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Abstract

The Australian tax legislative process, and the official discourse regarding that process, are born of the imperative of creating legitimate government. If power is diffused throughout a community, and if broad social consensus upon substantive or procedural norms is impossible, the process by which government achieves legitimacy for its laws more generally and its tax laws in particular, is a fertile field of inquiry which hitherto has attracted little attention. I argue that the legitimation imperative has engendered a tax legislative process which assumes a rhetorical function. This rhetorical function is achieved by the incorporation of a complex morass of models of democratic decision making within what is more appropriately described as ‘the Australian tax legislative processes’. Further, I argue that the apparent inclusiveness of this process is undercut by an emphasis upon elitist approaches to the political process. Such elitism is masked by an official discourse of inclusiveness and bureaucratic rationality. This elitism within the legislative process shrouds substantial interest group influence from public scrutiny. I argue that this strategic alliance engenders defective legislative outcomes. The paper concludes with a consideration of the obstacles impeding reform of the Australian tax legislative process, with suggested mechanisms for overcoming them.

1. Introduction

The way a society creates its taxation laws tells you much about the political character of that society, even if it does not provide the key to the meaning of everything.1 There can be no doubt that the process of creating tax laws has figured prominently in historically significant constitutional conflicts.2 Charles I asserted the royal prerogative in garnering Ship-money and lost all,3 the control of the

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1 Joseph Schumpeter, History of Economic Analysis (1954) at 769.
House of Commons over taxation was a key driver of ‘the Glorious Revolution’ and American revolutionaries declared ‘no taxation without representation’. Even today, the cry of the American revolutionaries reverberates in Australia. The mainstream account of taxation holds that the procedure by which tax laws are created, as much as the substantive content of those laws, is intertwined with the emergence of democratic political institutions. This mainstream account depicts a teleological progression from archaic political orders to ‘modern’ democracies with progressive taxation systems managed by experts, founded upon objective public finance principles and overseen by a watchful independent judiciary which ensures that taxation remains within the ‘rule of law’. Reinforcing this narrative of modernity, these ‘modern’ democracies are juxtaposed with ‘developing’ and ‘transitional’ economies — the latter being characterised by a lack of democratic ‘institutional capacity’ and also unsophisticated taxation systems. In view of this neat ordering of the modern world it is little wonder, as John Dunn observes, that to reject democracy today may be to write yourself out of politics, and it is certainly to write yourself out of polite political conversation.

The purpose of this paper is to undertake a critical review of this mainstream marriage of democracy and taxation by examining the Australian federal tax legislative processes. The central elements of this paper are an elaboration of the contemporary Australian applied understanding of ‘democracy’ in respect of taxation and, based upon that description, consideration of whether the Australian tax legislative process comprises a compelling model of democratic process. If the Australian legislative process is less than compelling, the prospects of systemic reform must be assessed.

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4 John Beckett, ‘Land Tax or Excise: The Levyng of Taxation in Seventeenth and Eighteenth Century England’ (1985) 100 English Historical Review 285 (direct taxes were preferred as it was believed that they were subject to more scrutiny than the indirect taxes). See also Henry Roseveare, The Treasury 1660–1870 (1973) at 53–4 (Treasury’s role strengthened during the latter stages of the Seventeenth Century because of Parliament’s concern to entrench stricter controls upon the executive arm).


7 For the purposes of this paper I adopt a broad concept of ‘the tax legislative process’ which embraces both the political formulation and the formal legal steps by which legislation is created.

8 Sidney Ratner, Taxation and Democracy in America (1967) at 9. See also the proposition that taxation is a ‘mirror of democracy’: Carolyn Webber & Aaron Wildavsky, A History of Taxation and Expenditure in the Western World (1986) at 326.

9 Robert Stanley, Dimensions of Law in the Service of Order (1993) who argues that adoption of the income tax in the United States is not an instance of the teleological progression towards a just society, as is often suggested. This teleological view of history may be discerned in the discussion of enhancing institutional capacity in developing and transitional countries — it is often assumed that ‘developed’ countries are ‘democratic’. For example, some accept that the United States of America is ‘democratic’ while simultaneously acknowledging that there are grave doubts about the operation of the democratic norm of equality in developed countries: Albert Hirschman, Exit, Voice and Loyalty (1970) at 32; Ian Shapiro, The State of Democratic Theory (2003) at 86.
In assessing the democratic character of tax legislative processes two questions arise. The first is whether there is consensus upon the meaning of 'democracy'. The short answer is 'no' — David Held identifies nine models of 'democracy'. Dunn observes that the strength of the concept of democracy derives from a widespread preparedness to describe quite different forms of government as 'democratic' and at different points in his recent work Ian Shapiro seems ambivalent as to whether the United States of America is 'democratic'. The second question is which of Held's models of democracy, or what combination of these models, has been adopted in the practice of the Australian tax legislative process?

More specifically, the question considered here is whether some form of Schumpeterian competitive elitism might be discerned in the Australian tax legislative process. According to Joseph Schumpeter, the general public merely appoints its rulers and those rulers should be left to govern. Although such rulers are notionally held accountable for their policy measures if they seek re-election, Schumpeter scorned the capacity of the general public to reach informed decisions on such matters. Somewhat less cynical versions of this elitist model of government hold that government probity is assured by the accountability of representatives at elections and the expertise of a rational bureaucracy. Such faith in a rational bureaucracy may be seen in John Witte’s claim that the creation of tax legislation by an authoritarian policy elite produces coherent taxation law which is simpler than that created under an open, consultative approach.


11 For discussion of this point see Miranda Stewart, ‘Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries’ (2003) 44 Harvard International Law Journal 139.


13 Such grounded theory adopts an inductivist epistemology in generating theory upon the basis of factual observation: Barney Glaser & Anselm Strauss, The Discovery of Grounded Theory: Strategies for Qualitative Research (1967); Anselm Strauss & Juliet Corbin, Basics of Qualitative Research: Grounded Theory Procedures and Techniques (1990). For an example of grounded political theory see Shapiro, above n9 at 1–3.


15 Dunn, above n12.

16 See below n220.


18 Id at 262.

19 Both of these propositions have been challenged from empirical and epistemological perspectives, particularly within the burgeoning postpositivist literature: Frank Fischer & John Forester (eds), The Argumentative Turn in Policy Analysis and Planning (1993); Maarten Hajer & Hendrik Wagenaar (eds), Deliberative Policy Analysis (2003).

20 John Witte, The Politics and Development of the Federal Income Tax (1985) at 20, 380ff; Sheldon Pollack, 'A New Dynamics of Tax Policy?' (1995) 12 American Journal of Tax Policy 61. This claim has also been made by several senior Australian Treasury staff and also tax academics during the course of informal personal conversations with the author.
Whether or not Witte’s claim regarding the simplicity of legislative outcomes is falsifiable,21 there is evidence which suggests that some form of elitist democracy prevails in Australia. The Australian Treasury’s self-description as ‘confidential adviser to government,’22 its successful use of a conclusive certificate to deny access to an internal report that was described as ‘innocuous’23 during proceedings which ultimately went to the High Court,24 its refusal to release a report regarding community consultation upon tax reform,25 statements of the Secretary to the Treasury26 and of the Treasurer27 which indicate a preparedness to subvert the underlying object of the freedom of information legislation,28 the practice of creating costly legislative deals within Ministerial offices29 and the development of much tax legislation ‘behind closed doors’30 are just some examples of current government practice which suggest that the better informed few prescribe for the less-informed many.31 The existence and prevalence of such elitism within the Australian tax legislative process needs to be verified by more detailed study of that process.

In the course of undertaking this study, an associated question is whether the model(s) of democracy reflected in the tax legislative process favour special interests. If so, and if the adoption of that model(s) took place by a process which was not expressly created by a democratic process, then the legitimacy of the tax legislative process and perhaps the government more generally is open to question. Abandoning all pretence to academic suspense in this paper, the argument presented here is that the Australian tax legislative process, and the official

21 It is doubtful that such a claim is falsifiable because there is no finite measure of legislative coherence or simplicity and it is doubtful that such a theory can be achieved.
23 Per Conti J during the course of submissions in McKinnon v Secretary, Department of Treasury [2005] FCAFC 142; quoted in Jonathon Porter, ‘Judge at a Loss on Tax Bracket Secrecy’ The Australian (5 May 2005) at 1.
24 McKinnon v Secretary, Department of Treasury (2006) 229 ALR 187.
25 In early 2006 I requested from the Australian Treasury (as secretariat for the Board of Taxation) a copy of a report on community consultation with respect to tax system design, prepared by KPMG on behalf of the Board of Taxation (Board of Taxation, Government Consultation with the Community on the Development of Taxation Legislation (2002)). By anonymous email I was refused access to the original report without any reason being given for the refusal. A brief summary of the KPMG report is available as an appendix to the Board’s published report on community consultation.
26 ‘Riding Treasury’s Roller Coaster’ The Canberra Times (23 January 2006) at 11.
27 Peter Costello MP, ‘Economic Reform Directions and the Australian Public Service’ (Address to the Australian Public Service Commission Ministerial Conversations Conference, 2 November 2005).
28 ‘The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth ...’: Freedom of Information Act 1982 (Cth) s 3.
30 Although the expression is not new, Linda McQuaig details the background to the 1987 Canadian federal tax reforms: Linda McQuaig, Behind Closed Doors (1988). For discussion of the general practice in Australia of confidential consultation upon tax measures see below, section 3A.
discourse regarding that process, are born of the imperative of creating legitimate
government. Many accept Max Weber’s proposition that legitimacy cannot be
grounded upon the insecure foundations of substantive principles but rather must
be grounded upon ‘objective’ norms such as bureaucratic rationality or procedural
justice. However, I argue that adoption of an anti-foundationalist perspective
means that neither approach affords a secure foundation for legitimising
government action. I suggest that the conception of centralised political power
which underpins ‘command and control’ descriptions of legitimisation is an
insecure foundation for a convincing account of the Australian tax legislative
process. If power is diffused throughout a community, and if consensus upon
substantive or procedural norms is impossible, the apparent public acceptance or
acquiescence with respect to the Australian tax legislative process must be
theorised in an alternate fashion. This alternate account must accommodate the
complex interplay of myriad actors, ideologies, institutions and interests shaping
the Australian tax legislative process. In beginning this account I argue that the
chaotic array of decision making processes within the tax legislative process, and
the portrayal of the tax legislative process in the official literature, play a crucial
role in shaping the apparent popular acceptance/acquiescence in the tax legislative
process. Although there are inclusive elements within this legislative process, I
argue that that inclusiveness is undercut by the emphasis given to elitist elements
within the same process. Further, contrary to Witte’s proposition that a
bureaucratic elite best protects the general public interest, I argue that this
essentially elitist legislative process shrouds substantial interest group influence
from public scrutiny. I argue that this strategic alliance engenders defective
legislative outcomes.

To overcome this pathology I argue that a reorientation of Australia’s tax
creation mechanisms towards a ‘thicker’ sense of democratic accountability, one
which requires the provision of sufficient information regarding Australian tax
policy embodied in legislative measures, is necessary. Although not requiring
widespread public participation and/or deliberation in the tax creation processes,
this thicker concept of democracy would take the prospect of wider informed
public participation seriously such that interested members of the community,
including journalists and emergent ‘public interest’ organisations, may engage
meaningfully in tax reform consultation. However, achieving such reform from
within the existing social environment is problematic because of the fact that that
environment suppresses meaningful, active engagement with the broader public.
The first step towards such reform is to demonstrate that the status quo, at least
with respect to taxation consultative mechanisms, reflects a thin form of
‘democracy’ which verges upon authoritarianism. The first step to reform, then, is
to recognise the dubious and contingent basis for the ‘democratic’ appellation with
respect to specific sites, such as tax reform processes, within Australian public
institutions. By destabilising the mainstream rhetoric of democracy which masks
authoritarian practices, broader public engagement in reinventing those
institutions becomes feasible because the tenuous basis of the legitimating
discourse will be opened to scrutiny.

2. Legitimacy, Democracy and the Tax Legislative Process

A. The Significance of Legitimacy in Shaping Political Process

From a holistic perspective, to understand the tax legislative process we must locate that process in its context, including the dynamics of the enforcement of a community’s rules. That is, the tax legislative process should be seen as just one of the many fields in which governors strive to achieve legitimacy for their preferred social order—a social order which, in part, is constituted by that legislative process. ‘Legitimacy’ is an aggregate concept which records the extent to which a population is willing to defer to the authority of government upon the basis that ‘the law must be obeyed’, even where individuals know that to comply is detrimental to their immediate private interests.32

Promoting legitimacy is significant for governors in securing public order and also in securing the financial capacity to govern.33 It enables governors to retain government by grounding public confidence in the integrity of both government institutions and governors, to govern without devoting massive resources to surveillance of the general population34 and it is crucial in creating the discretionary capacity of governors to govern without their every rule being subject to moral appraisal.35 Legitimacy therefore procures social stability and so, at times, it appears to be portrayed as an absolute public good.36 But it is not clear that legitimacy per se is an unqualified good. Thus, if legitimacy is understood in the ‘objective’ sense of ‘willing deference’ framed in terms of observed behaviour, the capacity of the subject population to make an informed judgement regarding deference is irrelevant. Legitimacy might therefore be ‘created’ to mask what many would consider to be dysfunctional government. For example, legitimacy might be a shroud behind which a government negotiates legislative favours with special interest groups while nevertheless retaining the confidence of the general population. Thus, according to Schumpeter, the electorate appoints its rulers37 under a process in which the will of the people is manufactured.38 In the context of taxation, it may be that the ‘spin’ of political parties vying for office is strong enough to blind the electorate as to any defects in the (tax) legislative process which may exist.39 Certainly Schumpeter had little faith in the critical capacity of

35 Tyler, above n32 at 4.
36 Id at 277.
37 Schumpeter, above n17 at 285.
38 Id at 263.
the general population, observing that ‘the typical citizen drops down to a lower level of mental performance as soon as he enters the political field.’ And there is evidence that the bulk of the population will be ignorant upon any particular political issue. With respect to taxation, many are ignorant of their tax burden in both real and relative terms and many openly admit to being ignorant of tax matters. The definition of legitimacy is therefore not value-neutral, because the elaboration of the preconditions for valid ‘willing deference’ in a ‘democratic’ society begs a definition of ‘democracy’, itself a contested concept. Constructing the concept of legitimacy in terms of a strategic implement of a governing elite wielding centralised social power therefore runs counter to the existence of decentralised social power which at least some models of democracy acknowledge and promote.  

(i) The Concept of Legitimacy and Models of Social Power in ‘Modern’ Democracies

There is little doubt that immense social power is wielded at the governing ‘centre’ of modern Australian society. However, conceiving legitimacy as the strategic implement of these governors might mean that the existing social institutions, structures and ideologies which enable and sustain this power are assumed a priori, thereby ignoring the processes by which these phenomena themselves came to be legitimised and sustained. If legitimacy is a strategic implement, it has become so, and remains so, as a result of the complex and dynamic interaction of many sites of power comprising disparate social agents, ideas and material conditions dispersed throughout the social framework. Focusing upon the status quo, and ignoring other nodes of power and alternate visions of social life, diminishes the perceived contingency of the status quo by ignoring key drivers of social change and regeneration. Thus, focusing upon the status quo, in some measure, contributes to the preservation of the status quo.

Acceptance of the concept of legitimacy does not necessarily mean the adoption of a centralised model of social power. That the ‘winners’ must promote or even ‘manufacture’ broad social consent for, or apathy towards, the status quo suggests that centralised state power is not absolute. Those at the centre of state power know that their legitimacy is purchased at a price of eternal vigilance in monitoring and responding to alternate visions of the distribution of social power. Thus, in contemporary Australia there are good reasons to question the general

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40 Schumpeter, above n17 at 262.
42 Ibid.
applicability of Schumpeter’s suggestion that the considerable resources of government might be sufficient to create legitimacy. Nosy investigative journalists, interest groups, opposition politicians, more or less independent public agencies such as the Australian National Audit Office, altruistic whistleblowers prepared to risk their careers (or more) by exposing what they consider to be bad government, academics and ‘informed’ members of an increasingly tertiary-educated general public all threaten to destabilise a government’s legitimating self-portrayal.\(^{45}\)

These reflections upon the concept of legitimacy suggest that the creation of the tax legislative process ought be understood as but one site where the conceptualisation, structuring, distribution, exercise and legitimisation of power occur simultaneously in an ongoing, dynamic exchange involving multiple actors with perhaps quite disparate motivations. Having thus introduced the concept of legitimacy, noted why governors desire legitimacy and suggested that the creation of legitimacy might be problematic where social power is broadly dispersed, it is time to examine the potential sources of legitimacy in the specific context of taxation law.

### B. The Elusiveness of Taxation Legitimacy

Having regard to the definition of legitimacy adopted in the preceding section, it may be seen that legitimacy is founded upon a community’s perceptions of the substantive merit of the law and/or a community’s perceptions of the procedure by which the law was created and/or applied.\(^{46}\) Legitimacy, then, depends upon perceptions of reality held by members of a community, and these perceptions may or may not be grounded upon a community’s more or less verifiable ‘objective’ knowledge of that reality. Whether or not a community’s perceptions of social reality are grounded upon ‘objective’ facts, the underlying ideological frameworks which shape a community’s cognition of social reality will play a crucial role in identifying relevant information and the relative weighting of such information.\(^{47}\) Considering the sources of legitimacy therefore necessitates consideration of this cognitive framing, the means by which a community obtains information about the social institution it is observing and also consideration of the nature of that social phenomenon itself.

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\(^{46}\) Tyler above n32, at 282; Amy Gangl, ‘Procedural Justice Theory and Evaluations of the Lawmaking Process’ (2003) 25 *Political Behavior* 119. Tyler’s original concentration upon engendering compliance through promoting procedural justice by government officials has expanded to include consideration of the procedural justice of lawmakering. However, it remains unclear how competing conclusions regarding the procedural (in)justice exhibited by different arms of government might impact upon legitimacy – can procedural justice of the Commissioner of Taxation neutralise perceptions of procedural injustice in the political realm?

\(^{47}\) Shapiro, above n9 at 121.
A law would achieve substantive legitimacy if a community perceived and agreed with the moral foundations of the law. In a mythical Fairyland, tax law would focus solely upon raising revenue in accordance with finite public finance principles grounded upon social consensus. Further, fairy politicians would have both the will and the popular support to enact such principles into legislation. In the real world, notwithstanding the exposition of ‘scientific’ principles of public finance, the content of substantive principles of public finance is contested. There is inevitably wriggle room in the minutiae of decisions with respect to taxation’s litany of ‘wicked problems’ — problems upon which closure can only be achieved by what are ultimately the arbitrary bases of satisficing and/or heuristics. The inability to draw upon finite public finance principles in framing taxation laws is one factor contributing to the complex morass of rules constituting the Australian tax system. Thus, the prospects of achieving tax system legitimacy upon the basis of substantive legitimacy alone are bleak — the existing system does not command respect born of principled integrity and nor is such principled integrity possible. We have, as Weber observed, inherited the legacy of the modernist age which ate of the tree of knowledge. The substantive foundations of law are, inevitably, contested.

(ii) Ramifications of Moral Relativity for Tax System Legitimacy

Many citizens apparently ignore or discount these theoretical shortcomings, and so might exhibit ‘loyalty’ to the tax system, rather than adopting the alternate courses of exit or voice. Such ‘loyalty’ might in truth comprise any of a range of


51 An expression coined by Herbert Simon to denote the posture of many decision-makers that it is time to call an end to their inquiries and arrive at a finite conclusion: ‘A Behavioral Model of Rational Choice’ (1955) 69 Quarterly Journal of Economics 99.


55 Hirschman, above n9.
compliant postures,\textsuperscript{56} including apathy, ignorance\textsuperscript{57} or cynical subjection to the dominant will of government. Others expressly adopt the discourse of ‘voluntary compliance’\textsuperscript{58} and so ignore opportunities to ‘play for the grey’ in tax matters.\textsuperscript{59} Nevertheless, it is quite conceivable that the apathy of some and the active compliance of others can be promoted by an official public discourse which downplays the significance of the anti-foundationalist challenge to the prospect of a just tax system. Thus, the portrayal of individual marginal tax rates as though these reflect the actual taxation paid upon economic income\textsuperscript{60} sustains a perception of ‘democratic’ wealth redistribution by ignoring the impact of the numerous tax concessions which undermine tax progressivity.\textsuperscript{61} The Commissioner of Taxation’s regular references to the benefit theory of taxation,\textsuperscript{62} in terms of the price we pay for civilised society, might also reflect an attempt to install an alternative discourse to one framed in terms of paying a fair share under a fair taxation system.

The actions of many in paying their ‘fair share’ of taxes, perhaps in part motivated by official discourses of substantive fairness, indicates that the anti-foundationalist rejection of substantive fairness need not induce a widespread perception of illegitimate government and, hence, mass tax protest. However, many others rely upon the moral relativity of taxation law and taxation principles in rationalising their decision to minimise their contribution towards the cost of public goods in which they share. Ignoring the self contradiction, ideologues of this opportunism take the ideology of private property a priori. They accept the moral relativity of taxation law and proceed to construct alternate discourses of losers and winners — or taxpayers and tax players.\textsuperscript{63} For example, taxation is cast

\textsuperscript{56} For discussion of various taxpayer postures, see Valerie Braithwaite, ‘Dancing with Tax Authorities’ in Valerie Braithwaite (ed), \textit{Taxing Democracy} (2003) at 17.

\textsuperscript{57} Australian Taxation Office, \textit{Community Perceptions Survey 2003} (2005). These data suggest that the public at large is currently ill-positioned to undertake a critical appraisal of the substantive merits of taxation law.

\textsuperscript{58} For discussion of the problematic nature of the concept of voluntary compliance, see Mark Burton, ‘Responsive Regulation and the Uncertainty of Tax Law – Time to Reconsider the Commissioner’s Model of Cooperative Compliance?’ \textit{2007 5 eJournal of Tax Research} 102 at 109.


\textsuperscript{61} The taxation of capital gains under employee share acquisition schemes at just 13%, despite the fact that the recipient may have an economic income of $20 million, is just one of the many egregious examples of this obfuscation of real taxation distribution: Stuart Washington, ‘The 13% Tax Rate – It’s a Fine Option for Millionaires’ \textit{The Sydney Morning Herald} (20 December 2006) at 8.

\textsuperscript{62} For discussion of the literature regarding the benefit theory of taxation in terms of justice, see Richard Musgrave, \textit{The Theory of Public Finance} (1984) at 228.

\textsuperscript{63} House of Representatives Committee on Finance and Public Administration, \textit{Taxpayers or Taxplayers?} (1989).
in terms of theft of private property\textsuperscript{64} or as a price for the provision of public services\textsuperscript{65} — a price which might, they say, legitimately be minimised. Perhaps understandably, those who adopt this cynical outlook of the 'tax game' will wish to be among the 'winners' rather than the 'losers'. With taxation law reduced to a game, it is perhaps understandable that aspiring 'winners' will seek influence at every decision making node in the tax domain — from the genesis of tax law\textsuperscript{66} to its execution.\textsuperscript{67}

In the absence of substantive bedrock which grounds resistance against such rentseekers, the tax law has proved to be an irresistible lure for those seeking to benefit from disguised government welfare. Business lobbyists, in particular, exercise considerable influence in winning concessions under the guise of 'simplification' of the law,\textsuperscript{68} the framing of 'equity' measures,\textsuperscript{69} identification of the appropriate tax mix\textsuperscript{70} and the nature of measures appropriate to achieving 'neutrality'.\textsuperscript{71} The theory of public choice\textsuperscript{72} has its theoretical\textsuperscript{73} and empirical\textsuperscript{74} limitations. Nevertheless, its elaboration has served to highlight the fact that those segments of the community which perceive that they have much to gain/lose will have a strong incentive to organise themselves into lobby groups which command considerable resources and influence at all levels of government.

\textsuperscript{64} Liam Murphy & Thomas Nagel, \textit{The Myth of Ownership} (2002).

\textsuperscript{65} For discussion of this understanding of the benefit theory, see Graeme Cooper, 'The Benefit Theory of Taxation' (1994) 11 \textit{Australian Tax Forum} 397 at 430. Justifying taxation upon the basis of it being a payment for services is problematic because there is no direct correlation between the tax 'price' and the value of the services received. Further, conceiving of taxation as an exchange contract undercutsthe ethical foundation of taxation as a contribution to the common fund. Framing taxation as an exchange contract suggests that 'purchasers' of public services are legitimately entitled to minimise the price they pay by engaging in 'tax avoidance', making the inclusion of General Anti-Avoidance Rules (GAARs) problematic. Either taxation is not an exchange contract (so GAARs have a legitimate role within a tax framework) or a GAAR must be conceived of as a government's effort to enforce its monopolistic rents (which jeopardises their legitimacy).

\textsuperscript{66} Jeffrey Birnbaum & Alan Murray, \textit{Showdown at Gucci Gulch: Lawmakers, Lobbyists, and the Unlikely Triumph of Tax Reform} (1987); McQuaig, above n30.

\textsuperscript{67} See discussion of the Church of Scientology's efforts to win a favourable taxation ruling from the United States Inland Revenue Service: Leonard Downie Jr & Robert Kaiser, \textit{The News about the News} (2003) at 30 (ie, hiring private investigators to harass IRS agents).

\textsuperscript{68} Dan Roberts, 'GE surges as tax breaks cut in' \textit{The Australian} (24 January 2005) at 28.

\textsuperscript{69} Such campaigns can range from negation of proposed equity measures (see, for example, Jason Koutoukis, 'Snout City – Influence Peddling or Participatory Democracy?' \textit{The Age} (4 June 2005) at 1) to modification of such proposed measures (see, for example, discussion of the modification of the Controlled Foreign Company rules in the \textit{Income Tax Assessment Act 1936 Part X}; Lee Burns, \textit{Controlled Foreign Companies: Taxation of Foreign Source Income} (1992) at 12–13.

\textsuperscript{70} See Richard Eccleston's portrayal of the key role that business lobby groups played in advancing the consumption tax agenda in Australia: Richard Eccleston, \textit{The Thirty Year Problem} (2004).
(iii) Legitimation and the Insecure Foundation of Proceduralism: the Dissension within Democratic Theory

(a) Procedural Universalism: an Alternate Foundation of Tax System Legitimacy?

Following Weber, the conceded contestability of substantive principles of taxation law discussed in the preceding paragraphs has compelled many commentators to ground the perceived legitimacy of the taxation system upon ‘objective’ grounds such as procedural fairness. Tom Tyler argues that the public assesses ‘the process by which allocations are made and disputes settled’ as a proxy for substantive fairness. According to Tyler, procedural fairness requires that decision makers seek out alternate viewpoints, be neutral, adopt appropriate interpersonal conduct (treating citizens with respect) and be trustworthy.

Thus, in the specific context of taxation law, the Commissioner of Taxation relies upon compliance with the ‘procedural’ principles embodied in the Taxpayers’ Charter as the foundation for building cooperative compliance. Although Tyler’s work originally focused upon the actions of law enforcement agencies, he has subsequently embraced the application of these principles of procedural fairness in the political domain. Thus, it seems that Tyler’s thesis is that a citizen will consider a law to be ‘legitimate’ if the principles of procedural fairness have been applied in both creating and enforcing the law.

(b) Procedural Contestability Within Democratic Theory: the Shortcomings of Legitimisation Grounded on Procedural Fairness

However, it is not necessarily the case that procedural fairness offers a firmer foundation for the legitimacy of law. This is because the same anti-foundationalist perspective which grounded the critique of universal substantive taxation...
principles also grounds the critique of universal principles of political decision making, notwithstanding Francis Fukuyama's 'end of history' thesis. As Australia is commonly regarded as a ‘democracy’ this point is best illustrated by reference to the contestation within ‘democratic political theory’.

‘Democracy’ means rule by the people, but interpretations of ‘rule’ and ‘people’ vary. Within liberal democratic theory there are competing approaches to reconciling individual liberty with democratic government — the central questions being:

1. identification of the members of the polity and whether and how the interests of those members should be considered during the democratic process — the young, future generations and the infirm being particularly problematic;

2. the normative significance of the democratic concept of equality (and in particular, whether it is enough for each member of the polity to have a theoretical opportunity to participate in decision making, ignoring the reality of socio-economic inequality);

3. the status of individual rights within a democracy, and in particular how to prevent a bare majority from oppressing a minority;

4. whether democratic government is a power sharing mechanism based upon:
   (a) competition between rival interests in a political marketplace for each others’ policy preferences;
   (b) a consensus between individuals ‘taken as they are;’ or
   (c) a consensus of individuals transformed by virtue of their participation in the process of democratic decision making; and

5. whether democracy jeopardises the creation of meritorious public policy.

Various strands of democratic theory answer these questions in different ways. For the dual purposes of critically assessing the existence of a universal procedural norm and also of informing the subsequent discussion of Australian tax legislative
processes, the following strands of democratic theory are pre-eminent in Australia: 91

1. Elitism — As noted in the introduction to this paper, under Schumpeter’s model of competitive elitism the extent of general public engagement in the political realm is restricted to selecting political representatives at open general elections. 92 Between elections the elected representatives and the bureaucracy are left to get on with the business of government. 93 Competitive elitism therefore envisages democracy in terms of ‘thin’ proceduralism and decries broad public participation in public policy. ‘Thin’ proceduralism might, for example, merely specify minimal standards for free and fair elections of decision makers without prescribing any substantive norms as to the nature of decisions made by those decision makers.

In the field of taxation law this elitism is rationalised upon several grounds:

(a) taxation law is often portrayed as especially complex 94 and therefore appropriately reserved for a tax policy elite, given the data regarding public ignorance and myopia. 95 Taxation law, then, is an archetypical domain for Weber’s bureaucratic rationality, 96

(b) public engagement in tax reform is motivated primarily by self interest, often expressed simplistically in terms of tax protest; 97

(c) the median voter theorem, which holds that the majority of a society would vote a punitive tax upon the wealthier minority — thereby destroying the economic vitality of the nation. 98 It was the median voter theorem which underpinned the creation of many upper houses of legislatures grounded upon a property franchise, 99 and

(d) Elitism is considered the most appropriate legislative process for curtailing the opportunity for interest groups to achieve outcomes which are contrary to the public interest. 100 One prominent view is that closed or elitist tax reform offers the best path to a simple tax system free of

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91 This is not intended to be a comprehensive discussion of alternate models of democratic politics, for which see Held, above n14.
92 Id at 284-5.
93 Id at 295.
94 Bayless Manning, ‘Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on Section 385’ (1982) 36 Tax Law 9. As an aside, it is a moot point whether this is true since measuring relative complexity across different policy realms is problematic.
95 Above n41.
97 For discussion of the sources of this tax protest literature, see Kornhauser, above n5; Larry Patriquin, Inventing Tax Rage: Misinformation in the National Post (2004).
98 For discussion of this point see Shapiro, above n9 at 104.
99 Id at 89.
100 Identifying the ‘public interest’ entails moral questions and the line between private and public will be blurred. It was once argued, for example, that what is good for General Motors is good for America.
According to this view, an authoritarian democratic government, left to its own devices, has the will and would have the institutional capacity to identify, and act in, ‘the public interest.’ The ‘public interest’ is portrayed as a monolithic normative benchmark founded upon objective tax system design principles developed by ‘experts’ and framed in terms of the well known lore of neutrality, equity and simplicity.

Closely controlled reform processes are contrasted to ‘participatory’, ‘republican’ and ‘deliberative’ processes which generally countenance consultative strategies which seek broad community engagement upon tax policy design. Open and broad based consultation upon tax reform, it is often suggested, engenders myriad special interest concessions which complicate the tax law.

2. Dissatisfaction with this elitist vision of government has prompted a reorientation of the concept of democracy in terms of the concept of ‘accountability’. Two institutional mechanisms which have been proposed for enhancing accountability are participatory models of democracy and also deliberative models.

3. By contrast to Schumpeter’s portrayal of elitist democracy, participatory democratic theory envisages democratic politics as an opportunity for individual transformation by general members through their active engagement in the legislative process. Participatory theory recognises the systemic forces which undermine the democratic aspiration to (at least) political equality by creating an environment in which some have greater political influence than others. The broad thrust of the participatory prescription for rejuvenating democracy entails creating the social conditions which would allow for and promote active participation on the part of the general public. Steps toward achieving this vision in the context of Australian taxation law have been considered elsewhere, and would entail lowering multiple barriers to public participation in the policy process.


102 Thus, for example, Joseph Pechman implies that the Secretary of the Treasury and members of legislative committees act in the public interest by critically assessing the merits of interest group claims: Joseph Pechman, *Federal Tax Policy* (4th ed, 1983) at 53–4. However, at other points in his work Pechman acknowledges the fact that committee members may be influenced by campaign contributions from interest groups: Pechman at 55.

103 For analysis of this expert discourse see Stewart, above n11.

104 See, for example, Organisation for Economic Co-operation and Development (‘OECD’), *Citizens as Partners* (2001); Gutman & Thompson, above n89.


If it is to be realised, the participatory vision must both overcome significant obstacles and resolve important issues as to its interaction with representative forms of democracy. For example, substantial resources would be required and many members of the public may be relatively disinterested in national issues.¹⁰⁸

One perhaps less than exemplary instance of a participatory tax reform process was adopted by the Ontario Fair Tax Commission,¹⁰⁹ where many of the problems associated with introducing a participatory process within a contemporary environment became manifest.¹¹⁰

4. Models of deliberative democracy move beyond the conception of democratic politics as a thin mechanism for aggregating private preferences¹¹¹ to one in which members of the polity demand a defensible account for public actions and are in a position to critically assess such accounts.

5. Different strands of deliberative democratic theory grapple with what is necessary to transform political discourse. One such model holds that the quality of political discourse and outcomes is promoted by impartiality, other-regarding and future-regarding norms.¹¹² However, other deliberative democrats question the validity of the impartiality norm in light of the acknowledged contestability of any particular standpoint.¹¹³ For example, how can a public official be ‘neutral’, given the ultimately arbitrary bases for arriving at closure upon a particular substantive issue?¹¹⁴ This more sceptical group of deliberative democrats favours a less stringent norm which would promote a genuine attempt to ‘hear’ and respond to alternate views which may be grounded upon alternate standpoints. Thus, for example, Amy Gutmann and Dennis Thompson propound a principle of reciprocity, which requires interlocutors to seek, in the first instance, mutually acceptable grounds for public action and, if no such accommodation can be found, a decision grounded upon mutual respect.¹¹⁵

¹⁰⁹ For one example of broad based community consultation, see Ontario Fair Tax Commission, *Fair Taxation in a Changing World* (1993). Unfortunately, no consensus upon tax reform emerged and, indeed, at least some participants felt more alienated from government as a result of this failed effort to build consensus: see the dissenting finding of Professor Neil Brooks.
¹¹⁰ Ibid.
¹¹¹ For a critique of the limitations of such aggregative models in light of contemporary conditions, see James Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (1991) at 1–13.
¹¹⁴ For discussion of alternate subjective models of bureaucratic decision making, see Thomas McGarity, *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy* (1991) at 5.
¹¹⁵ Gutmann & Thompson, above n89.
This brief discussion of the contestation within democratic theory suggests that the finite foundations for public action which Tyler sought in procedural fairness are also open to challenge. Such discord is reflected in Gangl's observation that Americans wholeheartedly embrace abstract concepts of democratic government but are less enamoured with 'democracy in action'.\(^{116}\) Thus, each of Tyler's criteria for procedural fairness begets its own definitional and operational difficulties depending upon one's moral stance regarding the nature of democratic decision making. For example, although it is generally accepted that trust is enhanced through the adoption of good governance principles including transparency,\(^ {117}\) the meaning of 'transparency' is subject to differing interpretations depending upon the moral standpoint of the observer.\(^ {118}\)

In any case, even if the general public were to form a consensus view upon the necessary and sufficient indicia of procedural fairness, a consensus as to whether procedural fairness had been achieved in a particular case may still prove elusive. If the general public is not in a position to understand and/or agree upon substantive taxation policy, it is not clear why we should be confident in the general public's capacity to critically assess the procedures by which that law is enacted. How, for example, does the general public appraise the 'neutrality' of decision makers if the general public do not understand the nuances of public finance theory such that they are in a position to assess the credibility of arguments for adopting a particular policy stance?

### 3. Tax Legislative Processes in Australia

The preceding discussion of the substantive and procedural sources of legitimacy suggests that there is no readily identifiable basis upon which the legitimacy of the Australian tax system might be grounded. And yet, although survey data indicate that there is a significant group of taxpayers which expresses dissatisfaction with the tax legislative process,\(^ {119}\) it cannot be said that there is a widespread perception that the Australian tax system is illegitimate. The question which therefore arises is how the apparent legitimacy of the Australian tax system comes into being. In Section 2A above it was hypothesised that the social process of legitimation is far more dynamic than that envisaged in sociological models which focus upon identification of a universal legitimating norm (such as 'substantive fairness' or 'procedural legitimacy'). Having considered the significance of the legitimation imperative, and ruled out the existence of universal norms which might readily be relied upon by government in meeting this imperative, it is appropriate to turn to a consideration of the Australian tax legislative process with a view to elaborating upon the dynamic character of the legitimation process in the context of the Australian tax legislative process.

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117 OECD, above n104 at 22.
119 See the text accompanying nn 187ff below.
Unfortunately, space limitations preclude a detailed review of the Australian tax legislative process.120 Nevertheless, brief reference to illustrative examples suffices to demonstrate the characteristics of the Australian tax legislative process which, I suggest, evidence the chaotic dynamism of legitimation evident in the tax legislative process.

A. The Chaos of the Legislative Process

A review of the Australian tax legislative process discloses what is best described as a chaotic assemblage of legislative processes. There is an apparently disordered range of policy development mechanisms adopted by various agencies and which incorporate manifold approaches to consultation — from confidential, targeted consultation to open consultation with many of the hallmarks of participatory and/or deliberative democratic processes.121 Sometimes, the same inquiry incorporates concurrent open and closed consultation processes.122 These various consultative mechanisms reflect a multiplicity of government rationalities constructed upon different strands of democratic theory — from Schumpeterian elitism to participatory models to interest group pluralism to public choice to deliberative models. It may be that this assemblage of disparate mechanisms merely reflects the fact that different methods will be appropriate in different contexts. However, in the absence of any statement as to the principles framing the selection of the most appropriate process, it is difficult to reconcile the apparently chaotic disorder of the Australian tax legislative process with Weber’s depiction of a bureaucratic ‘steel hard cage’123 that legitimates state power with its rationally created rules. Similarly, it is difficult to accommodate the apparent chaos of the Australian tax process within the legitimising discourse framed in terms of governance norms.

B. Accountability: the Divergence of Official Discourse and Official Practice

The Schumpeterian model of elitist democracy holds that elected rulers should be left to rule during their term of office, with those rulers being held accountable for their policies on election day. The current understanding of accountability focuses upon rational decision making procedures.124 These procedures include information gathering, clear identification of policy objectives including performance measures, impartial weighing of alternate options, selection of best option and conduct of post implementation reviews to assess actual performance against performance measures.125

The preceding discussion of the Australian tax legislative process indicates that this model of bureaucratic rationality is not uniformly adhered to. The legislative

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121 See Appendix A.
122 Treasury, A Tax System Redesigned (1999), Appendix B (‘Ralph Report’).
124 Dowdle, above n106.
125 See, for example Centre for Management and Policy Studies, Better Policy-making (2001) at 14.
measures noted above — the entrepreneurs’ tax offset, the capital gains concession for foreign investors and the new small business tax concessions appear to be more consistent with bureaucratic anti-rationality. These are demonstrably instances of policy making in the absence of credible demonstration of a need for public intervention, with no clear performance measures and no systematic post implementation review process.

C. Elitism and Business Lobbyists

The preceding discussion evidences the elitist approach adopted by the Australian Government in creating new tax legislation — the number of confidential consultations with selected members of the community,126 the secretive nature of the Australian Treasury127 and the self-perception of Treasury officials as the last bulwark against interest group politics128 point to an elitist outlook with respect to tax policy development.

A recurrent theme of the official discourse is that the policy elite within the bureaucracy are adept at furthering the public interest while managing the claims of interest groups. The reality of the Australian tax legislative process does not match this rhetoric. There may have been a time during the 1980s and early 1990s when the influence of business lobbyists waned as the star of ‘public interest’ groups ascended.129 However, the long term status quo,130 under which business lobbyists enjoy substantial access at all levels of the tax legislative process, has been restored. The role of broader ‘public interest’131 groups in the process of tax law creation is minimal or non-existent.132 The significant presence of business lobbyists within the political arena is not, in itself, objectionable. However, when government appears to distribute public funds to business interests without taking prudent measures to ensure that such public investments are in the public interest, there is a failure of public institutions. It may be that in some domains the Australian taxation system has reached this point. Taking the example of small business tax concessions, there is a demonstrated want of rational oversight of this tax expenditure program.133

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126 See Appendix A.
127 See the text accompanying nn23–27 above.
131 In using this nomenclature I am aware of the proposition that there is no such thing as a ‘public interest group’ – there are only different types of private interest groups. Whether or not this is correct, the point is that business lobbyists enjoy a disproportionate political voice.
132 See the discussion of the diminishing role of such groups in Australian tax consultations in Section 4(C) above.
4. **The Limitations of the Existing Literature on the Tax Law Creation Processes**

A. **Official Literature**

The preceding discussion of the various consultative processes with respect to tax law highlights the fact that there is a dearth of literature which provide an overview of those consultative mechanisms in Australia. Although the Australian Board of Taxation released a report regarding government consultation with the community about tax reform, the report is beset with a number of limitations. The other official literature is sparse, fragmented and ignores the underlying tensions within democratic theory which indicate alternative approaches to consultation. Moreover, to the extent that it ignores the extent and significance of secretive consultation, the official literature is misleading.

B. **Secondary Literature**

Although there is a considerable body of secondary literature within any particular jurisdiction with respect to the processes by which tax law is made, that literature is limited in various ways. Such limitations include a narrow focus of the subject matter and simplifying assumptions which impede full understanding of the subject matter.

Thus, for example, some literature focuses narrowly on the budget process and therefore ignores other contexts in which taxation law is made and/or modified. Other literature focuses on the formal mechanisms which are ideally adopted in developing tax legislation while ignoring the fact that much legislation emerges from truncated lawmaking processes and with perhaps minimal deliberation and/or consultation. Richard Krever’s useful analyses of Australian tax system dysfunction concentrate on participants in the creation and administration of the taxation law, and so largely pass over the process by which the law is created. Richard Eccleston concentrates on the various efforts to introduce a goods and services tax by ‘big bang’ tax reform processes which entailed broad public inquiries, and so largely ignores the mundane process by which much Australian taxation law is created. Further, Eccleston’s concentration on institutional theory largely ignores the significance of ideological, material and interest group pressures in shaping the tax reform mechanisms. Alison McLelland considers

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134 Australian Government, above n7.
135 For discussion of which see Section 4C(ii) below.
136 See, for example, Commonwealth Government, above n22.
the mundane processes of tax reform, but assumes that broad public engagement in tax reform processes is a public good which should be adopted without acknowledging the problematic politics of reforming the tax reform process. McLelland's analysis is limited because it does not identify the causes of this incapacity and therefore implies that, absent this incapacity, government has the political will to implement fundamental institutional reform. Once again, the politics of reforming the tax reform process are ignored.

Some significant studies of tax reform processes have developed simplifying assumptions which limit the scope of their work. Thus Sven Steinmo\textsuperscript{142} accepts that the federal process of law creation adopted in the United States of America reflects the deliberate efforts of the 'Founding Fathers' to entrench an extreme diffusion of power across multiple actors in the lawmaking process.\textsuperscript{143} Steinmo compares this diffusion of power to the authoritarian concentration of power in the executive arm of parliamentary government in the United Kingdom.\textsuperscript{144} Steinmo argues that absence of political compromise is a feature of an institutional framework dominated by a two party parliamentary system where there is strong party discipline and majoritarian government.\textsuperscript{145} However, by focusing on the formal concentration of power in the executive government,\textsuperscript{146} Steinmo ignores the multiple sites of power which influence government lawmaking even where power is formally concentrated. On this basis, Steinmo assumes that majoritarian governments in parliamentary systems can ignore interest groups and so do not need to engage in the compromises endemic within the United States lawmaking process.\textsuperscript{147} Steinmo continues by arguing that successive majority governments in the United Kingdom were free to enact their proposals and did so, committing the United Kingdom to a series of substantial policy shifts from one government to the next.\textsuperscript{148} What Steinmo ignores is the power of lobby groups to broker legislative deals 'behind closed doors'\textsuperscript{149} and for other interests to wield more subtle influence upon public policy.\textsuperscript{150} What is missing here is the Foucauldian

\begin{itemize}
  \item \textsuperscript{141} Alison McLelland, 'Taxation: Towards a Better Policy Process' (Paper delivered at Investing in Ourselves: Fair and Effective Taxation for an Enterprising Australia Conference, 30 May 2003).
  \item \textsuperscript{142} Steinmo, above n139.
  \item \textsuperscript{143} Id at 68.
  \item \textsuperscript{144} Id at 52.
  \item \textsuperscript{145} Id at 206.
  \item \textsuperscript{146} Steinmo, above n139 at 206.
  \item \textsuperscript{147} Steinmo, above n139 at 160, 203–4.
  \item \textsuperscript{148} Steinmo, above n139 at 206.
  \item \textsuperscript{149} McQuaig, above n30.
  \item \textsuperscript{150} Thus, for example, the capacity of the World Bank and the OECD to influence government policy: Arthur Cockfield, 'The Rise of the OECD as Informal 'World Tax Organisation' Through National Responses to E-Commerce Tax Challenges' (2006) 9 Yale Journal of Law and Technology 59. One area which deserves much more attention is the way in which interest groups and others shape public opinion and hence the way in which taxes are shaped. Some useful contributions in this field include: William Blatt, 'The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy' (1996) 51 Tax Law Review 287; Larry Patriquin, Inventing Tax Rage: Misinformation in the National Post (2004). More generally, see Edward Herman & Noam Chomsky, Manufacturing Consent (2002).
\end{itemize}
recognition of the diffusion of power throughout a community, notwithstanding the concentration of formal power in the executive branch of government.\textsuperscript{151}

Because Steinmo adopts the dualistic paradigm of ‘government’ and ‘the people’, he ignores the process by which the majoritarian government in the United Kingdom arrives at its tax policy. His analysis takes a priori a government’s tax policy, rather than exploring the way in which that policy is generated. Had he undertaken such exploration, he may well have seen that ‘government’ and at least some segments of ‘the people’ are closely integrated. Within the executive arm of government there will almost always be a brokering of deals in shaping legislation — it may not take place within a formal committee system such as that of the United States, but it takes place nonetheless. As discussed in Section 3 above, the considerable influence of business lobbyists in the Australian legislative process cannot be doubted. Similarly, Eccleston describes an institutionally weak Australian Government which must construct strategic alliances with different interest groups in building support for a legislative program.\textsuperscript{152} Formal concentration of power means little — what is far more important is the capacity of ‘stakeholders’ to create and react to the political mood of at least some significant sectors of the general community.\textsuperscript{153}

Although he endorses Steinmo’s ‘dynamic institutionalism,’ Eccleston’s ‘new institutional’ theory is somewhat more sensitive to the dynamic interplay of a variety of forces shaping a tax system. Formal institutions such as the constitutional framework,\textsuperscript{154} political pragmatism,\textsuperscript{155} interest groups\textsuperscript{156} and even the role of the media are acknowledged at various points in Eccleston’s work as he strives to explain how government enhances its ‘relational capacity’ by engaging with ‘key stakeholders’. But once again the complexity of this task is beyond the capacity of institutional theory’s wooden fixation with the brokering of centralised power among an apparently entrenched and static group of ‘stakeholders’. Thus, for example, Eccleston does not tease out the suite of different reform strategies simultaneously maintained by government in its management of ‘mundane’ tax law creation. Moreover, identifying the ‘key stakeholders’, setting out the indicia to be applied in determining how they are to be identified, explaining how they became key stakeholders in the first place and considering the implications of this ‘new institutional’ depiction of the Australian legislative process for normative democratic theory and institutional reform, are not considered.

\textsuperscript{151} Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1977).
\textsuperscript{152} Eccleston, above n70.
\textsuperscript{153} Id at 174–5.
\textsuperscript{154} Id at 10, 15.
\textsuperscript{155} Id at 27–30.
\textsuperscript{156} Id at 52.
\textsuperscript{157} Id at 69.
C. Explaining the Procedural Chaos of the Australian Tax Legislative Process

The chaotic tax legislative process considered in section 3 suggests that social power is far more diffuse than much of the social science literature considered in section 4 contemplates. The chaos of the tax legislative process indicates the absence of any legitimating, universal procedural norm. In the absence of such a universal norm, the tax legislative process does not necessarily afford the policy elites the discretionary capacity which enables them to broker deals with minimal public scrutiny. This suggests that the legitimacy of the tax legislative process is far more tenuous, and hence contested, than models of centralised social power suggest.

Two related questions, which are not addressed in the earlier literature because of the concentration upon centralised social power, arise from the preceding observations upon the nature of the Australian tax legislative process. How has the most unprepossessing form of public administration, evident in the chaotic irrationality of the Australian tax legislative process, come to be adopted, and apparently widely tolerated if not accepted, within a ‘modern’ ‘democratic’ society? What forms of social behaviour have enabled this dissonance between norm and fact to continue?

In beginning to answer these questions it is important that we do not throw out the baby with the bathwater. Eccleston, Steinmo and other commentators have made invaluable contributions to an understanding of the tax legislative process. It certainly is true that government agents build ‘relational capacity’ and broker deals with ‘stakeholders’ (Eccleston) and that a government in a parliamentary system, and with strong public support, plays a strong hand in such deal-making (Steinmo). But such depictions offer only a partial account of the Australian tax legislative process. In the following paragraphs I would like to suggest how this earlier work might be supplemented in seeking answers to the questions identified in the immediately preceding paragraph. Such answers, I suggest, must proceed from an acknowledgement of the significance of the legitimacy imperative to government agents (and to the ‘mainstream’ faith in ‘modern’ democracy as the most legitimate form of government). Further, such answers must acknowledge the tenuous character of legitimacy surrounding the tax legislative process.

Recognition of the interrelationship between diffuse social power and the chaotic instability of the Australian tax legislative process enables elaboration of several aspects of the legislative process.

(i) The Strategic Functionality of Chaos for Those Already Empowered and also for Those Who Aspire to Power

One strand of chaos theory suggests that order may be plucked from what appears to be chaos. Similarly, an analytics of government suggests that the apparent chaos of the Australian tax legislative process might be rational within its given

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context. Institutional theory emphasises the institutional incapacity of Australian Government to unilaterally procure its legislative agenda upon substantive issues — it needs to find allies for specific policy actions.\(^{159}\) Given the dissension within democratic theory, it is reasonable to expect that such ‘capacity building’ would arise also in determining the processes of government.\(^{160}\) Thus, Huntington describes the dynamic tension between competing moral imperatives within the political system of the United States, and argues that this tension is the mainspring which has procured the survival of what he suggests is the most democratic and most liberal political system in the world.\(^{161}\)

In the specific context of taxation, the chaos of the tax legislative process fulfils a rhetorical function in winning support, albeit temporarily, from individuals and groups with quite different standpoints as to the proper legislative process. Government agents and agencies such as the Treasury, which possesses a range of lawmaking strategies, can be seen to be all things to all people. These government agencies can self-describe themselves as ‘transparent’\(^ {162}\) and thereby portray themselves as deliberative/participatory decision makers. Simultaneously, these agents and agencies can assume an elitist persona in brokering deals for special interests behind closed doors\(^ {163}\) or conducting the vast preponderance of Australian tax legislation with no consultation or with targeted (and often confidential) consultation.\(^ {164}\)

Although some observers might be troubled by the insistent presence of lobby groups, they might optimistically hope that the elitist elements within this eclectic system would maintain the floodgates holding back the flood of special interest concessions.

Aside from this rhetorical function served by the chaotic legislative process, for government functionaries (politicians in the governing parties as well as servants within the executive arm of government) a choice between many lawmaking processes is strategically advantageous. Such choice allows them a discretion as to which path to choose, influenced by the objective(s) they wish to achieve. For example:

1. as control of the agenda and forceful implementation of policy is essential to ‘getting things done’, it is understandable that politicians and bureaucrats alike will prefer an autocratic approach if they wish to achieve a particular policy outcome;

\(^{159}\) Eccleston, above n70.

\(^{160}\) Although Weber drew a distinction between substantive and procedural rules, concluding that dissensus upon moral questions meant that state legitimacy must rest upon the (assumed) consensus upon the nature of procedural rationality: Max Weber, ‘Bureaucracy’, in Gerth and Mills, above n75 at 224.


\(^{162}\) Treasury, Making Transparency Transparent (1999).

\(^{163}\) ‘The Department of Prime Minister and Cabinet and the ATO have been consulted on this issue. In view of the requirement to introduce legislation on 9 December 2004, there is not sufficient time to consult more widely’. Explanatory Memorandum, Tax Laws Amendment (2004 Measures No. 7) Bill 2005 (Cth) cl 1.63.

\(^{164}\) See Appendix A.
2. this will not always be possible because, for example, strong ‘community’
opposition may dictate that at least lip service be paid to consulting with the
community. In such cases, a more inclusive approach to consultation might
be adopted even if an elitist approach is ultimately adopted in dealing with
the outcome of the review process; and

3. the conduct of open forms of consultation might also serve pragmatic
functions of enabling government to identify emerging interest groups and
determine whether any of those groups should be brought into the inner
sanctum.

To the lobby groups there is enough evidence to suggest that they have enough
success under the existing institutional structures to warrant the continuation of
these structures.\(^{165}\) Again, these groups will not necessarily be opposed to the
existence of differing procedural paths because they might prefer different
mechanisms in different contexts. In some cases, interest groups will prefer the
existence of multiple veto sites. Thus, for example, interest groups who are trying
to negate a proposed measure, such as treating trusts as companies, are only too
happy to allow multiple decision making levels because they only need one
decision maker to exercise their veto power to kill the particular measure.\(^{166}\) In
such cases they might be happy to proceed with an ‘open’ process of review, which
creates the prospect that those undertaking the review might adopt a ‘favourable’
standpoint. If not, the responsible Minister affords a second veto point. The longer
duration of an open process might also allow sufficient time to mobilise support
against the proposed measure.\(^{167}\) On the other hand, if a measure is sought by
interest groups who are confident in the responsible Minister’s support, it is
understandable that they will prefer a closed decision making process under which
power is concentrated in one decision maker such as a powerful Treasurer who can
win the agreement of Cabinet and hence almost invariably of the lower house of
Parliament.

In an adaptation of one aspect of Huntington’s thesis, it is therefore arguable
that the procedural ambivalence of the Australian tax legislative process is not
necessarily a weakness but rather an important source of strength for the
government in marshalling support for its legislative activity. Rigid adherence to
any one process would confront challenge almost immediately, whereas the
flexibility endemic to a chaotic system enables lawmakers and active participants
in the lawmaking process alike to pursue their respective interests through
channels determined on a case by case basis.

\(^{165}\) McQuaig, above n30; United States House of Representatives Committee on Government
Reform, \textit{Staff Report of the Government Reform Committee} (2006); Burton, above n71.

\(^{166}\) As can be seen in the history of the proposed entity taxation measure: Brett Freudenberg, ‘Entity
Taxation: The Inconsistency between Stated Policy and Actual Application’ (2005) 1 \textit{Journal
of the Australasian Tax Teachers Association} 458.

\(^{167}\) Ibid.
The Contest of Ideas: Rhetoric Within the Official Discourse of the Australian Tax Legislative Process

The Australian tax legislative process therefore constitutes a panoply of mechanisms embodying the pragmatic imperative of systemic survival. Despite this pragmatic foundation, the legislative process is enveloped in an official discourse which sustains the portrayal of bureaucratic rationalism. To the extent that the official literature describes tax consultation, it focuses attention upon a mythical process of deliberative consultation combined with elitist protection of the public interest. This official discourse distracts the public gaze from what is often (but not always) the reality of close collaboration between government and business lobbyists in particular. As such, the official literature may serve a legitimating function — creating a veil of procedural legitimacy behind which government agents or agencies can choose if and when they will collaborate and who they will collaborate with. This discourse is built around several rhetorical devices which I outline in the following paragraphs.

(a) Omission

Deconstructing the meaning of a particular text is often as much about what is not within the text as about what is within the text. Thus, for example, the Board of Taxation’s report on community consultation focuses the reader’s attention on the form of consultation considered in the report and thereby neglects other consultative mechanisms. In the context of government consultation with ‘the community’ there are various mechanisms by which consultation may occur. Different mechanisms may be appropriate given different consultative contexts and different perceived purposes of the consultation. Consultation can be direct, as where a constituent writes to a Member of Parliament or where a member of the public appears before a parliamentary committee. Consultation might also take place by indirect means, as where a member of the public writes a letter to the editor of a public newspaper which is read by politicians and/or bureaucrats. Either mechanism for consultation accommodates invited or uninvited consultation.

The Board of Taxation appears to have concentrated upon consultative processes which comprise invited consultation initiated by the Treasury branch of the executive government. This therefore excludes consideration of a significant amount of community consultation regarding the ‘development’ of taxation legislation, including the ‘provision of information’ to government by lobbyists or by others acting under the guidance of lobby groups, consultation between the Commissioner of Taxation and the community with respect to the ‘unfolding’.
of taxation law by the issuance of public rulings and also consultation regarding tax legislation undertaken by various parliamentary committees.\textsuperscript{173} Reference to various forms of Ministerial consultation, such as that which procured the entrepreneur tax offset,\textsuperscript{174} is not to be found.

The exclusion of these additional forms of consultation from the Board of Taxation’s purview is unfortunate, as it has produced a partial account of community consultation upon the development of Australian taxation legislation. Were such forms of secretive consultation expressly referred to, questions regarding the significance and transparent reporting of those consultations might have arisen.

(b) Assertion
A second rhetorical ploy is to assume the rhetorical higher ground early in a dialogue by asserting a proposition as fact. If such an assertion is allowed to pass unchallenged, the onus passes to those subsequently wishing to challenge that assertion to disprove it, rather than merely demanding proof for that assertion. The statement ‘tell a lie often enough and it will be believed’ is generally attributed to Josef Goebbels, while Adolf Hitler considered that telling a big lie was far more credible than telling a small one because the populace would not believe that anyone would have the audacity to tell big lies.\textsuperscript{175} In this regard, the government’s control of official publication media gives the Australian Government the upper hand. Thus, for example, in \textit{Making Transparency Transparent}\textsuperscript{176} the Commonwealth Government does not expressly define ‘transparency’ but apparently adopts a limited concept of ‘transparency’ in making the claim that the Australian Government is transparent. Here, the assertion of transparent practice serves to exclude the voice of those who propound alternate interpretations of the ‘transparency’ concept.

(c) Narrative of Bureaucratic Rationality
The narrative of bureaucratic rationality in the service of the public interest is central to the portrayal of accountable elites within democratic government. This narrative is routinely embodied within the official discourse. The Secretary of the Treasury’s recent comment that ‘policy discipline is hard. But it is not too hard’,\textsuperscript{177} thus, for example, Rechner details a campaign against the introduction of a broad based consumption tax, overseen by the Retail Traders’ Association, under which 45,000 letters were sent to Parliament in 1980: R Rechner, \textit{Options for Tax Reform}, Economic Papers, No 62; cited in Eccleston, above n70 at 69.

\textsuperscript{171} Thus, for example, Rechner details a campaign against the introduction of a broad based consumption tax, overseen by the Retail Traders’ Association, under which 45,000 letters were sent to Parliament in 1980: R Rechner, \textit{Options for Tax Reform}, Economic Papers, No 62; cited in Eccleston, above n70 at 69.


\textsuperscript{173} These Committees most obviously include the Senate Finance Committee, but might also include other Committees which incidentally consider taxation matters affecting their portfolio.

\textsuperscript{174} See n92 above.

\textsuperscript{175} Adolf Hitler, \textit{Mein Kampf}, Bk 1 ch 10.

\textsuperscript{176} Treasury, above n162.

\textsuperscript{177} Henry, above n128 at 7.
the reference to legislative drafting grounded in ‘coherent principles’,\(^{178}\) the detailed procedures for the development of legislation set out in the *The Best Practice Regulation Handbook*,\(^ {179}\) the glowing review of taxation regulation impact statements undertaken by the Office of Regulation Review which found that 92% of taxation regulations requiring a Regulation Impact Statement satisfied the requisite standard\(^ {180}\) and the portrayal of Australia as a ‘rule of law’ country\(^ {181}\) are just some examples of this narrative of bureaucratic rationality. This narrative is reinforced by drawing a comparison between ‘developed’ countries such as Australia, which are portrayed as ‘modern,’ and ‘developing’ and ‘transitional’ countries, which are portrayed as pre-modern.\(^ {182}\)

This discourse of bureaucratic rationality underpins an essentially elitist perspective of the tax legislative process. Thus, the Board of Taxation’s adoption of the terminology of ‘consultation’\(^ {183}\) is significant. At its broadest signification, ‘consultation’ connotes communication between two parties and embraces receipt of any communication which offers advice or information. From the discussion of democratic theory in Part 2B(iii) above, it may be seen that some theories of democracy envisage ‘the people’ and ‘the government’ as one and the same, while others treat them as discrete. Strictly speaking, ‘consultation’ assumes the separation of government and ‘the community’ and so to speak in terms of ‘community consultation’ implies adoption of particular strands of democratic theory. Only if ‘consultation’ is taken to be a shorthand reference to the nature of public engagement/oversight in the lawmaking process might such a sleight of hand be avoided.

However, a second aspect of the Board of Taxation report is the distinction which it draws between ‘community’ and ‘stakeholders’. At some points within the report it seems that the two terms are used interchangeably, suggesting that at least\(^ {184}\) all of the Australian community are ‘stakeholders’. However, at other points it seems that ‘stakeholders’ are those persons who will be immediately and directly affected by a legislative measure.\(^ {185}\) Under this more limited definition, consultation with ‘stakeholders’ would comprise discussions between Treasury,

\(^{178}\) Australian Treasury, above n172.


\(^{182}\) AusAID, ‘Governance’, <http://www.ausaid.gov.au/keyaid/gover.cfm> accessed 19 February 2007: ‘Strong and accountable institutions that operate transparently, that enable participation by citizens in decision making and that act in accordance with the rule of law are a key to economic growth and poverty reduction. Australia ensures that its engagement, particularly measures for dealing with poor performing countries, is backed up by flexible programs that offer practical support and incentives for reform.’

\(^{183}\) Board of Taxation, above n25.

\(^{184}\) Persons who are not members of ‘the Australian community’, such as non-resident investors and prospective immigrants, might also have a legitimate interest in being heard upon Australian taxation reform.
the Australian Taxation Office and relevant lobbyists/interest groups representing those directly affected by the proposed measure. This limited definition of 'stakeholder' implies that the stakeholders in the consultation process, most importantly Australian Treasury, will adequately represent the public interest and so the Australian public might safely be excluded from any consultative process. The recent statement of the Secretary of the Treasury suggests that there is cause to believe that, at least in some circumstances, Treasury places more store in protecting the interests of government than in serving the public interest.

(d) Ambivalence

From the preceding discussion it might be seen that the official discourse reflects the tension between different strands of democratic theory — elements of deliberative decision making, elitism and state corporatism are all included. The adoption of inconsistent positions is irrational and so one would think that this would be a rhetorical weakness. However, as discussed in Section 4C(i) above, such ambivalence affords a resilience which enables observers to find at least something to agree with and the prospect of further 'advancement' towards their preferred norm.

(e) How Effective is the Rhetoric?

At present in Australia it seems that there is a substantial section of the community which, rightly or wrongly, believes that the tax policy process favours special interests. True, these data should be treated with caution. In the absence of more detailed data it is not possible to determine the basis of such beliefs. Further, in the absence of time series data it is difficult to know whether this perception is changing or not. It is therefore difficult to assess the extent to which the legitimating discourse is succeeding in promoting public confidence in the tax legislative process. Nevertheless, the fact that such cynicism is expressed by a substantial number suggests that the breadth of the 'credibility gap' is contested and hence the legitimating rhetoric does not exclude alternate standpoints completely.

185 Hence, for example, the reference to obtaining advice from 'affected taxpayers': Board of Taxation, above n25 at 9.
186 Canberra Times, above n26.
188 The collection of such time series data would most appropriately be a function of government rather than, for example, relying upon ad hoc academic research in this field (which usually will comprise relatively short term projects). However, any government which is less than altruistic has little incentive to promote scrutiny of the legislative process which it has adopted.
189 This gap is the distance between what may be disparate interpretations of governmental norms and perceptions of the operationalisation of those norms: Samuel Huntington, American Politics: The Promise of Disharmony (1981) at 31–60.
Promoting ‘Public’ Passivity: the Politics of Suppressing the Possible

(a) The Higher Rhetorical Ground

The discussion of Australia’s tax reform processes highlights the fact that there are many with an entrenched interest in preserving the status quo with respect to Australia’s tax design institutions. Government Ministers, Opposition politicians who hope one day to be Government Ministers, Treasury bureaucrats and many special interest groups have a clear interest in maintaining the predominantly elitist status quo which entails minimising broad public participation in the political process. The present tax legislative process has been shaped incrementally and dynamically by those who benefit from it, those who hope to benefit from it and those who have adapted to it. Promoters of this status quo have achieved the higher rhetorical ground by wielding considerable influence over the official and public discourse which speaks of transparency, but acts opaquely, and by challenging those advocating alternate models to prove that the alternative is better.

In this context, the ambivalence within participatory/deliberative models of liberal democracy does not grant those with a broader, participatory agenda the firm ground upon which to base an alternative normative vision of government. Thus, Shapiro claims to combine the practical world of political ‘science’ with the ‘impractical’ world of political theory by developing a normative theory which addresses the question of how the preferred normative theory might be implemented. In particular, Shapiro is critical of Gutmann and Thompson’s failure to consider the obstacles to achieving their vision of deliberative government. However, fundamental elements of Shapiro’s normative theory remain ill-defined, including the concepts of ‘vulnerability’ and ‘basic interests’. This failure to offer a clear account of fundamental elements of his theory undermines Shapiro’s aspiration to ‘practical theory’.

Similarly, advocates of participatory government acknowledge that there are legitimate concerns regarding the resource implications of adopting participatory institutions in the context of mass government. Such concerns seem to be

190 Schattschneider, above n87 at 140.
191 Thus, for example, Huntington suggests that members of the community of the United States of America should feel guilty about the credibility gap, but ‘take comfort from the fact that American political institutions are more liberal and democratic than those of any other human society past or present’: Huntington, above n189 at 261.
192 See Sven Steinmo’s suggestion that political science is distinct from the natural sciences because political science does not entail the quest for universal truth because no such thing exists in politics. All that exists, according to Steinmo, are context specific explanations for political behaviour which are framed in socio-cultural terms: Sven Steinmo, Taxation and Democracy (1993) at 201.
193 Thus Shapiro dismisses Gutmann and Thompson because of their failure to address the challenge of implementing their deliberative theory in a ‘democracy’ such as the United States, where there is demonstrable political, social and economic inequality: Shapiro, above n9 at 30.
194 Shapiro offers only vague definitions of these terms and this failure severely limits the capacity of commentators to engage in critical consideration of how Shapiro’s vision might be implemented.
validated by occasional efforts to adopt broad based decision making processes. The experience of the Ontario Fair Tax Commission\(^{196}\) might be taken to support that conclusion. The Fair Tax Commission expended a considerable sum of public money were expended on a participatory consultative model which failed to procure recommendations for tax reform accepted by the Commission members. Without the appropriate ideological rationale and institutional foundations in place, such attempts at revolutionising tax reform processes are most probably doomed from the outset simply because of the daunting scale of the multiple tasks of inventing a new consultative process, winning sufficient support for this process and identifying finite tax reform proposals for the consideration of government.

(b) **Not Pursuing Alternate Visions**

As Pateman acknowledges and as the experience of the Ontario Fair Tax Commission suggests, the adoption of an alternate tax legislative process which encourages broad public participation is problematic.\(^{197}\) However, in Australia it seems that resources are not devoted to exploring ways by which such issues might be resolved. For example, the development of credible ‘citizens guides’\(^{198}\) which might serve to inform interested members of the public and the creation of opportunities for asynchronous public e-participation in policy making are explored, if at all, on an ad hoc basis by interested academics.

This torpor has many parents. The perceived absence of crisis with respect to the tax legislative process and the legitimating official discourse are two. Two others are the active suppression of community political engagement and the failure of much scholarship in this domain to adopt a critical approach to its subject matter.

**Suppression of Broad Based Public Participation at All Levels**

Writing almost thirty years ago, Thomas Reese dreamt of a society in which adequately resourced public interest groups might be able to compete with the well resourced business lobbyists on their own terms.\(^{199}\) Unfortunately, such a vision has not materialised in Australia. A vignette of the political inequality can be seen in the non-neutral tax treatment of the funding of political lobbying. In accordance with the general deduction rule,\(^{200}\) a business entity can claim a full tax deduction with respect to payments made to an industry association, irrespective of the extent to which the industry association engages in political lobbying. Conversely, a member of the ‘general public’ who makes a payment to a ‘public interest’ group, which might engage in political lobbying, is generally denied a deduction unless it is a deductible gift recipient which engages in incidental political lobbying.\(^{201}\) It

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196 Ontario Fair Tax Commission, above n109.
is little wonder, then, that public interest groups struggle to participate meaningfully in the tax legislative process. In response to my question of why public interest groups were no longer represented on many of the Australian Taxation Office's consultative committees, a senior ATO officer replied 'because we weren't getting anything from them.' There was no hint of a suggestion that this was perceived to be a problem which ought to be addressed.

The Failure of Scholarship

A more general shortcoming of many of the empirical accounts of tax creation processes is the conservative influence of much contemporary empirical research. This scholarship purports to be 'neutral', 'scientific' observation of social practice, but fails to explain many aspects of that social practice because it ignores what might be considered 'political' observations. Thus Eccleston's thesis that Australian federal governments must establish and maintain their relational capacity if they are to govern may be 'right' as far as it goes. However, as noted earlier in this paper, such institutional theory does not offer any explanation for how societal institutions have come into being and how they are, daily, invented and reinvented by myriad social agents acting within a sea tossed by the currents of ideologies, material factors and interest groups. Such limited empiricism leaves the impression that what will be will be, rather than at least prompting, if not undertaking, critical reflection upon whether social and institutional reform ought to be pursued. The same fearfulness of engaging in critical scholarship is evident in much of the 'governmentality' literature. Thus, Mitchell Dean states that the governmentality 'project' rejects any quest for 'general principles by which the "conduct of conduct" could be reformed.' It was this omission of normative theory from much philosophy which prompted Karl Marx to observe that theorists often missed the point of social inquiry, which was to change the world (for the better).

5. Is Reform Possible?

Eucalyptus trees produce chemicals which they deposit on the ground above their root zone in order to contribute to the myriad factors which suppress the growth of competitor plants. Similarly, the discussion of the literature and practice of the Australian tax legislative process suggests that the growth of alternate models of the legislative process is suppressed in myriad ways, some of which may be deliberately orchestrated, while others may be 'background' factors. The experience of the Ontario Fair Tax Commission indicates that effective and lasting revolutionary reform of the legislative process will be difficult to procure. However, significant changes might also be achieved incrementally if it were possible to mobilise broad based community pressure calling for the closure of the


203 Karl Marx, 'Theses on Feuerbach' in Karl Marx and Friedrich Engles Feuerbach: Opposition of the Materialist and Idealist Outlooks (1973) 92 at 95.
gap between fact and the norm embodied in the contemporary mainstream elitist discourse. Foucault’s thesis, that ‘power goes all the way down’ in a subjectivized world might be taken to suggest that we are incapable of freeing ourselves from our subjective lifeworld in order to invent a new social order. However, what this view ignores is the contestation within our lifeworld and, hence, the fact that we are daily choosing between alternate worldviews when making microscopic decisions which shape our world.

A. Applying Existing Accountability Norms to the Tax Legislative Process

This contestation at different sites within the legislative process can be illustrated by taking the concept of accountability, a concept which is crucial to the contemporary discourse regarding public action. This discourse holds that government is, at least, ‘accountable’ on election day, when it is answerable to the public for the policies which it has implemented over the current term of government. The concept of accountability has undergone some development over the past century. In earlier times it was framed in terms of answering to another with respect to substantive decisions made upon particular issues. Thus, in electoral terms, a voter would compare their personal aggregated value preferences with those of competing candidates and cast their vote accordingly. More recently, the limitations of such substantive accountability have been acknowledged — particularly given that most, if not all, substantive issues comprise ‘wicked problems’ which defy closure and that all voters are subject to information limitations which impede informed decision making on all issues. The second concept of accountability is therefore framed upon what is portrayed as the more objective basis of procedural accountability.

If assessed against the first concept of accountability, the current government has expressed by word and action a disinterest in providing information which might allow for informed voter decision making. For example, as discussed earlier in this paper, the tax expenditures statement does not offer any information which evidences critical appraisal, or tax expenditure analysis, of the government’s tax expenditure program. Even if a more relaxed concept of accountability were adopted, under which government would be held to a lesser standard of performance appraisal against stated legislative objectives, Australia’s tax legislative process would fail for want of clear identification of performance measures for each legislative measure. In this regard, the comment of the Secretary of the Treasury, to the effect that Treasury was not about to release information to the public which would embarrass government and would seriously consider strategies to minimise the release of such information, is particularly

204 Dowdle, above n106 at 3.
205 See the discussion of this phenomenon in Section 2B(i) above.
206 Burton, above n118.
significant. Even the timing of the release of the tax expenditures statement, during the annual summer siesta \textsuperscript{209} when interest in national politics diminishes, is indicative of this cynical manipulation of the release of potentially damaging public information.

The second concept of accountability, procedural accountability, is grounded upon adherence to rationalist norms of information gathering and analysis by a professional bureaucracy. \textsuperscript{210} Under this procedural concept of accountability, it is difficult to see how a disinterested observer might credibly defend the status quo. The preceding review of the Australian tax reform process indicates that these norms are not routinely followed. This is a status quo in which government and special interests negotiate taxation welfare ‘behind closed doors’ for some segments of the community. Thus, for example, the entrepreneurs tax offset\textsuperscript{211} was passed into law without any effective public scrutiny prior to its implementation and without any statement of performance measures against which this $400 million\textsuperscript{212} spending program might be assessed. Moreover, this legislation was passed in the knowledge that there is no government institution which routinely examines the policy effectiveness of such measures under post implementation reviews. At the time of writing this paper, a bill which would grant further small business tax concessions had been introduced into Parliament, again without a credible tax expenditure analysis demonstrating the need for such measures\textsuperscript{213} and again subject to a Senate Committee review under compressed timeframes.

\textbf{B. Enhancing Accountability: Specific Institutional Reforms}

Incremental change towards a more accountable government might begin with the provision of sufficient information to the general public such that the barriers to participation in the ‘political marketplace’ are lowered. If we move beyond the thinnest conceptions of democratic government which call for open and fair elections of representatives authorised to make a community’s laws, alternate models of democracy depend upon the provision of adequate information to the general public. \textsuperscript{214} If elected representatives are truly to be held accountable for their public actions, there must be adequate information to enable voters to assess the merit of those actions.

It is unrealistic to expect all members of the polity to rush home, gulp down their dinner and then settle down to some critical tax policy reading. However, it

\begin{itemize}
\item \textsuperscript{209} The 2006 Tax Expenditures Statement was released on 21 December 2006, and attracted only fleeting press coverage.
\item \textsuperscript{210} Dowdle, above n106 at 4; compare with Dean’s definition of governmentality: Dean, above n106 at 11.
\item \textsuperscript{212} Treasury, Tax Expenditures Statement 2006 (2006) at 88 (entrepreneurs tax offset – $400 million for 2007/08 income year).
\item \textsuperscript{213} Tax Laws Amendment (2006 Measures No 7) Bill 2006 (Cth).
\item \textsuperscript{214} See, for example, Offe & Freuss, above n112.
\end{itemize}
is realistic to expect those with a keen interest in the politics of taxation — journalists, politicians, lobby groups (including community groups) and at least some academics to be interested in this domain. The suggested reforms noted below would lower the barriers to such interested parties participating meaningfully in the tax legislative process.

(i) **Standing Tax Commission**

Calls for a Standing Tax Commission, or equivalent independent institutions, are not new. The most recent Australian recommendation for such a body emanated from the Ralph Review of Business Taxation. Although a Board of Taxation with a broad ambit, and independent from government, was proposed, the Treasurer announced a Board with a far more limited ambit and, in any case, the Board was appointed by the Treasurer. A new, independent, Tax Commission would displace the Board and undertake credible, critical scrutiny of the policy underpinning Australia’s taxation laws. Further, the Standing Tax Commission would undertake periodic performance reviews of tax legislation against the performance objectives set out in the relevant Regulation Impact Statement. Such critical reviews of tax legislation should be made public but the government would not be bound to adopt the Commission’s recommendations. Nevertheless, the existence of credible independent reviews of legislative performance would enhance accountability — unanswered negative reviews could be the basis for damaging assessment of government performance.

The broad inclusiveness of the Inspector-General in his initial consultations, and the web-based consultative processes of the United States’ Taxpayer Advocate, suggest that it is possible to undertake and facilitate broad consultation with a large community in setting the agenda for review of salient aspects of a mass tax system.

(ii) **Augmenting Legislative Information**

As noted above, the limited scope and perfunctory nature of taxation Regulation Impact Statements constitute significant barriers to a critical review of proposed legislation and also to undertaking a credible post implementation review of legislation. There is clearly considerable room for improvement here. For example, taxation-related regulation impact statements should be required to make a case on the merits of the proposed taxation measure, having regard to credible evidence. This critical appraisal of the merits of a proposed taxation measure would necessarily entail clear elaboration of the expected impact of that measure.

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(iii) Opening Lobbying to Scrutiny

The incipient, extended lobbyist registration and reporting mechanism of Canada might serve as a basis for adopting a similar mechanism in Australia with a view to bringing more dealings between government and interest groups into the open.

6. Conclusion

Dunn suggests that a strength of the democratic concept is that it has been applied to quite different political theories, but continues by noting that it is the ‘egoist’ strand of democratic theory which has reigned supreme for the past two centuries. This is borne out by the preceding review of Australian tax law creation mechanisms. In general, a ‘tax policy elite’ comprising senior Cabinet Ministers including the Treasurer, business lobbyists and key members of the executive branch of government dictate the process by which proposed laws will be developed. In many cases, behind closed doors they negotiate the terms of the tax legislation which will affect us all. There is limited opportunity for active engagement of those representing broader perspectives and, apparently, little will on the part of senior public officials to encourage such participation. Although participatory models of democracy have not been ignored in designing Australia’s tax design processes, the limited utilisation of these processes suggests that they are a thin veneer legitimating a process in which the real business of government is undertaken in confidential collaboration with key business lobby groups.

Such autocratic management of the tax legislative process need not necessarily be destructive of the public good, but there is evidence to suggest that in the Australian context the secretive tax legislative process serves special interests. There is limited prospect of accountability, if that term is taken to entail the answerability of public officials for legislative performance against clearly articulated policy objectives. Such failures institutionalise an extremely thin form of Schumpeterian democracy in which only lip service is paid to the accountability of rulers to the electorate on election day.

It would be possible to overstate the significance of this elitist description of modern democratic government by suggesting that the identified elite can rely upon the efficacy of its legitimating discourse and thereby effectively ignore the prospect of tax revolt. However, much as the elite might strive for hegemony, contest and power are apparent at every turn. Thus, for example, Macmillan points to the public dissemination of some damaging information regarding the policy failures of the elite. Although some might read the preceding description of the extant Australian tax legislative processes as another in the line of Schumpeterian revisionism or another in the line of neoliberal critique of the public sphere, neither interpretation is appropriate. Rather, the purpose of this paper is to suggest that the

219 Dunn, above n12 at 179.
chaotic nature of the Australian tax legislative processes and the, only partial,
success of the legitimating discourse described here in fact gives cause for
optimism. This chaos demonstrates Bruno Latour’s point that the present is not
static but rather an ongoing contest which comprises an opportunity for change.
The catalyst for such change might be publicity of the failure of the existing tax
legislative processes when measured against the mainstream discourse of
competitive elitism. By lowering the barriers to general public understanding of
Australia’s tax laws, the modest, incremental reforms suggested in Section 5 above
would amplify the participatory elements of the existing legislative processes.
Although such reforms would inevitably encounter resistance, framing the impetus
for such reforms in terms of the contemporary discourse of procedural
accountability offers the best prospect of overcoming such resistance.

Although ostensibly a paper about the Australian tax legislative process, this
paper is equally about the state of democratic theories as they have been applied in
a particular context. This paper suggests that commentators perhaps too readily
describe a country as ‘democratic’ when discussing ‘first world’ countries. Thus,
at some points in his work Shapiro implies that the United States of America is a
democracy while at other points he appears to accept that his country does not
fall within his normative vision of democratic government. In discussing the
concept of democracy there is a need to define the necessary and sufficient
conditions of democracy. This inquiry entails a consideration of whether specific
institutions of government, such as the legislative process, must meet certain
‘democratic’ criteria. The history of constitutional crises and the significance of
tax measures to the government’s most important policy document, its budget,
suggest that the tax legislative process is a useful canary in the coal mine of
democratic institutions. Even if a thin model of democracy were adopted in merely
requiring accountability of government in fair and open elections, there is reason
to believe that Australia’s canary needs resuscitation. The considerable
shortcomings of the Australian tax legislative process must be overcome before
Australia can credibly claim the mantle of an open democracy when speaking of
‘capacity building’ in developing and transitional economies.

221 Shapiro, above n9 at 86.
222 Thus, for example, Shapiro devotes Chapter 5 to a grim portrayal of the realpolitik of American
‘democracy’, in which the poor are governed by the propaganda of ‘the American Dream’ fed
to them by a media in which ownership is concentrated in the hands of the extremely wealthy:
Shapiro, above n9 at 104-45. Sorel might well be right, ‘democracy’, he observed, ‘is the
paradise of which unscrupulous financiers dream.’ Georges Sorel, Reflections on Violence
(Thomas E Hulme & Jack Roth trans, 1961 ed) at 222.
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