourage employee share

⁶ The Tax Law Improvement Project was established in 1994 to rewrite the *Income Tax Assessment Act 1936*. Its main product was the *Income Tax Assessment Act 1997*, which employs a number of new drafting features. Several other Acts (for example, the *A New Tax System (Goods and Services Tax) Act 1999*) now use the same style.

ownership in order to allow both employees and employers to benefit through aligning their interests and their goals. Employees can benefit directly when their business does well, and employers benefit through a more committed and motivated workforce. The intended policy outcome of the recently enacted amendments (see subsection 139DQ(1) set out above), is to ensure that the Division achieves its intended policy outcome even after a corporate restructure.

Policy means

The next step in the hierarchy is to determine what means to use to achieve the policy outcome (or, in other words, *how* to give effect to the policy outcome). In tax laws, this will usually be a tax vehicle (for example, creating an income tax offset or a deduction, imposing an excise on new goods, or enacting a whole new tax) but is sometimes a non-tax vehicle, such as an appropriation.

The means chosen for the amendments to the employee share scheme provisions was to stop a taxing point being triggered when shares were disposed of as a temporary incident of a corporate restructure, by ignoring the disposal.

Legislative purpose (objects clause)

The next step is the first of the legislative steps in the hierarchy. It is to identify the intended legislative purpose, which will usually be expressed in the objects clause in the law. Not every legislative measure will have an objects clause, but new measures, and any significant new module added to an existing measure, will usually contain one.

The objects clause explains how the legislation will implement the desired policy outcome, using the chosen policy means. While the policy outcome and policy means are usually framed in economic, social or political terms, the objects clause needs to reflect legal principles and the legal framework underlying the tax laws. At its most effective, an objects clause will explain both the broader purpose or policy intent behind the measure (the *why*) and the way the provisions achieve that broader purpose (the *how*).

Coherent principle(s)

The next step is to develop the coherent principles that will be the operative rules for implementing the legislative purpose in the law. Treasury develops these principles by examining the possible situations in which the intended policy outcome is expected to apply and the results that are intended in those cases. Patterns that emerge from that examination are refined into a proposition about what the general result should be

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across the range of likely situations, what the general characteristics of those situations are, and how that result and those characteristics can be expressed as principles. That proposition, and the principles it advances, are tested and refined by applying them to a range of different scenarios. Following this initial testing, the proposition is developed as a series of instructions to the OPC to prepare legislation.

At various stages of its development, the proposition and resulting principles will be further refined by consultations with the ATO, the tax profession and other interested parties.

The principles will be structured to flow logically in the order in which they interact. For small measures, there might be only one principle. For other measures, there will be a hierarchy of principles, and at times a collection of principles with no discernable hierarchy, that work together to achieve the legislative purpose.

When principles are grafted onto an area of the law that is expressed in black-letter terms, the 'meshing' of the new drafting approach and the existing law will be critical. In some such cases, practicalities may dictate that amending the existing framework in a black-letter style would be more appropriate than adding the amendments in a principled form. But, if the amendments are added as principles, particular attention has to be paid to providing a bridge between the principled rules of the new measure and the black-letter rules of the existing law with which it interacts.

For the employee share scheme amendments, the main principles are in Subdivision DA of Division 13A of Part III of the *Income Tax Assessment Act 1936*, and in subsection 139DQ(1) in particular (see above). Division 13A is otherwise written in a black-letter form.

The new Subdivision, written using the coherent principles approach, has been inserted into the middle of Division 13A, thus demonstrating that principled law can be used to amend existing black-letter provisions. The bridge between the new principles and the existing black-letter law that makes that possible in this case is that the principles directly affect an element of the existing black-letter structure: the trigger events that bring the tax deferral to an end.

An alternative, in some cases, will be to rewrite an existing area of black-letter law in a principled form incorporating the amendments. However, rewriting an area would only be appropriate when a thorough examination suggested that it was the most effective approach. For instance, if wholesale amendments were proposed to an area, it may be more practical to rewrite it in a principled form.

Carve-outs and add-ons

Sometimes the principle that seems the most natural or intuitive will encompass more situations than the policy outcome is intended to cover. That can be addressed by amending the principle to bring its scope within the intended bounds. But, often a better approach will be to retain the broader principle and identify carve-outs from its operation.

The reason for preferring the alternative approach is that the broader principle expresses the intended idea in a way that will make more sense to readers than modifying the principle. This happens when a modified principle would compromise the reader's intuitive grasp of what the law is doing and so actually reduce reader comprehension.

At other times the natural or intuitive principle will not cover a situation the amendments are intended to cover. The preferred course will usually be to identify the add-on to, or extension of, the principle, rather than to change the principle itself. The reasons are the same as those, outlined above, for using a carve-out.

An instance of an add-on can be found in subsection 139CA(4) of the *Income Tax Assessment Act 1936*, added as part of the employee share scheme amendments. Paragraph 139CA(2)(b) says that the deferral of tax on the discount an employee received on a share issued under an employee share scheme comes to an end when any restriction on disposing of the share stops applying. This can be a problem in a takeover case because a takeover offer usually does not offer employees replacement shares that maintain existing restrictions on disposal if the offer to other shareholders is replacement shares without restrictions. So, even if the continuation principle applied, tax on the deferral could be triggered because restrictions on disposal of the original shares would not apply to the replacement shares. To address that issue, subsection 139CA(4) says:

- (4) Paragraph (2)(b) does not apply in relation to a share that, because of section 139DQ, is treated, for the purposes of this Division, as if it were a continuation of a share acquired under an employee share scheme.

That subsection removes the taxing point that would otherwise arise when employee shares with restrictions on disposal are replaced with shares without restrictions during a takeover or other corporate restructure. It is not a modification of the 'continuation' principle, but an add-on to the law. Had the principle instead been modified, its intuitiveness might have been compromised and its effectiveness more limited.

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Lower level detail ('unfolding')

A well-written principle will describe the intended outcome clearly enough to produce workable results. However, there can still be cases where it is useful to explain the principle's application to particular situations or where there may be a sufficient doubt or ambiguity about its meaning or scope to warrant clarification. The process of explanation and clarification is called 'unfolding' the principle.

To identify appropriate cases for unfolding, the principles are tested against known situations to ensure that the intended outcome is clear in those cases. Where it is not, unfolding will be necessary.

Unfolding may occur in the primary law itself by including a note, an example or further provisions in the Act. Sometimes unfolding will be done in subordinate legislation (such as regulations). More commonly, unfolding will occur in the explanatory memorandum that accompanies a Bill into Parliament.

An example of unfolding in the law can be seen in the note at the end of subsection 139DQ(1), quoted above. It does not change the law; it merely makes it clear that equivalence of the market values of the original and replacement shares was one of the factors the Parliament intended would be taken into account in deciding whether the replacement shares 'match' the original shares.

As a general rule, too much reliance on unfolding in the primary law or in subordinate legislation, particularly in obvious situations, could diminish the benefits of using the coherent principles approach: it could add to the length and complexity of the law, and could even cast doubt on the intended interpretation of the principles it is explaining.

Administration — Interpretation/systems

After law that uses the coherent principles approach is enacted, experience may suggest that further guidance is necessary in specific situations. In such cases, as now, the Commissioner of Taxation will publish rulings and other interpretive material to explain how the law applies to those situations. That process is also part of unfolding the principles.

But it does not mean the ATO is inventing the law. In those cases, the Commissioner is explaining how he thinks the principles apply, not creating the principles themselves. The principles are enacted by Parliament and, like any legislation, impose limits on what interpretations can be drawn from them. In the final analysis, the judiciary will adjudicate on whether the Commissioner's interpretations are correct, in the same way as it already rules on the correctness of his interpretations of black-letter legislation.

Key issues

Coherent principles and certainty

One of the concerns about using a principle-based legislative approach is whether it will produce law that is less certain than black-letter law is thought to be.

However, black-letter law is itself far from certain. Language is inherently ambiguous and the more complex the ideas it expresses, the greater the chance an ambiguity will arise. The problem is exacerbated with law as lengthy as the income tax law, because its sheer length makes it difficult to know what things it covers, and how it covers them.

Even recognising these inherent problems, most people's natural assumption is that, if the law deals specifically with every issue, it must be more certain than a law that covers the issues in a principle-based way.

However, our tax law does not, and probably cannot, deal specifically with every issue. Even if it could, it would have to be so long that it would take an unacceptable amount of time to reach a definitive answer to all but the simplest questions.

Since our tax laws do not deal specifically with every issue, the actual question becomes 'how can there be certainty about cases that the law does not deal with expressly?'

In those cases, a black-letter approach is actually highly uncertain because there is no way to know how, in principle, to derive an answer. The black-letter approach typically has to address such uncertainty by requiring the law to be amended to cover each new case as it emerges.

An illustration of that process was the growth in the number of capital allowance regimes in the income tax law since 1936. Under the income tax law, capital expenses are not normally deductible against income, so a special rule is needed when such deductions are to be allowed. An initial regime in the *Income Tax Assessment Act 1936* allowing deductions for 'plant' depreciation was augmented over the next 60 years by similar regimes for depreciating buildings, for writing off investments in research and development, for writing down film copyrights, for depreciating telephone connections to rural land, for depreciating land care improvements, and so on for over

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30 separate regimes.⁷ This amendment process, which is usually necessary for black-letter law, may deal with the problem for that instance but does not do so for any future instances, so their treatment remains uncertain.

The approach of principle-based law is very different. It aims to deal with issues at a general, or thematic, level and only descends to detail when there is something specific about a particular case that requires separate attention. There is less room to argue that each new situation can only be dealt with properly by a new specific rule because the principle is intended to deal with *all* relevant situations. Even as new situations emerge, a properly constructed principle provides a framework for working out how to deal with them.

In the capital allowance cases, such a principle might have asked whether a non-private expense produced benefits beyond the year in which it was incurred and, if so, apportioned a deduction for it between the years in which it produced those benefits.⁸ In that case there would be no need for a new regime each time another situation emerged.

Coherent principles and stability

If tax law does not cover everything it needs to cover, covers something in an inappropriate or ambiguous way, or has been interpreted in an unintended way, it usually needs to be amended.

The continuing need for amendment ties up the resources of the Parliament, which must consider and vote on any proposed law; of the ATO, which must administer it; of tax practitioners, who must keep abreast of the changes; and of taxpayers, who must adjust their affairs accordingly.

Principle-based provisions, on the other hand, will describe what the law does rather than how it does it. That can give the ATO the flexibility to design administrative systems that minimise the compliance burdens on taxpayers and tax practitioners.

It can also leave the law flexible enough to apply to newly emerging arrangements, commercial and otherwise, that the legislature could not have specifically contemplated when it enacted the law, but are nevertheless within the scope of its policy.

7 The number of capital allowance regimes was greatly reduced with the enactment of the *New Business Tax System (Capital Allowances) Act 2001*, which replaced most of the separate capital allowances with a generic treatment (see Division 40 of the *Income Tax Assessment Act 1997*).

8 I am indebted to Professor Rick Krever for this suggestion.

Currently, newly emerging arrangements can create problems with the administration, interpretation or scope of the law, that have to be fixed legislatively because the law does not cover them at all or covers them in an unexpected way. Legislative amendments can take a long time. In the interim, the problem continues. Using principles to design and draft tax law can provide the flexibility for practitioners and the ATO to improve administration of the law, and to clarify its interpretation, without that delay. In particular, practitioners and taxpayers can interpret and apply the principles to their own situations without having to wait for either a legislative amendment or an ATO ruling to appear.

Draft law that makes it easier to understand the key concepts may also provide a better basis for consultation. Law prepared using the coherent principles approach could make it easier to understand how proposed amendments fit with existing law. This could reduce the preparation time practitioners need to make useful contributions during consultation, and so increase both the number of practitioners able to contribute in a consultation process, and the effectiveness of their contributions. That, in turn, may lead to better law.

If law is conceptually clearer, is interpreted more frequently in accordance with Parliament's intention, adapts to changes in the commercial environment and undergoes more effective consultation, there will be less need to amend it to preserve its original intention or keep it up-to-date. Law that changes less often is more stable law, and that is of considerable advantage to taxpayers and practitioners.

How does the coherent principles approach help with complexity?

The primary goal of the current black-letter approach to tax law is to realise an effective technical model, so that the law works. The effective communication of that technical model to readers, while important, has been a secondary consideration. But, even if communication had been the primary focus, complexity would still have been a problem because it is an inherent result of trying to write a rule for each situation.

The coherent principles approach, in contrast, may provide at least a partial solution to the issue of complexity. It aims to explain the law's intended outcomes, not to detail the law's application in a variety of different situations. Although that does not reduce the number of issues the law has to cover, it does synthesise into a few principles what in a black-letter version could be several ideas and many rules. This can greatly reduce the number of ideas in the law and the interactions between those ideas.

Perhaps more significantly, presenting the ideas as principles can help readers to organise their thinking about what the law is doing. Having fewer ideas makes a better structure possible, especially if those ideas map onto the reader's existing understanding of the world.

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Those two things – fewer ideas to wrestle with and a more naturally grasped organisation of the ideas that are used – can mean that for most readers, law designed and written under the coherent principles approach may be both less complex and more comprehensible than black-letter law.

Over time, black-letter law could be expected to require more amendments than would a version using principles. This is mainly because black-letter law aims to cover each relevant situation specifically and new situations do emerge from time to time. Those extra amendments in the black-letter version mean that it will usually come to have more ideas and a less well-organised structure than its coherent principles equivalent. Therefore, over time, readers will always find a black-letter version more complex to deal with.

It is true that some details traditionally provided in the primary law may migrate to subordinate law (for example, regulations) or to explanatory material (for example, the explanatory memorandum or ATO rulings). But that qualification should not lead to the conclusion that law using the coherent principles approach will be just as detailed and as complex as black-letter law, only with the detail transposed to different places. Moving details into other material is a possibility to be aware of and guard against, not a likelihood.

Explanatory memoranda and rulings already contain a lot of detail and should not grow simply because the primary law is no longer as detailed. In any case, an advantage of moving the details on a particular topic to secondary materials such as an ATO ruling is that they only need to be read in cases where that topic was in issue. If the detail is in the law, you have to read all of it to be sure you have read everything relevant to your current case.

Ultimately, however, the aim of the coherent principles approach is to avoid the need for detail in the first place, not to move it somewhere else. Achieving that outcome may involve a change in culture on the part of both the ATO and practitioners. If the ATO were to be deluged by demands for rulings on obvious applications of clear principles, the potential benefits of the approach would be unlikely to be realised.

The coherent principles approach and the judiciary

The judiciary's approach to interpretation of principle-based law will, of course, be important to its success.

The inherent ambiguity of language can make interpretation of law difficult whatever style of drafting is chosen. But this problem can be worse with black-letter law, where the absence of a stated principle makes it harder to discern the purpose of the law and so increases the chance that the interpretive task becomes an abstract exercise rather

than a real attempt to understand Parliament's intention. This is exacerbated if black-letter law is silent about a situation, such as a commercial development not contemplated when the law was drafted. In those cases, the courts can be left with no means of knowing what Parliament wanted to happen.

The judiciary has, on occasion, expressed a desire for the law to contain statements of its underlying purpose so that the courts can more frequently interpret it in accordance with Parliament's intention. For instance, in November 1996, the then President of the New Zealand Court of Appeal, Sir Ivor Richardson, said:⁹

Now the standard judicial approach to the interpretation of all legislation is to consider its purpose, its scheme and its language. The judges have to gain an overall understanding of the legislation they are interpreting. If the legislation is just a morass of detail, the judges will try to work out the scheme and interpret for themselves and they will try to take a big picture approach. So clear statements of policy intention and of underlying principles and criteria in settling the rules for determining tax liability will assist the courts and all uses (sic) of legislation.

The coherent principles approach may make it possible to deliver on that sort of judicial preference.

Next steps

Using coherent principles in tax laws is being phased in gradually. The effectiveness of the approach can only really be tested and judged on actual legislative measures. If the benefits of the approach are to be fully realised, the results of those measures have to be properly evaluated and the lessons from them identified and applied to further measures.

Measures that are already in the pipeline should not be delayed unnecessarily by imposing a principle-based approach on them, particularly where those measures simply amend existing black-letter structures in the law. Attempting to redraft entire structures on a principled basis would add unacceptable delays to achieving existing legislative commitments.

The measures being chosen to test the new approach should be those where it offers the greatest benefits. These are typically measures that are self-contained rather than

⁹ The conference proceedings of the tax drafting conference; hosted by the Inland Revenue Department of New Zealand; Auckland; 27-29 November 1996; pp. 29-30.

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those that modify existing black-letter law,¹⁰ and those that can be developed on a principled basis from their earliest stages.

Each measure that uses the approach is evaluated by Government and, of course, by the wider tax profession. Consultation on the measures that have used the approach, even though its use has been limited so far, has been most encouraging.¹¹

Conclusion

The coherent principles approach is not a panacea for all the ills, real or imagined, of Australia's tax laws. But it does hold promise as *one* means for addressing concerns about the sustainability of our tax laws.

In particular, principle-based law can be conceptually clearer. It avoids the necessity for the details so prevalent in black-letter law, by synthesising them into principles that produce the outcomes Parliament intends. Principles also tend to fit together into better structures. Clear, operative statements of Parliament's intention and better, more intuitive structures should usually combine to produce law that is less complex than black-letter law.

The approach also offers the advantages of flexibility and robustness. Law that uses the approach is likely to adapt better to an evolving world without the need for constant amendments to keep it up to date or to ensure that it applies to every intended situation. If it needs fewer amendments, it will tend to be stable.

Finally, the approach can highlight complexities in implementing policy choices, which can otherwise be hidden in a legislative design that focuses on a technical model. With the additional complexity from particular options for implementing a policy being more obvious, this can better inform policy developers about how their decisions affect equity, efficiency and simplicity and could, itself, lead to less complex policy implementation options. That can only be positive for the wellbeing of Australians.

10 That said, it can still be used in some of those cases. The employee share scheme amendments are an instance of such a case.

11 As noted at the beginning of this article, the coherent principles approach has been used to allow consolidated groups to be headed by corporate unit trusts and public trading trusts; to divide the income tax position of life insurance companies into one position for their superannuation business and one for their other business; and to allow employees with shares under an employee share scheme to continue to defer being taxed on the discount they got when the shares were issued, when their employer is taken over or restructures.