

# Is Participatory Tax Transparency in Australia Achievable?

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Reprinted from *Tax Notes Int'l*, July 24, 2006, p. 333

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*This paper was presented at the 2006 meeting of the Australasian Tax Teachers Association in Melbourne.*

In 2000 Greg Terrill observed that the literature on open government had become dated, and he suggested that there was little prospect of theoretical development in that area.<sup>1</sup> However, there is much to be done in elaborating on the application of the concept and exploring its implications in specific contexts. This article expands consideration of the issue by examining its application to taxation.

A government's budget is generally considered to be the most important policy document, because it represents the reconciliation of competing policy objectives and the concrete implementation of government policy.<sup>2</sup> As the principal source of government revenue, a government's tax laws fall under the "budget paper" rubric: To understand the budget, one must understand the tax laws that underpin the revenue side of the budget.<sup>3</sup> The expression of govern-

ment policy embodied in its budget is pragmatically significant for several reasons, not the least of which is its effect on financial markets and its relevance to the relationship between the citizens and the state. For those purposes, at least, it is said that a government's budget must be transparent:<sup>4</sup>

Fiscal transparency is defined . . . as openness towards the public at large about the structure and functions, fiscal policy intentions, public sector accounts and projections. It involves ready access to reliable, comprehensive, timely, readily understandable and internationally comparable information on government activities . . . so that the electorate and financial markets can accurately assess the government's financial position and the true costs and benefits of government activities, including their present and future economic and social implications.<sup>5</sup>

That definition of transparency is not absolute — the emphasis placed on elements in the definition of transparency varies with the perceived purpose of implementing transparent governance. Perceptions of purpose depend on the normative political theory that informs the public discourse and on pragmatic considerations such as the desire to achieve voluntary tax compliance. For example, the International Monetary Fund (IMF)<sup>6</sup> and the Australian government<sup>7</sup> sometimes seem to adopt a limited concept of

2001, para. 3. The OECD consideration of budgetary transparency excludes consideration of transparency or budget-related legislation such as tax legislation: OECD, "OECD Best Practices for Budget Transparency," OECD, Paris, 2001.

<sup>4</sup>See, e.g., IMF, "Code of Good Practices on Fiscal Transparency — Declaration on Principles," Washington, 2001; International Monetary Fund, *supra* note 3, para. 1.

<sup>5</sup>George Kopits and Jon Craig, "Transparency in Government Operations," IMF Occasional Paper No. 158, Washington, 1998, 1. The OECD adopts a briefer definition of transparency, stating "budget transparency is defined as the full disclosure of all relevant fiscal information in a timely and systematic manner." OECD, *supra* note 2, 3. See also OECD, "Citizens as Partners," OECD, Paris, 2001: "In broad terms transparent government means that reliable, relevant and timely information about the activities of government is available to the public," at 10.

<sup>6</sup>See, e.g., IMF, *supra* note 3, para. 3: "In response to an increased emphasis on ensuring the provision to the IMF and

<sup>1</sup>Greg Terrill, *Secrecy and Openness*, Melbourne University Press, Melbourne, 2000, 237-238.

<sup>2</sup>See, e.g., OECD, "OECD Best Practices for Budget Transparency," OECD, Paris, 2001, 3; Margaret Levi, *Of Rule and Revenue*, University of California Press, Berkeley, 1988, in which Levi argues that the ability of a government to impose taxes is a significant determinant of public policy; see also Geoffrey Brennan and James Buchanan, *The Power to Tax*, Cambridge University Press, Cambridge, Massachusetts, 1980, and Geoffrey Brennan, "Public Choice and Taxation: Leviathan After Twenty Years," in: Richard Krever, *Tax Conversations: A Guide to the Key Issues in the Tax Reform Debate*, Kluwer International, London, 1997.

<sup>3</sup>For consideration of this issue, see International Monetary Fund, *Manual on Fiscal Transparency*, Washington, (Footnote continued in next column.)

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transparency. That limited concept focuses on providing sufficient information to enable financial markets to operate efficiently as a result of being adequately informed about the respective fiscal positions of governments.<sup>8</sup>

This interpretation of the transparency concept is heavily influenced by a utilitarian perspective that holds that social utility will be maximized if government sees its role as optimizing the efficiency of private markets in allocating limited societal resources.<sup>9</sup> Here, it seems, it is enough for the government to cater to the public finance fraternity advising the investment banks and major players in the financial markets — the mass of the populace is effectively ignored. In this paper, I refer to that limited application of the transparency principle as “market transparency.”

By contrast, the political theory of civic republicanism informs another concept of transparency that has its foundation in democratic principles. In broad terms, civic republicanism examines the means by which governments may ensure that their citizens are fully informed about policy choices<sup>10</sup> so that they may actively engage in all stages of the reform agenda — from setting the government agenda to the implementation of reform measures. Civic republicanism calls for government to provide and explain relevant information to the public at large — a far broader task than providing information to players in the financial markets. I refer to that interpretation of the transparency principle as participatory transparency. Although much of their literature regarding budget transparency focuses on market transparency, at times the IMF, the OECD,

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to markets of the best available economic and financial information, it has become apparent that more attention needs to be paid to the data quality aspect of fiscal transparency.” IMF, “Assessing and Promoting Fiscal Transparency: A Report on Progress,” Washington, 2003, para. 3.

<sup>7</sup>Commonwealth of Australia, *Making Transparency Transparent*, AGPS, Canberra, Australia, 1999, iii.

<sup>8</sup>From Australian Treasurer Peter Costello to the 2005 Global Forum on Taxation: “Improved transparency supports good governance. Good governance is vital to the ability of countries to effectively enforce their own laws — including their chosen tax systems. This provides a stable environment, supporting well functioning markets, from which countries may grow and develop. There are no long term benefits from a ‘race to the bottom,’ with countries competing to attract financial activity on the basis of reduced transparency and a willingness to turn a blind eye to tax abuses.” The Hon. Peter Costello, Opening Address, Global Forum on Taxation, Melbourne, Nov. 15, 2005.

<sup>9</sup>Managing Director of the IMF, Speech at the 24th Annual Conference at the International Organisation of the Securities Commission, Lisbon, May 25, 1999, reported in *IMF Survey*, June 7, 1999.

<sup>10</sup>See, e.g., OECD, *supra* note 5.

and the Australian government acknowledge the importance of that concept of transparency in strengthening democratic institutions.<sup>11</sup>

Many are skeptical about the public benefit in promoting participatory democracy. The general impression one gets from the literature on the political economy of tax reform is that democracy is destructive of tax reform, because the diffusion of legislative power in democracy creates an environment in which political survival dictates that government create big spending programs while providing tax concessions to those with sufficient political resources to win those favors. Sven Steinmo wrote in 1993:

As the public debt increases — it has risen to more than \$3 trillion by the end of 1992 — all major political aspirants are forced to promise more spending *and* tax cuts for average voters. This, of course, is what citizens want. America may have indeed become the most democratic political system in the modern world. This may be its undoing.<sup>12</sup>

In Australia there are convincing data suggesting that Steinmo’s conclusion is not applicable.<sup>13</sup> Nevertheless, Steinmo implies that tax systems are best left to the experts. Many such studies seem to assume that the countries under examination are democratic,<sup>14</sup> but they ignore the possibility that modern liberal democracies often represent a weak shadow of the democratic ideal in which citizens are empowered to actively engage in public policy design and implementation. The issue might not be how to keep democracy out of tax reform processes, but how

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<sup>11</sup>OECD, *supra* note 2, para. 3.4; IMF, *supra* note 3, para. 1.

<sup>12</sup>Sven Steinmo, *Taxation and Democracy* (New Haven, Connecticut: Yale University Press, 1993), 209. This literature posits a dichotomy between democracy and deliberation. However, it seems that such accounts treat democracy as an absolute that either exists or does not exist — there is no recognition of the possibility that there may be shades of gray in democratic accountability.

<sup>13</sup>Richard Grant, “Less Tax or More Social Spending: Twenty Years of Opinion Polling,” Research Paper No. 13 2003-04, Information and Research Services, Commonwealth Parliamentary Library, 2004 (available at <http://www.aph.gov.au/library>).

<sup>14</sup>For example, Eccleston observes that the political institutions of Australia are weak in that they are compelled to respond to a diverse array of sectional interests: “While such a system arguably improves democratic accountability, many authors have pointed out that an institutionally ‘weak’ state is often forced to respond to short-term political pressures, making the pursuit of structural economic reform extremely difficult.” Richard Eccleston, *The Thirty-Year Problem: The Politics of Australian Tax Reform*, ATRF, Sydney, 2004, 17.

to introduce institutional reform that brings a strong form of democratic participation into tax reform processes.

Although there is little argument about the need to implement some form of transparency in the tax context, the preceding overview illustrates the point that there are various interpretations of the transparency concept. The official literature appears to adopt a variety of those interpretations, seemingly without regard to the competing political theories that inform those interpretations. If Richard Eccleston correctly suggested that Australia is at a governance crossroads in terms of cultivating “a more deliberative political culture and building its relational capacity if it is to achieve purposeful policy change,”<sup>15</sup> there is an urgent need for an assessment of the problems of and prospects for institutional reforms designed to open the Australian political system to the wider public. In this context, it is time to take stock of the transparency concept and explain its pragmatic and theoretical significance. Given the significance of the issue for all liberal democracies, this critical appraisal of the transparency principle within a particular jurisdiction is of universal application.

A full consideration of the transparency concept entails questions of normative political theory as well as pragmatic considerations, including the scope of the public’s right to participate in political processes and the pragmatic institutional norms that are most conducive to procuring an effective tax system.<sup>16</sup> Part I of this article sets the context for a consideration of concepts of transparency by identifying several aspects of the current practice of the Australian government regarding disclosure of information about the Australian tax system. The implications of those disclosure practices are also examined in Part I. Part II considers the significance of political theory in framing differing interpretations of the transparency concept. Part III elaborates on the nature of participatory transparency and what it would entail in the context of the tax law. Part IV suggests implications of adopting civic transparency.

## I. Why Transparency Matters

The Australian government has adopted a discourse of transparency by, for example, enacting the

<sup>15</sup>*Id.*, 182.

<sup>16</sup>In the sense of obtaining the desired revenue at minimal cost. For consideration of the definition of tax compliance costs, see C. Sandford, M. Godwin, and P. Hardwick, *Administrative and Compliance Costs of Taxation*, Fiscal Publications, Bath, 1989, 10ff; Commonwealth of Australia, *Compliance Costs of Taxation in Australia*, Office of Regulation Review Report, Canberra, Australia, 1996, 4-6.

Charter of Budget Honesty Act 1998 (Cth). Further, the government’s transparency review concluded that Australia generally upholds a high level of public transparency.<sup>17</sup> In particular, the review recorded the various avenues to information about public decisionmaking, suggesting that Australians are generally well informed — or at least can be well informed if they so choose.<sup>18</sup>

### A. The State of Public Disclosure

Before considering the various concepts of transparency and the political theories that inform them, I will first set out some aspects of the current Australian government practice regarding tax information disclosure. I will then consider some of the more significant consequences, in terms of tax system integrity, of those facts.

#### 1. Withholding Relevant Information

It is trite to acknowledge that successive Australian governments have controlled and manipulated the dissemination of information in furthering their political ends.<sup>19</sup> There is a wealth of literature dealing with government secrecy suggesting there has never been strict adherence to the concept of a professional public service, giving “frank and fearless”<sup>20</sup> advice to the government of the day.<sup>21</sup> Some public servants have always been more government servants, in the sense that they are complicit in withholding and manipulating information to protect the government of the day, regardless of the consequences in terms of the public interest.<sup>22</sup>

The recent freedom of information litigation between the Commonwealth Treasury and the newspaper *The Australian*<sup>23</sup> illustrates the difficulties experienced by those seeking to expose official information about the operation of the Australian tax

<sup>17</sup>Commonwealth of Australia, *supra* note 7.

<sup>18</sup>John Macmillan, “Twenty Years of Open Government — What Have We Learnt?” Law and Policy Paper No. 21, Federation Press, Sydney, 2003.

<sup>19</sup>Terrill, *supra* note 1; David Marr, *Dark Victory*, Allen & Unwin, Sydney, 2004 (2nd ed.).

<sup>20</sup>Australian Public Service Commission, *Australian Public Service Values*, Canberra, Australia, AGPS, 2000. For an international comparative study of public service standards, see Janos Bertok, “Trust in Government: Ethics Measures in OECD Countries,” OECD, Paris, 2000.

<sup>21</sup>Terrill, *supra* note 1; *see also* Editorial, “Let’s Lose Rose Coloured Spectacles Here and Now,” *The Canberra Times*, July 1, 2004, 15; M. McKinnon, “Hidden Papers Challenge Democracy,” *The Australian*, July 10, 2004, 1; M. Costello, “Let’s Re-create Bureaucrats’ Independence,” *The Australian*, May 7, 2004, 15.

<sup>22</sup>*See, e.g.*, Terrill, *supra* note 1; Marr, *supra* note 19.

<sup>23</sup>*McKinnon v. Secretary of the Treasury* [2005] FCAFC 142.

system. In that case, *The Australian* sought access to an official report on the effects of bracket creep. After legal fees on both sides had exceeded a reported \$1.1 million,<sup>24</sup> the federal court held that a “conclusive certificate” was validly issued if one Australian Treasury official considered that release of the document was not in the public interest. It was held that countervailing expert evidence was of no import. Judge Conti noted during the hearing:

I’ve been grappling to try and understand all day why it’s against public interest to have unrestricted disclosure of matters going to bracket creep. Everyone knows what bracket creep is. . . . I don’t understand what the song and dance is about. I’m so surprised there is such a veil of secrecy that needs to be drawn across two matters that are in the public domain of discussion.<sup>25</sup>

Indeed. If the release of relatively uncontroversial information about the significance of bracket creep is contrary to the public interest, woe betide those seeking access to Australian Treasury advice on more controversial tax policy matters.<sup>26</sup> That account of Treasury secrecy regarding such basic information as the effect of bracket creep indicates that the Australian government and the IMF march to the beats of different drums when it comes to transparency:

Meanwhile, freedom-of-information legislation helps ensure government transparency and accountability by giving citizens access to public documents and *assigning to government the burden of justifying nondisclosure*.<sup>27</sup> [Emphasis added.]

Even if it is true that the government does not wish to reduce tax policy debate within the community, government control over the release of tax policy information gives it the critical strategic advantages of controlling the agenda of that debate and controlling the boundaries of the ensuing debate.<sup>28</sup>

<sup>24</sup>Matthew Ricketson, “Information a Vital Tool in the Protection of Our Freedom,” *The Age*, Aug. 15, 2005, 4.

<sup>25</sup>Quoted in Jonathan Porter, “Judge at a Loss on Tax Bracket Secrecy,” *The Australian*, May 5, 2005, 1.

<sup>26</sup>Note that there has been a history of Treasury resistance to indexation of the income tax rates scale. For discussion of this, see Eccleston, *supra* note 14, 66-67.

<sup>27</sup>Kopits and Craig, *supra* note 5, 5.

<sup>28</sup>“Whoever determines the way a tax proposal is discussed often determines the outcome . . . Who can be opposed to a ‘fair deal’, to a ‘great society’, to ‘anti-discrimination law’, to a ‘new frontier’, and to a ‘progressive tax’? My point is that the side of the argument that determines the language used to describe a proposal and addresses the arguments on their own

(Footnote continued in next column.)

In a sequel to the *McKinnon* decision, *The Australian* on October 17, 2005, reported the contents of an e-mail sent by one of the Treasurer’s media advisers to two Treasury officials:

Chris/Phil,

Not sure which one of you this belongs to!

The Treasurer has asked that a table be prepared comparing the current tax rates to the 1996 tax rates if they had been indexed. This would (hopefully) show that people are paying less tax than if rates had been indexed. The Treasurer is hoping to include this in bracket creep ministerials.

I would like to be able to give the table to the Treasurer today, so let me know if you have any problems.<sup>29</sup>

What would have happened had the table sought by the Treasurer’s office shown that people are paying more tax than if the tax rate scale had been indexed? It also would be reasonable to ask whether any benefit from tax cuts has been soaked up by higher user fees, other taxes, and so forth. However, based on the *McKinnon* decision, it is reasonable to expect that any data that cast the government in an unfavorable light would be the subject of a conclusive certificate and be ignored by the Treasurer’s office.<sup>30</sup>

It is clear that the Australian government refuses to publicly disclose some information within its possession that deals specifically with tax policy matters. Further, as Judge Conti observed, it is difficult to see how that secrecy can be justified in terms of the public interest.

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turf has a substantial advantage.” Testimony of James C. Miller before the U.S. Joint Economic Committee, “Economic Growth Through Tax Cuts: What’s the Best Approach?” (1999) 106th Cong. 157, at 153; cited in: Marjorie E. Kornhauser, “Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America” (2002), 50 *Buffalo L. Rev.* 819, note 36.

<sup>29</sup>David Uren and Michael McKinnon, “Costello Fights Indexed Tax,” *The Australian*, Oct. 17, 2005, 2.

<sup>30</sup>Australian Treasurer Peter Costello came under political fire for failing to disclose to Parliament in October 2005 a Treasury “Executive Minute” regarding the macroeconomic implications of proposed workplace relations reforms. In response to a question asking Costello whether there were any Treasury report of analysis of the proposed workplace reforms, Costello denied that any report existed. The existence of the Executive Minute was revealed under freedom of information laws. It is a mystery why no conclusive certificate was issued in this case. See Michael McKinnon and Steve Lewis, “IR Laws: What Costello Was Told,” *The Australian*, Dec. 19, 2005, 1; Steve Lewis and Brad Norington, “Advice on IR Wrong: Costello,” *The Australian*, Dec. 20, 2005, 1.

## 2. Secrecy Laws

Aside from the nondisclosure of information that could be disclosed in the public interest, information regarding some aspects of the operation of the tax system is not disclosed in the interests of promoting voluntary compliance. The Australian tax laws encourage full disclosure to the Australian Taxation Office (ATO) by taxpayers of their tax affairs by offering a limited confidentiality regarding that information.<sup>31</sup> Disclosure of information by tax officers and third parties can carry heavy criminal penalties. The secrecy laws are therefore justified on the basis of minimizing tax administration costs. The tax administration does not need to unearth information that has been voluntarily disclosed.

However, those secrecy laws can also jeopardize public confidence in the administration of the tax law by allowing conspiracy theories of corrupt influence to flourish without any prospect of full public disclosure to quash that speculation. For example, in the recent Gerard affair, there were allegations of political interference in the pursuit of individual tax cases by the ATO.<sup>32</sup> The secrecy provisions prevented the ATO from rebutting the allegations by publishing information regarding specific cases, but that fueled suspicions of a cover up of maladministration or corruption.<sup>33</sup>

## 3. Ignorance Is Bliss

The government not only does not disclose information it has, but it also does not have the information that would be prudent for the government to obtain for the purpose of deliberating legislative proposals.

In an earlier article,<sup>34</sup> I argued that the history of the small-business tax concessions is neither consistent with a public interest nor a public choice account of legislation, but rather is consistent with a theory of public and legislative irrationality. The

small-business tax concessions were promoted by the Ralph Committee,<sup>35</sup> by the politicians who introduced and sustain them,<sup>36</sup> the interest groups that promoted them, and also some commentators.<sup>37</sup> However, the evidence supporting the introduction of those provisions, in terms of verifying that the concessions will achieve the objects for which they were introduced, is thin to say the least.<sup>38</sup> The Board of Taxation's belated investigation of the compliance costs regarding small business indicates the paucity of information that informed the decision to introduce the small-business tax concessions.<sup>39</sup> In an earlier paper, I argued that the absence of credible information regarding small-business tax concessions enabled both small-business lobbyists and the government to control the political discourse with unsubstantiated claims of a "crisis"<sup>40</sup> and the merits of proposed small-business tax concessions.<sup>41</sup> Recommendations for reform were seemingly made on the basis of a consideration of partisan submissions to the government's review body and without the benefit of credible, independent analysis.<sup>42</sup> Further, it seems, the government pursued its own political agenda in adopting and expanding<sup>43</sup> those recommendations, again apparently without the benefit of any credible, independent analysis of the claims

<sup>35</sup>Commonwealth of Australia, *A Tax System Redesigned*, Final Report of the Review of Business Taxation (John Ralph AO, chairman), Australian Treasury, Canberra, Australia, 1999, 586ff.

<sup>36</sup>See, e.g., Peter Costello, Press Release No. 058, Sept. 21, 1999; Helen Coonan, Media Release C097/03, Oct. 16, 2003; explanatory memorandum accompanying New Business Tax System (Capital Gains Tax) Act 1999, para. 4.14.

<sup>37</sup>For a discussion of the role of interest groups in promoting small-business tax concessions, see Burton, *supra* note 34.

<sup>38</sup>*Id.*

<sup>39</sup>Peter Costello, Media Release 095/2005, Nov. 4, 2005.

<sup>40</sup>On the use of a discourse of crisis in prompting ill-conceived reform, see Theodore R. Marmor and Jerry L. Mashaw (eds.), *The Use and Abuse of "Crisis" in Policymaking: Social Security: Beyond the Rhetoric of Crisis* (Princeton, New Jersey: Princeton University Press, 1988); for a review, see Gary Burtless, "Book Review: *The Use and Abuse of 'Crisis' in Policymaking: Social Security: Beyond the Rhetoric of Crisis*," (1989) 6 *Yale J. on Reg.* 403.

<sup>41</sup>Peter Costello, *supra* note 39.

<sup>42</sup>Only now has the Board of Taxation initiated a limited study of small-business tax concessions, but even here the efficacy of those concessions in terms of achieving the macroeconomic claims made for them by the government will remain untested.

<sup>43</sup>Note the broader scope of ITAA97 Div 152 by comparison to the original recommendation of the Review of Business Taxation: Commonwealth of Australia, *supra* note 35, 586ff.

<sup>31</sup>ITAA36 section 16; Taxation Administration Act 1953 (Cth) sections 8XA, 8XB.

<sup>32</sup>"Tax Office Faces Probe Over Audits," *Australian Financial Review*, Dec. 12, 2005.

<sup>33</sup>See, e.g., Morgan Mellish, Laura Tingle, and Fiona Buffini, "ATO failed to follow prosecution policy on Gerard," *Australian Financial Review*, Dec. 7, 2005, 1. The Inspector General of Taxation has announced that he will initiate an inquiry into ATO decisions to refer cases to the DPP for prosecution: Brian Toohey, Morgan Mellish, and Fiona Buffini, "Tax Office faces probe over audits," *Australian Financial Review*, Dec. 12, 2005, 1.

<sup>34</sup>Mark Burton, "The Australian Small Business Tax Concessions: Public Choice, Public Interest or Public Folly?" (2006), 21 *Australian Tax Forum* 91.

made for those concessions. The media coverage drowns out opponents, and without their own credible evidence indicating that the claims are spurious, opponents are labeled as being negative ne'er-do-wells and antientrepreneurial.<sup>44</sup>

In the tax legislative domain, claims are made for which there is often no credible evidence. While that spin is expected of politicians, wouldn't it be better if the absence of credible supporting evidence was candidly expressed, so that the need for the particular legislative measures — and the best means of achieving their stated objective — might be critically assessed?

#### 4. Assertion of Partisan Views as Fact

There is also evidence to suggest that the provision of information to the public by the Australian government includes the assertion of partisan views as fact. One example is the assertion in the "Tax Expenditures Statement"<sup>45</sup> that the goods and services tax is a state tax — an assertion made on the basis that all of the net GST revenue is paid over to the states and territories and should therefore properly be excluded from the Commonwealth "Tax Expenditures Statement." That proposition ignores the legal form of the GST legislation (it is Commonwealth legislation)<sup>46</sup> and the substance of the case in terms of substantive control over the revenue. Despite "A New Tax System (Commonwealth-State Financial Arrangements) Act 1999,"<sup>47</sup> the Commonwealth is free to amend the GST law at any time and without the consent of the states and territories, so the GST is under the control of the Commonwealth. The failure to consider those countervailing arguments illustrates the partisan nature of the Treasury document and only serves to inhibit clear analysis of what the "Tax Expenditures Statement" should report.<sup>48</sup>

#### 5. Information Critical of Public Administration

The preceding three subsections paint a somewhat depressing picture (at least, from the perspective of a democrat) of executive control of disclosure of information about the operation of the Australian taxation system. However, as John Macmillan ob-

served, there are rays of light in this darkness.<sup>49</sup> Despite the Executive's best endeavors, information damaging to the government sometimes slips through the net. In addition to containing information leaks (which may or may not be officially sanctioned), the literature is replete with examples of the retrospective, ad hoc disclosure of significant information regarding the operation of the Australian tax system. For example:

- The challenges confronted by the Australian Taxation Office in managing its relationship with the professions came to light only as a result of an Australian National Audit Office Inquiry.<sup>50</sup>
- The perceived inequity of Australian Taxation Office treatment of "innocent" taxpayers who participated in mass-marketed tax-minimization arrangements, for which the Australian Taxation Office did not send clear messages regarding the dubious legal basis of those schemes, received only official acknowledgement in two Senate Economics References Committee reports.<sup>51</sup>
- The so-called Gerard affair, in which tax minimization by a high-wealth individual was, according to newspaper reports, treated leniently.<sup>52</sup>
- It was only after *The Australian* successfully obtained access to Treasury documents that the suboptimal administrative oversight of the personal services income measures<sup>53</sup> came to light.<sup>54</sup>
- The Inspector-General of Taxation's report regarding the laxity of the ATO debt collection practices regarding small-business debt<sup>55</sup>

<sup>49</sup>Macmillan, *supra* note 18.

<sup>50</sup>Commonwealth of Australia, *The Australian Taxation Office's Management of Its Relationship With Tax Practitioners*, Australian National Audit Office Report No. 19, 2002-2003, AGPS, Canberra, Australia, 2003.

<sup>51</sup>Commonwealth of Australia, *Inquiry Into Mass Marketed Tax Minimisation Schemes and Investor Protection*, Interim Report of the Senate Economics Committee, AGPS, Canberra, Australia, 2001, ch. 4; Commonwealth of Australia, *Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection*, Final Report of the Senate Economics References Committee, Parliament of Australia, Canberra, 2002.

<sup>52</sup>See the sources at notes 28-29.

<sup>53</sup>ITAA97 Part 2-42.

<sup>54</sup>David Uren and Michael McKinnon, "Tax Office Refutes Treasury on Firms," *The Australian*, Oct. 15, 2005.

<sup>55</sup>Commonwealth of Australia, *Review into the Tax Office's Small Business Debt Collection Practices*, Report of the Inspector-General of Taxation, Apr. 12, 2005, Canberra.

<sup>44</sup>See note 28.

<sup>45</sup>Commonwealth of Australia, "Tax Expenditures Statement 2004," Australian Treasury, Canberra, Australia, 2005.

<sup>46</sup>See, e.g., A New Tax System (Goods and Services Tax Imposition — General) Act 1999 (Cth).

<sup>47</sup>Section 11(4).

<sup>48</sup>Mark Burton, "Making the Australian Tax Expenditures Statement an Effective Policy Instrument — From Fiscal Record to Transparent Report" (2005), 8 *Journal of Australian Taxation* 1; cf. Peter Costello, "Disclosure Reforms Are Best Practice," *Australian Financial Review*, Oct. 27, 2005, 67.

raises the question whether other “special category” taxpayers benefit from such munificence.

- A report that the ATO had overcharged penalty interest to the extent of \$200 million emerged only as a result of Treasury’s acceptance of the need to provide for the anticipated refund liability in the December 2005 midyear budget statement.<sup>56</sup>

Those depictions of the operation of particular aspects of the taxation system contrast the upbeat official reports of government agencies that generally emphasize administrative successes rather than difficulties encountered, errors made, and shortcomings of the existing system. Further, even if some of the bad news is referred to in agency reports, there is a considerable degree of circumspection, bordering on spin, in how that material is dealt with.

True, the fact that this information came to light could be taken as evidence of the transparency of Australian government.<sup>57</sup> However, ad hoc disclosure of information raises the question of how much other bad news is out there awaiting discovery should some crisis prompt another inquiry. Moreover, wouldn’t it be better if the information came to light without the need for a freedom of information request, an independent external audit being commissioned, or a parliamentary inquiry?

#### 6. Opaque Access

Even if the government willingly or unwillingly provides credible information regarding critical aspects of the operation of the Australian tax system, it is often difficult for tax specialists to get the information because of how the government makes information publicly available. An inquirer searching for government information regarding the policy behind and operation of a particular aspect of the tax law would have to be familiar with the means of accessing tax-related information provided by a disparate collection of public agencies. Those agencies include the Australian Treasury, the ATO, the Australian National Audit Office, the Commonwealth Ombudsman, the Board of Taxation, the Inspector-General of Taxation, the Office of Regulation Review, various parliamentary committees, and the parliamentary research service.

That ad hoc patchwork quilt of government information can have no logical foundation other than historical chance — each source of information has been grafted to the existing public information

framework. Perhaps in an earlier era, when mass storage and efficient retrieval of information were nonexistent, the disorganization was justifiable. However, in the current era, the continuation of this dysfunction can only be described as a quaint anachronism that impedes timely and widespread access to fundamental public policy information.

## B. Disclosure and Dysfunction

Governmental secrecy and nondisclosure of information regarding tax policy and tax administration is not necessarily dysfunctional. The secrecy obligations imposed on the Commissioner of Taxation and others<sup>58</sup> may be one characteristic of a sound tax system. However, aside from cases of beneficial opacity, there are good reasons to believe that governmental opacity has a deleterious effect on at least two aspects of the Australian tax system. First, governmental opacity affects the ability of government to obtain information from the community at large regarding proposed legislative reform. Second, governmental opacity affects the legitimization of the tax system overall, which, according to the literature, directly affects voluntary compliance with the tax laws.<sup>59</sup>

### 1. Opacity and Tax Reform

There are mixed views about the success of the past two decades of tax reform in Australia.<sup>60</sup> From the perspective of horizontal equity, it is true that some loopholes have been closed or at least scaled back,<sup>61</sup> but new avenues for tax minimization have appeared.<sup>62</sup> Now the question is whether the informational shortcomings outlined in the preceding section have contributed to the mixed results and, if so, to what extent.

<sup>58</sup>Income Tax Assessment Act 1936 (Cth), section 16; Taxation Administration Act 1953 (Cth), sections 8XA, 8XB.

<sup>59</sup>See, e.g., T.R. Tyler, *Why People Obey Laws* (New Haven, Connecticut: Yale University Press, 1990); Makkai and Braithwaite, “Procedural Justice and Regulatory Compliance” (1996), 20 *Law and Human Behaviour* 83. For an annotated bibliography of the literature in this area, see Maryann Richardson and A.J. Sawyer, “A Taxonomy of the Tax Compliance Literature: Further Findings, Problems and Prospects” (2001), 16 *Australian Tax Forum* 137.

<sup>60</sup>Richard Krever, “Taming Complexity in the Australian Income Tax” (2003), 25 *Syd. L. Rev.* 467.

<sup>61</sup>For example, the general exemption of most capital gains that existed before 1985 has been reduced, but note the general capital gains discount and the exemption of specific capital gains such as qualifying small-business capital gains: ITAA97 Div 152.

<sup>62</sup>In particular, note the differential between the corporate tax rate (30 percent) and the top personal marginal income tax rate (47 percent plus applicable levies): Income Tax Rates Act 1986 (Cth). Note also that the failure to tax the free use of

(Footnote continued on next page.)

<sup>56</sup>Elizabeth Colman, “\$200m in Tax Collected by Mistake,” *The Australian*, Dec. 16, 2005, 1.

<sup>57</sup>Macmillan, *supra* note 18, 10ff.



Establishing a link between governmental opacity and tax system dysfunction is problematic for several reasons, including that it is impossible to prove by regression that opacity was what produced the current tax system dysfunction. A critical aspect of rational discourse is the exposure of new hypotheses to peer review by providing all relevant information regarding experimental methods as well as factual findings. The earlier discussion of the small-business tax concessions illustrates the limitations of contemporary tax reform processes in Australia if measured against this rationalist benchmark. If the Treasury is right in quantifying the cost of those concessions at \$1 billion per year,<sup>63</sup> ill-informed government expenditure of substantial sums of public revenue can only be seen as irrational when assessed from the perspective of public finance theory.<sup>64</sup>

**Establishing a link between governmental opacity and tax system dysfunction is problematic for several reasons.**

In view of the brief account of small-business tax reform earlier in this article, it is reasonable to question whether enhanced access to government information *might* serve to enhance legislative outcomes by exposing informational shortcomings to the public gaze. Public exposure of informational shortcomings, or the possibility of them, might be the catalyst for a more systematic and thorough review of legislative proposals. A more rigorous process in which the costs and benefits of proposals are truly measured rather than there being rhetorical allusions to a cost-benefit analysis might allow many tax expenditures — such as the small-business tax concessions — to wither. Alternatively, the tax expenditures might be substantially improved in terms of their achievement of stated objectives.

## 2. Tax System Legitimacy

Tax compliance has often been explained on rational grounds.<sup>65</sup> A central question of compliance

corporate assets by shareholders enables controllers of private companies to effectively acquire assets from income that has been subject to tax only at the rate of 30 percent.

<sup>63</sup>Commonwealth of Australia, *supra* note 45.

<sup>64</sup>Although the concept and method of tax expenditure analysis has its critics, at least it can be said that the analysis would serve to inform the appraisal of the Australian small-business tax concessions.

<sup>65</sup>Richard K. Gordon, “Law of Tax Administration and Procedure,” in: Victor Thuronyi, *Tax Law Design and Drafting*, IMF, Washington, 1996, vol. 1, 95, 112ff.

research is why individuals are — and generally feel — morally obliged<sup>66</sup> to comply with the tax law. In addressing that question, there is a growing body of literature that draws on Weberian sociology in suggesting that the voluntary compliance of taxpayers depends on the perceived legitimacy of the tax system.<sup>67</sup> There are various definitions of legitimacy and various theories on how legitimacy is produced and sustained.<sup>68</sup> However, conscious acquiescence of the majority of taxpayers to comply with the tax law is symptomatic of perceived legitimacy — even more so if taxpayers engage in fostering voluntary compliance by the community at large. This suggests that we must discover the means of promoting perceived legitimacy. The remainder of this article suggests that a substantial part of the answer lies in reconsidering the definition of transparency.

Communal perceptions of substantive fairness<sup>69</sup> and procedural fairness<sup>70</sup> are commonly identified as critical sources of tax system legitimacy. Ideally, there would be a unanimous consensus on the substantive and procedural fairness of the Australian tax system.

Promoting the legitimacy of the Australian tax system is part of the wider project of promoting the legitimacy of the Australian government. Over the past 15 years, there has been a groundswell of research in the field of political theory directed toward strengthening democratic institutions.<sup>71</sup>

<sup>66</sup>As distinct from rationally obliged, in the sense that a rational self-seeking person considers that he or she would be better off by complying with the law rather than not complying.

<sup>67</sup>Valerie Braithwaite (ed.), *Taxing Democracy, Understanding Tax Avoidance and Tax Evasion*, Burlington, Vermont, and Hampshire, U.K.: Ashgate Publishing, 2003. But note Margaret Levi’s broader concept of rational choice, which extends to perceptions of fairness: Levi, *supra* note 2 (in appendix).

<sup>68</sup>Kornhauser, *supra* note 28, 831 n19.

<sup>69</sup>Valerie Braithwaite, “Perceptions of Who’s Not Paying Their Fair Share,” Working Paper No. 54, Centre for Tax System Integrity, Canberra, Australia, 2004.

<sup>70</sup>For a discussion of this point, see Kristina Murphy, “An examination of taxpayers’ attitudes toward the Australian tax system: Findings from a survey of tax scheme investors,” Centre for Tax System Integrity, Canberra, Australia, 2003.

<sup>71</sup>Riccardo Pelizzo and Rick Stapenhurst, *Legislatures and Oversight*, World Bank, Washington, 2004 (arguing that the end of the Cold War shifted the world community focus from maintaining world order to promoting democratic institutions). Others accept that proposition but add that other sources of this “democratic distemper” include the reorganization of the world economy: Erik Asard and W. Lance Bennett, *Democracy and the Marketplace of Ideas* (Cambridge, Massachusetts: Cambridge University Press, 1997), 17. It is also suggested that the rise of value skepticism in

(Footnote continued on next page.)

That research has been prompted by growing evidence that trust in government is almost universally declining in developed countries.<sup>72</sup> In that literature, it is generally taken as axiomatic that good governance engenders trust and entails governmental openness, accountability, and transparency.<sup>73</sup>

### C. Communal Perceptions of Fairness

As Gregory Rawlings has noted, the link between perceptions of fairness and voluntary compliance arises because a sense of communal obligation to contribute to the commonwealth dissolves into individual instrumental rationalism once there is a perception that some are shirking their fair share of the communal tax contribution. Credible survey data indicate that there is a widely held view that the Australian tax system is substantively unfair.<sup>74</sup>

That conclusion appears to be based on the view that the rich are not paying their fair share,<sup>75</sup> which in turn is probably founded on impressions engendered from a steady diet of news media revelations regarding the perceived tax avoidance of others, including retirees,<sup>76</sup> small-business people,<sup>77</sup> and

conjunction with the decline of faith in moral and epistemological absolutes can only have added to this distemper.

<sup>72</sup>Russell J. Dalton, "The Social Transformation of Trust in Government" (2005), *International Review of Sociology*; viewed Dec. 12, 2005, at <http://www.worldvaluessurvey.org/>.

<sup>73</sup>Openness means governments "listen to citizens and businesses, and take their suggestions into account when designing and implementing public policies": OECD, "Public Sector Transparency and Accountability: Making It Happen," OECD, Paris, 2002, 7.

<sup>74</sup>Gregory Rawlings, "Cultural Narratives of Taxation and Citizenship: Fairness, groups and globalisation" (2003), 38 *Australian Journal of Social Issues* 269.

<sup>75</sup>Valerie Braithwaite, "The Australian Tax System — Fair or Not Survey," Centre for Tax System Integrity, Canberra, Australia, 2002, Item 5.5; Michael Wenzel and Tina Murphy, "The What's Fair and What's Unfair Survey About Justice Issues in the Australian Tax Context," Survey Item 1.6, Centre for Tax System Integrity, Canberra, Australia, 2002.

<sup>76</sup>See, e.g., Anna Fenech, "Ease the Transition to Retirement," *The Australian*, Nov. 23, 2005, 2; Brian Toohey, "Call to Close Loophole on Super Tax Rort," *The Canberra Times*, Oct. 30, 2005, 50; Noel Whittaker, "Over 55s Can Double Dip Into Magic Pudding," *Gold Coast Sun*, Oct. 13, 2005, 3.

<sup>77</sup>Shane Nichols, "Meeting the Rules of Engagement," *Australian Financial Review*, Mar. 17, 2005, 19; Fleur Anderson and Fiona Buffini, "ATO Gives Ground on Tax Schemes," *Australian Financial Review*, Dec. 14, 2005, 1; Fiona Buffini, "More Than One Way of Splitting Tax Office Ruling," *Australian Financial Review*, Dec. 20, 2005, 6; Fiona Buffini, "Retreat Is a Blue Collar Bonus," *Australian Financial Review*, Dec. 14, 2005, 4; Owen Covick, "A Woeful Tale of Two Tax Nations," *Australian Financial Review*, Oct. 11, 2004, 29.

the famous and wealthy,<sup>78</sup> rather than on any accurate understanding of relative tax rates.<sup>79</sup> Moreover, the tax law is riddled with expressed legislative concessions<sup>80</sup> and administratively allowed concessions,<sup>81</sup> creating an environment in which there is an impression of the haves and the have-nots and in which any rational person who perceives that he is a have-not will strive to become a have. Publicized tax compliance programs,<sup>82</sup> which are intended to shore up public confidence in the taxation system, appear to have had little effect on survey results.<sup>83</sup> Doreen McBarnet rightly suggested that there must be a cultural mind-shift before the dominant culture of "creative compliance" can be subverted.<sup>84</sup> But that mind-shift can happen only if there is public confidence in the substantive fairness of the tax system. The combination of tax loopholes (often formulated without any credible policy justification), regular

<sup>78</sup>There has been a veritable smorgasbord of such news items in recent times alone. See, e.g., Morgan Mellish, "Gerard Played Tax Haven Name Game," *Australian Financial Review*, Nov. 29, 2005, 1; Jeremy Roberts and Richard Gluyas, "ATO Expert Hits Gerard Tax Havens," *The Australian*, Dec. 1, 2005, 1; Duncan Hughes and Eric Johnston, "ATO likely to untangle complex tax web," *Australian Financial Review*, July 7, 2005, 9 (Steve Vizard); Alessandro Fabro and Angus Wilson, "ATO, police swoop on rich tax evaders," *Australian Financial Review*, June 11, 2005, 5 (Operation Wickenby).

<sup>79</sup>Michael Roberts and Peggy Hite, "Progressive Taxation, Fairness, and Compliance" (1994), 16 *Law & Policy* 27, 32; Joel Slemrod and Jon Bakija, *Taxing Ourselves: A Citizen's Guide to the Great Debate Over Tax Reform* (2nd ed.) (Cambridge, Massachusetts: MIT Press, 2000); Edward McCaffery and Jonathan Baron, "The Political Psychology of Redistribution" (2005), 52 *UCLA L. Rev.* 1745; Edward McCaffery, "The UCLA Tax Policy Conference: Cognitive Theory and Tax" (1994), 41 *UCLA L. Rev.* 1861, 1887 ff.

<sup>80</sup>The rules regarding the alienation of income illustrate the dysfunctional status of the Australian tax system as a whole. Why an athlete can alienate his personal endorsement income (see ATO, Taxation Ruling IT2121, para. 17; explanatory memorandum accompanying the New Business Tax System (Alienation of Personal Services Income) Act 2000, para. 1.27) but not direct sporting income is just one example of the bizarre distinction between categories of income that enable some to minimize their tax while others may not.

<sup>81</sup>See, e.g., PS LA 2004/5 (GA) (GIO shareholders); ATO, Media Release (Nat 01/25) (settlement offer for mass marketed scheme investors).

<sup>82</sup>See, e.g., Commissioner of Taxation, *Compliance Program 2005-06*, Canberra, Australia, 2005.

<sup>83</sup>See the survey results mentioned at note 75.

<sup>84</sup>Doreen McBarnet, "When Compliance Is Not the Solution but the Problem: From Changes in Law to Changes in Attitudes," in: Valerie Braithwaite (ed.), *Taxing Democracy, Understanding Tax Avoidance and Tax Evasion*, Burlington, Vermont, and Hampshire, U.K.: Ashgate Publishing, 2003.

reports of how others exploit those loopholes, and occasional reports of bad tax administration regarding those who try but fail to access their tax minimization nirvana<sup>85</sup> does nothing to instill confidence in the substantive fairness of the tax system.

#### D. Communal Perceptions of Due Process

Aside from public perceptions of the substantive fairness of the tax system, the legitimation of tax systems also depends on perceptions of the processes by which laws are created and applied.

The law creation process is a matter of general political theory, which I will return to later. However, in the specific context of the process by which tax law is created, the preceding discussion regarding the withholding of tax policy information from the public, the limitations of the tax reform process, the partisanship of government agencies in conveying tax policy information, and the opacity of government-provided tax policy information can only serve to raise questions about the credibility of Australian tax policy design processes. The tax legislative process in Australia is one example of a political domain that, despite the widespread rhetoric of deliberative democracy,<sup>86</sup> can only be described as dysfunctional. At least in the Australian tax context, there is much to be said for the view that politics has become “a symbolic spectacle for the people rather than a substantive engagement by the people.”<sup>87</sup> It is little wonder there is cynicism regarding politicians. That disengagement has potentially severe ramifications for communal perceptions of tax policy and tax administration. Cynicism on the part of taxpayers and tax advisers threatens the integrity of the Australian tax system and the legitimacy of the rule of law as the foundation of the Australian legal system.

Research data also indicate that voluntary compliance with tax laws is tied to cultivating a taxpayer’s sense of trust in the tax authorities.<sup>88</sup> Although some survey data on that issue look positive for the

Australian tax system,<sup>89</sup> the data also include disturbing signals. In two surveys undertaken by the Centre for Tax System Integrity, a significant level of disaffection was evident:

- In response to the proposition that “the Tax Office listens to powerful interest groups rather than to ordinary Australians,” on a scale of 1 (strongly disagree) to 5 (strongly agree), 1,143 survey respondents returned a mean of 3.52 with a standard deviation of 1.04.<sup>90</sup>
- In response to the proposition that “the Tax Office’s decisions are too influenced by political interests,” on a scale of 1 (strongly disagree) to 5 (strongly agree), 1,145 survey respondents returned a mean of 3.65 with a standard deviation of 0.95.<sup>91</sup>
- In response to the proposition that “the Tax Office has too much power,” on a scale of 1 (strongly disagree) to 5 (strongly agree), 1,143 survey respondents returned a mean of 3.24 with a standard deviation of 0.96.<sup>92</sup>
- In response to the proposition that “the Tax Office gives me a chance to have a say in tax matters,” on a scale of 1 (strongly disagree) to 7 (strongly agree), 934 survey respondents returned a mean of 2.95 with a standard deviation of 1.54.<sup>93</sup>
- In response to the proposition that “the Tax Office has procedures in place that allow everybody to have their say in tax matters,” on a scale of 1 (strongly disagree) to 7 (strongly agree), 929 survey respondents returned a mean of 3.07 with a standard deviation of 1.51.<sup>94</sup>
- In response to the proposition “the Tax Office listens to the views of some groups of taxpayers more than others,” on a scale of 1 (strongly disagree) to 7 (strongly agree), a survey with 944 respondents returned a mean of 4.99 with a standard deviation of 1.53.<sup>95</sup>

<sup>85</sup>See, e.g., the material dealing with mass-marketed tax minimization arrangements noted at note 50 above.

<sup>86</sup>See, e.g., Commonwealth of Australia, *Engaging in Consultation on Tax Design*, Treasury, Canberra, 2003.

<sup>87</sup>Allan Hutchinson, “The Three Rs: Reading Rorty Radically,” 103 *Harv. L. Rev.* 555; Murray Edelman, *Constructing the Political Spectacle* (Chicago: University of Chicago Press, 1988).

<sup>88</sup>Kristina Murphy, “Who Me? I Didn’t Do Anything Wrong: Trust, Resistance and Compliance Among Tax Scheme Investors,” paper presented at Centre for Tax System Integrity’s 3rd International Conference, July 24-25, 2003, Canberra, Australia.

<sup>89</sup>In response to the proposition that “the Tax Office does its job well,” on a scale of 1 (strongly disagree) to 5 (strongly agree), 1,145 survey respondents returned a mean of 3.28 with a standard deviation of 0.80: Braithwaite, *supra* note 75, Item 4.3.6.

<sup>90</sup>*Id.*, Item 4.1.7.

<sup>91</sup>*Id.*, Item 4.3.4.

<sup>92</sup>*Id.*, Item 4.1.7.

<sup>93</sup>Wenzel and Murphy, *supra* note 75, Item 4.1.14.

<sup>94</sup>*Id.*, Item 4.1.16.

<sup>95</sup>*Id.*, Item 4.1.5.

Of course, the usual reservations regarding the validity of survey results must be noted.<sup>96</sup> Also, it is unfortunate that the survey focused on the Tax Office rather than the Commonwealth government more generally, as other government agencies and inquiries provide opportunity for public engagement with tax system design and oversight. Nevertheless, the survey results indicate that the Australian public is cynical about the substantive tax law and at least some important aspects of the ATO's administration of that law. If perceived legitimacy and voluntary compliance are the foundations of the Australian tax system, we may well be on the verge of a crisis.

## II. Liberal Theory and Transparency

### A. Legitimacy, Consensus, and Transparency

The preceding discussion of the partial delivery of relevant information to the community noted the importance of *perceived* legitimacy to the efficacy of a tax system. However, much contemporary political theory ignores the relevance of perceived legitimacy and instead focuses on *theoretical* legitimacy. The literature considers what would make a government legitimate and constructs a theory of legitimate government by hypothesizing some form of rational consensus formed by the polity. From a pragmatic perspective, the concentration on hypothesized consensus and hence theoretical legitimacy is unfortunate, because the contemporary discourse regarding transparency mirrors the fascination with theoretical legitimacy evident in the political theory literature. In other words, the contemporary discourse ignores consideration of how the norm of transparent government might be developed to enhance perceived legitimacy.

Endorsement of transparency as the foundation of good public governance is often justified on pragmatic grounds rather than being grounded on normative political theory. Those pragmatic considerations include:

- ensuring markets are fully informed of government policy so that the markets may operate efficiently in allocating scarce resources to maximize social benefit;<sup>97</sup>

<sup>96</sup>See, e.g., David Kahneman, Paul Slovic, and Amos Tversky (eds.), *Judgement Under Uncertainty: Heuristics and Biases* (Cambridge, Massachusetts: Cambridge University Press, 1982).

<sup>97</sup>IMF, *supra* note 3, para. 1.

- minimizing the risk of corrupt practice infecting the public sphere by enabling scrutiny of widely understood government policies and practices;<sup>98</sup>
- achieving greater social cohesion, because transparent public policy means that a wide cross section of the community may actively engage in shaping communal laws;<sup>99</sup>
- achieving voluntary compliance with the law, as those subject to the law have greater confidence in the process by which the laws are created and administered;<sup>100</sup> and
- enhancing policy outcomes by tapping into a broader range of ideas and experiences.<sup>101</sup>

Those rationales embody a tension between competing versions of political theory and, consequently, competing understandings of transparency. It is therefore necessary to consider political theory in a little more detail to inform our consideration of the various concepts of transparency. This part of the article introduces various political theories and illustrates how their different approaches to the concept of transparency are central to their respective theoretical legitimations of state power. In doing so, I focus on theories of liberal democratic government, largely because the Australian community purports to uphold some variation of liberal democracy.<sup>102</sup>

<sup>98</sup>Vito Tanzi, "Corruption Around the World" (1998), 45 *IMF Staff Papers* 559.

<sup>99</sup>OECD, *supra*, note 5, 20; Mark Button and David Ryfe, "What Can We Learn From the Practice of Deliberative Democracy?" in: John Gastil and Peter Levine (eds.), *The Deliberative Democracy Handbook* (San Francisco: Jossey-Bass, 2005). In 2001 Pippa Norris suggested that the results of an international comparative survey of public attitudes to the functioning of the democratic state indicated that Australian confidence in this domain was "robust and healthy"; Pippa Norris, "Confidence in Australian Democracy," in: Marian Sawyer (ed.), *Elections: Full, Free, and Fair* (Sydney: The Federation Press, 2001), 215. This conclusion was founded on survey data drawn from the mid-1990s — well before a series of political events that can only have damaged public perceptions of those in high public office. See, e.g., Marr, *supra* note 19.

<sup>100</sup>OECD, *supra* note 5, 20; IMF, *supra* note 3, para. 1. For a recent review of the literature regarding confidence in Australian democratic institutions, see Norris, *supra* note 99, ch. 13.

<sup>101</sup>OECD, *supra* note 5, 22.

<sup>102</sup>I am not suggesting that some concept of transparency is anathema to other forms of government such as autocratic rule. It would be possible, for example, for an autocracy to comply with some concept of transparency — the financial markets may be kept fully informed regarding important budget data.

## B. Liberal Democratic Government

### 1. Tenets of Liberal Political Theory

Liberal political theory takes as its starting point the moral autonomy of the individual. That autonomy means that each person is entitled to his own beliefs, regardless of whether others in the community find those beliefs repugnant.<sup>103</sup> In other words, liberals are staunch relativists. Taking the right of each individual to pursue his own vision of the good life, liberal political theory is primarily concerned with ensuring that individual freedom is maximized, while at the same time recognizing the capacity of uncontrolled individuals to harm each other if left to pursue their respective self-interests. For this purpose, liberals accept that a neutral overseer, in the form of a government, is a necessary instrument. However, liberal theorists also recognize that state power can destroy the individual rights that it was created to protect. Here, liberalism and democracy are not necessarily natural allies: In a democracy, the will of the majority may be to pursue a particular conception of the good life to the detriment of minorities.<sup>104</sup> Here lies the rub. On what basis does the state ensure that it does not exercise its monopoly of coercive power to promote one subjective vision of the good life?

**Communal perceptions of substantive fairness and procedural fairness are commonly identified as critical sources of tax system legitimacy.**

To a liberal, the legitimacy of state power depends on scrupulous neutrality in the sense that the state must not promote a particular conception of the good life. Various bases for that neutrality have been postulated by the different versions of liberal political theory. In the remainder of this section, I will describe the differing versions of the neutrality norm and consider the interpretations of the transparency norm that flow from those theories of state neutrality.

### 2. Natural Rights and Libertarian Theory

One basis on which government might be neutral — therefore making its laws legitimate under liberal theory — is if the actions of the government are

grounded on the express consent of those subject to government regulation. With that in mind, early approaches to the legitimation of the state constructed a hypothetical social contract. According to the social contract theories, before the formation of government, individuals existed in a state of nature and possessed some natural rights. To protect their capacity to exercise those rights, individuals agreed to the formation of a government to enable them to each exercise those rights in pursuit of their self-interest.

Thomas Hobbes maintained that those contracting individuals found themselves in the paradoxical situation of being entitled to personal security but that if left unrestrained, they would exercise their respective capacities to the detriment of the personal security of others. The social contract created the state that saved us from an otherwise “nasty, brutish, and short” existence, which, Hobbes suggested, would have been a war of all against all. For John Locke, before the formation of the state, each individual possessed the right to appropriate to himself the fruits of the earth in satisfying hunger. Under either understanding of the social contract, the neutrality of state power, and hence its legitimacy, was restricted to the protection of the natural rights of the individuals who created the state. That is because the contracting individuals could give the state only some or all of their power deriving from their natural rights — a purported grant of some other power must fail *ab initio*. Thus, the definition of those natural rights is critical to the neutral foundation of the power conferred on the state.

By adopting a discourse of individuals with pre-existing rights conferring power on the state, social contract theory emphasizes the separation of the individual from the state and is reflected in narratives such as the “free born Englishman,”<sup>105</sup> which are grounded in a distrust of government. Under that conferral of power conceptualization of the liberal state, the conferrer will always question whether the conferee has usurped the terms of its mandate. That sense of distrust is only heightened by disputes within liberal ranks about exactly what natural rights the state was formed to protect. For example, in the context of taxation, libertarian liberals see progressive taxation or other redistributive taxes as no more than oppressive state plunder of private property, and hence as illegitimate,<sup>106</sup> while

<sup>103</sup>By contrast, social conservatives consider that the community at large is entitled to regulate private behavior if that behavior is considered outside the bounds of communal morality.

<sup>104</sup>Hence the limitation on state promotion of any particular religion: Australian Constitution, section 116.

<sup>105</sup>See E.P. Thompson, *The Making of the English Working Class*, Pelican, Harmondsworth, U.K., 1968, ch. 4.

<sup>106</sup>See, e.g., Eric Mack, “Self Ownership, Taxation, and Democracy: A Philosophical-Constitutional Perspective” in: Donald P. Racheter and Richard E. Wagner (eds.), *Limiting Leviathan*, Edward Elgar, Cheltenham, U.K., 1999, ch. 2; Robert Nozick, *Anarchy, State and Utopia*, Basic Books, 1974.

(Footnote continued on next page.)

others presume wealth redistribution is an essential attribute of a liberal state.<sup>107</sup>

Focusing on that distrust, libertarians perceive government as a necessary evil that is intrinsically corruptible. In the face of that inevitable corruption, they say, the only way to minimize the damage wrought by corrupt government institutions is to minimize the size of government — “that government is good which governs least.”<sup>108</sup>

To a libertarian, widespread public consultation on public issues is unnecessary, because a minimal-ist government will make few policy decisions. The perceived inevitability of government corruption and exploitation by interest groups dictates that the pursuit of transparency is a forlorn quest. With that in mind, libertarians favor direct democratic institutions, such as referendums, and would leave it to individuals to inform themselves regarding specific policy items on the referendum.<sup>109</sup> However, if pressed, a libertarian would probably accept that the concept of transparency is restricted to the first two pragmatic concerns, as those two answer the central tenets of libertarian liberal theory: the primacy of the role of individuals in allocating the community’s scarce resources and a deep distrust of a government that is remote from the people.

Founded on a distrust of government, libertarian liberal theory rejects any prospect of some concept of transparency being the linchpin in rejuvenating perceived legitimacy. If the stream of “bad government” images are not to lend support to widespread agreement with libertarian theory and the consequent loss of voluntary tax compliance, alternative political theories must specify some action to counteract the disenchantment with the current tax system.

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For discussion of the vicissitudes of this discourse, see Marc Linder, “Eisenhower-Era Marxist Confiscatory Taxation: Requiem for the Rhetoric of Rate Reduction for the Rich” (1996), 70 *Tulane L. Rev.* 905.

<sup>107</sup>John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: Cambridge University Press, 1999), 65ff. For a discussion of Rawls’s work on tax redistribution, see Linda Sugin, “Property, Taxation, and Distributive Justice: Theories of Distributive Justice and Limitation on Taxation: What Rawls Demands from Tax Systems” (2004), 72 *Fordham L. Rev.* 1991.

<sup>108</sup>Nozick’s “minimal state”: Nozick, *supra* note 106.

<sup>109</sup>See, e.g., Gary Wolfram, “Taxpayers Rights and the Fiscal Constitution,” in: Donald P. Racheter and Richard E. Wagner (eds.), *Politics, Taxation, and the Rule of Law*, Kluwer, Boston, 2003, ch. 4; Randall G. Holcombe, “Tax Limits,” in: Donald P. Racheter and Richard E. Wagner (eds.), *Limiting Leviathan*, Edward Elgar, Cheltenham, U.K., 1999, 115 at 129ff.

### 3. Utilitarian Fiscal Transparency

Recognizing the limitations of a hypothesized social consensus embodied in a social contract, John Stuart Mill proposed that the neutral legitimacy of state power could be founded on his principle of utility. According to that principle, state power would be legitimate if it maximized social utility. Mill accepted that this principle dictated state neutrality, as state-imposed conceptions of the good life would diminish the general welfare.

One modern interpretation of utilitarian theory holds that private markets are a more efficient means of aggregating individual preferences. That suggests that government has been granted legislative power primarily to ensure that private markets operate efficiently in allocating scarce resources. Neoliberalism takes that further by professing that the state should merely provide the social infrastructure within which private markets can efficiently allocate scarce resources.<sup>110</sup> This conception of the government’s role suggests that the principle of transparency will be adequate if it enables markets to operate efficiently. The discourse of market efficiency often excludes any reference to an understanding of transparency structured on promoting the active participation of a government’s subjects in the political process. Although the maximization of social welfare entails consideration of the aggregate interests of all members of the community, public participation in the application of that principle regarding specific policy settings would be limited to providing information to those responsible, when requested.<sup>111</sup>

The OECD discussion of best practices for budgetary transparency<sup>112</sup> and the IMF *Manual of Fiscal Transparency*<sup>113</sup> emphasize the neoliberal concept of legitimate government and downplay the role of public participation in social policy formation. The primary focus of both documents is the relatively narrow reporting of budgetary measures rather than reporting and public education on budgetary measures. The emphasis on reporting of budgetary measures alone is founded on the view that the purpose of government transparency is the provision of information to the financial and commercial marketplace. In elaborating on the merits of the transparency norm, Kopits and Craig said:

Timely publication of a clearly presented budget document makes it easier for the market to

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<sup>110</sup>See, e.g., Racheter and Wagner, *supra* note 109.

<sup>111</sup>See the views of the current Australian Treasurer, *supra* note 8.

<sup>112</sup>OECD, “OECD Best Practices for Budget Transparency,” OECD, Paris, 2001.

<sup>113</sup>IMF, *supra* note 3.

evaluate the government's intentions and allows the market to impose a constructive discipline on the government. Transparency increases the political risk of unsustainable policies, whereas the lack thereof means that fiscal profligacy can go undetected longer than it otherwise would. Similarly, a transparent public financial accounting system makes it possible for the market to determine what the government has actually done and to compare budgeted and actual financial operations.<sup>114</sup>

Reporting to the marketplace implies that the transparency norm applies only to a circumscribed category of information. Kopits and Craig note that the basis of their definition of transparency is the Declaration of Partnership for Sustainable Global Growth, promulgated by the Interim Committee of the IMF. That declaration stated that "it is essential to enhance the transparency of fiscal policy by persevering with efforts to reduce off-budget transactions and quasi-fiscal deficits."<sup>115</sup> Accordingly, transparency will be satisfied if information is adequate for the needs of financial institutions and other players on the world stage:

The Code will facilitate surveillance of economic policies by country authorities, financial markets, and international institutions.<sup>116</sup>

That minimalist transparency standard, which focuses on supplying sufficient information to enable participants in global financial markets to make informed market decisions, is reflected in the contemporary Australian discourse on budgetary reporting. While passing observations are made about engaging with the citizenry in formulating tax policy, the absence of any detail regarding active engagement suggests that it is not a priority. For example, in *Making Transparency Transparent*,<sup>117</sup> the government noted that tax laws and related material were freely available from the ATO. Regarding whether the materials were understood by the citizenry, the government said:

Since 1 July 1994 the Tax Law Improvement Project has been rewriting Australia's tax laws with the objective of clarifying and developing legislation to make it more understandable and certain for taxpayers. The project has rewritten large amounts of the law (including capital gains tax) and is well advanced. Techniques used by the Project include core provisions for

each Act, Chapter, Part and Division and a coherent structure and plain language. The Government announced in 1998 that an integrated tax code will be established which will integrate all the tax rules, using consistent terminology and definitions and use general principles in preference to long and detailed provisions.

The government did not refer to the substantial literature supporting the proposition that the average member of the Australian taxpaying public has little financial literacy<sup>118</sup> and does not understand his tax obligations,<sup>119</sup> let alone possess any understanding of the tax system as a whole sufficient to enable critical appraisal. The Australian government's rhetoric of accessibility and understandability falls short of any concept of enabling active participation on the part of the citizenry.

To be fair, the official literature does make reference to the importance of a transparency norm to facilitating widespread public participation in public policy formation. For example, Kopits and Craig said: "More generally, transparency, by increasing the trust that the population reposes in the government, has a salutary effect on society and the economy."<sup>120</sup> Similarly, the OECD stated that "the finance ministry should actively promote an understanding of the budget process by individual citizens and non-government organisations."<sup>121</sup> Also, the IMF observed that fiscal transparency "should lead to better informed public debate about the design and results of fiscal policy,"<sup>122</sup> and stated a requirement that "budget information should be presented in a way that facilitates policy analysis and promotes accountability."<sup>123</sup> However, those statements appear almost as afterthoughts, and no plan of

<sup>118</sup>Commonwealth of Australia, "Australian Consumers and Money," A Discussion Paper by the Consumer and Financial Literacy Taskforce, Canberra, 2004.

<sup>119</sup>See, e.g., Richard Grant, "Less Tax or More Social Spending: 20 Years of Opinion Polling," Parliament of Australia Research Paper 13/2003-2004, Parliament of Australia, Canberra, 2004. For consideration of such cognitive failure, see McCaffery, "The UCLA Tax Policy Conference: Cognitive Theory and Tax," *supra* note 79. For an example of the practical significance of this ignorance of the scope of the taxation law, an ignorance shared by the ATO, the tax profession, and the taxpaying public alike, see Commonwealth of Australia, *Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection*, Final Report of the Senate Economics References Committee, Parliament of Australia, Canberra, 2002.

<sup>120</sup>Kopits and Craig, *supra* note 5, 2.

<sup>121</sup>OECD, *supra* note 2, 9.

<sup>122</sup>IMF, *supra* note 4.

<sup>123</sup>*Id.*, para. 3.2.

<sup>114</sup>Kopits and Craig, *supra* note 5, 2.

<sup>115</sup>IMF, "World Economic Outlook, October 1996: A Survey by the Staff of the International Monetary Fund," World Economic and Financial Surveys, Washington, 1996, p. xii.

<sup>116</sup>IMF, *supra* note 4, Introduction.

<sup>117</sup>Commonwealth of Australia, *supra* note 7, at 63.

action for active engagement of the citizenry with the information supplied is proposed. Those limited references to public engagement stand in contrast to the more considered and developed plans for active participation of the citizenry in contemporaneous OECD publications.<sup>124</sup> In the fiscal context, it seems citizens should be happy to receive budget reporting that includes a limited tax expenditures statement and a full statement of government assets and liabilities.<sup>125</sup>

#### 4. *The Public Information Marketplace*

Under broader derivations of utilitarian theory, the function of government is to implement the will of the people. According to that theory, the state is at the center of a political marketplace in which the political preferences of the community are aggregated and transformed into law. Government is an independent moderator that oversees a contest between competing interest groups, each vying for supremacy in representing its constituency.<sup>126</sup> According to its proponents, that moderated competition in the legislative marketplace is in the public interest because the political realm replicates the realm of individual markets in ensuring that the market achieves equilibrium by arriving at the most efficient aggregate outcome.<sup>127</sup>

Pluralist public interest theory accepts that bargaining contests take place in a realm remote from the everyday existence of the bulk of the citizenry.<sup>128</sup> If government affords an opportunity to participate in the political process, it is assumed that the general population accepts the legitimacy of the government. Indeed, absence of political engagement on the part of the community is taken by some to be an indicator that the law has reached a state of equilibrium.

The opportunity to participate in the political process is evidenced in various ways, including

allowing subjects to inform themselves on matters of public policy and to freely express their views, allowing subjects to vote, and allowing subjects to make representations to the lawmaking authority or to their elected representative.<sup>129</sup> If members of the public do not avail themselves of those opportunities, they can be considered to have opted out of the political process voluntarily and to have accepted the legitimacy of the law. Although the notion of implied consent is open to challenge,<sup>130</sup> it is sufficient to note that it shifts the onus to individuals to choose how much they wish to participate in the political process. Placing the onus on the individual is significant because it means that the state is not obligated to pursue widespread dissemination of information about public policy matters, nor is the state obliged to undertake widespread education programs. Moreover, the rhetoric of opportunity to participate might even allow government to withhold information on the basis that an individual has the opportunity to gather the same information. That rhetoric of opportunity to participate can serve to legitimize the state even when many subjects do not participate in voluntary electoral processes.

On occasion, the official discourse and practice reflects the rhetoric of opportunity for widespread public participation while tacitly accepting that participation will be restricted to relevant interest groups. Thus, in concluding its recommendations for revising Australian tax legislation design processes, the Ralph Review observed:

Opening up the policy process to public input at an early stage provides an opportunity to build confidence and trust between taxpayers and the revenue authorities.<sup>131</sup>

However, in that section, the Review Committee referred to consultation with business representatives without detailing how wider public consultation could be managed. It may be that, in referring to “public input,” the committee meant only to include consultation with specific interested parties, such as business lobbyists.<sup>132</sup>

<sup>124</sup>See, e.g., OECD, *supra* note 5.

<sup>125</sup>Thus, Hameed completely ignores the interest of the electorate and the prospect of stronger democratic institutions when setting out the perceived benefits flowing from the adoption of fiscal transparency. Hameed concentrates on the enhanced information received by markets, stronger fiscal discipline, and the minimization of corruption: Farhan Hameed, “Fiscal Transparency and Economic Outcomes,” IMF Working Paper No. WPF 05/225, Washington, 2005, 5-8.

<sup>126</sup>Robert Dahl, *Who Governs?* (New Haven, Connecticut: Yale University Press, 1961).

<sup>127</sup>See, e.g., Charles E. Lindblom, *The Intelligence of Democracy: Decisionmaking through mutual adjustment* (New York: Free Press, 1965); for critical consideration of that proposition in the context of the Australian small-business tax concessions, see Burton, *supra* note 34.

<sup>128</sup>Charles E. Lindblom, *The Policy-Making Process* (Englewood Cliffs, New Jersey: Prentice Hall, 1968), 13.

<sup>129</sup>See, e.g., Robert Dahl, *A Preface to Democratic Theory*, Polity Press, Cambridge, Massachusetts, 1985. Note, however, that in his later work Dahl questioned whether countries such as the United States could indeed be considered “democratic”: Robert Dahl, *Dilemmas of Pluralist Democracy: Autonomy vs. Control* (New Haven, Connecticut: Yale University Press, 1982).

<sup>130</sup>For a discussion of this aspect of liberal political theory, see Carole Pateman, *The Problem of Political Obligation: A Critique of Liberal Theory* (Cambridge, Massachusetts: Polity Press, 1985).

<sup>131</sup>See *supra* note 35, 125.

<sup>132</sup>For example: “Following initial consultation with the Board [of Taxation] and others in the business community (Footnote continued on next page.)”



If the membership of many governmental tax consultative committees is a guide, business interests have achieved substantial direct access to government. For example, the ATO convenes several consultative groups specifically directed toward consultation on business taxation, and those groups do not incorporate direct representation of the wider community.<sup>133</sup> Ironically, the ATO has not published on its Web site the details regarding the membership, minutes of meetings, and so forth of the Integrity Advisory Committee, which is convened for the purpose of advising “the Commissioner on enhancing public confidence in the integrity of the Tax Office.”<sup>134</sup> The wider public, it seems, has good reason to be cynical regarding the representation of its interests within the executive government.

Although individuals are notionally entitled to seek information from the government and to make submissions to the government, pluralist politics favors the better-resourced interest groups and sees no need for government to intervene by, for example, providing comprehensive information to the public at large. Pluralist political theory ignores any consideration of how governments might promote public participation in public policy formation.

### 5. Public Choice

Public choice theory<sup>135</sup> challenges what it perceives to be the Panglossian perception of interest groups endorsed by pluralist public interest theory. Applying neoclassical economic theory and its psy-

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and elsewhere, as appropriate, the forward work program will be submitted by Treasury to the Treasurer for final approval.” *Id.*, 122.

<sup>133</sup>See, e.g., the membership of the Small Business Advisory Group and the Corporate Consultative Committee, available at <http://www.ato.gov.au/default.asp?menu=6540> (viewed Jan. 6, 2006).

<sup>134</sup>See <http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/47965.htm&page=4&H4=&pc=&mnu=10639&mfp=001&st=&cy=> (viewed Jan. 6, 2006).

<sup>135</sup>See, e.g., Dennis C. Mueller, *Public Choice III* (Cambridge, Massachusetts: Cambridge University Press, 2003), at 1: “Public choice can be defined as the economic study of non market decision making, or simply the application of economics to political science. The subject matter of public choice is the same as that of political science: the theory of the state, voting rules, voter behavior, party politics, the bureaucracy, and so on. The methodology of public choice is that of economics, however.” For critical consideration of the public choice literature, see Daniel Farber and Philip Frickey, “The Jurisprudence of Public Choice” (1987), 65 *Texas L. Rev.* 873; Edward L. Rubin, “Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out the Baby” (2002), 87 *Cornell L. Rev.* 309; David A. Skeel Jr., “Public Choice and the Future of Public-Choice-Influenced Legal Scholarship” (1997), 50 *Vanderbilt L. Rev.* 647, 663; Richard Posner, *Overcoming Law* (Cambridge, Massachusetts: Harvard University Press, 1995).

chological assumptions to the political realm, public choice theorists argue that politicians, bureaucrats, and voters all set out to rationally maximize their respective interests.

**If we trusted the experts to get it right that might be enough to ground widespread perceived legitimacy.**

Ignoring the normative strands of public choice theory,<sup>136</sup> one strand of public choice theory states that self-interested legislators will seek to maximize their prospects for election and reelection by adopting the standpoint of their self-interested constituents.<sup>137</sup> While many abhor the discourse of self-interest that underpins that account of the legislative process, it at least suggests that the majority of the electorate remains relevant in determining the nature of the legislation by which it is governed.

In any case, mainstream public choice theory<sup>138</sup> challenges that majoritarian view on the basis of evidence of widespread public myopia and voter disinterest.<sup>139</sup> Kenneth Arrow’s work indicates that voting schemes may not accurately reflect the voting

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<sup>136</sup>See, e.g., James Buchanan, *Public Finance in Democratic Process* (Chapel Hill, North Carolina: University of North Carolina Press, 1967), in which Buchanan characterizes taxes in terms of the price of public goods and so the function of democratic institutions is to shape tax laws that transparently convey clear information regarding the tax price being paid (so direct taxes are preferred over indirect taxes and so forth).

<sup>137</sup>Sam Peltzman, “Constituent Interest and Congressional Voting” (1984), 27 *J.L. & Econ.* 181; D. Mayhew, *The Electoral Connection* (New Haven, Connecticut: Yale University Press, 1974); Morris P. Fiorina, *Congress — Keystone of the Washington Establishment* (New Haven, Connecticut: Yale University Press, 1977). See the discussion of the public interest tendencies of early economic theorists in Daniel Shaviro, “Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980’s” (1990), 139 *U. Pa. L. Rev.* 1, 32-33.

<sup>138</sup>See, e.g., Jonathan R. Macey, “Public Choice: The Theory of the Firm and the Theory of Market Exchange” (1988), 74 *Cornell L. Rev.* 43, 43; Fred S. McChesney, “Rent Extraction and Rent Creation in the Economic Theory of Regulation” (1987), 16 *Journal of Leg. Stud.* 101, 101-102.

<sup>139</sup>On the basis that the cost of personal political engagement exceeds any personal benefit that can reasonably be anticipated to emanate from that engagement. For discussion of the comparison between private markets and public policy markets, see Herbert Hovenkamp, “Legislation, Well-Being, and Public Choice” (1990), 57 *U. Chi. L. Rev.* 63; Daniel Shaviro and Herbert Hovenkamp, “Exchange on Public Choice” (1990), 57 *U. Chi. L. Rev.* 833.

preferences of voters and may even produce unpredictable outcomes.<sup>140</sup> That mainstream public choice account holds that interest groups comprising members with common interests and that are able to exclude free riders achieve political influence in excess of the democratic significance that their membership numbers would suggest.<sup>141</sup> According to that mainstream account, self-interested legislators sell their legislative product to the highest bidding interest group in the legislative marketplace.<sup>142</sup>

For present purposes, it is sufficient to note that the psychological assumptions underpinning public choice theory dictate that there is no prospect of redeeming the broader voting public from its current condition of disinterested myopia.<sup>143</sup> Public choice theory sees no need for consideration of reforms to enhance democratic government because the limits of the legislative marketplace are cast in the stone of fundamental economic principle. Public choice theory therefore has nothing to say about how the transparency of public administration might be enhanced, and instead it feeds, and feeds on, the distrust of government promoted by libertarians.

#### 6. *Deliberative Rulemaking by Experts*

To some liberals, utilitarian theory engenders incorrect answers in the sense that social utility may be maximized by adopting what are considered to be unsavory laws. Thus, social utility may be maximized by inflicting harm on minorities in a public spectacle attended by the majority. Recoiling from the majoritarianism that utilitarianism allows, some liberal and communitarian political theorists draw on Kantian epistemology in grounding state neutrality on the application of rationally derived public policy principles. Grounding state neutrality, and hence le-

gitimacy, on principles emanating from rational discourse and consensus, those political theories specify the preconditions for such rational consensus.<sup>144</sup> Recognizing that actual consensus between *all* real subjects is impossible, those theories effectively ignore large swathes of the public as nonparticipants in the policymaking process by hypothesizing a consensus of rational participants in a policymaking forum. There are differing formulations regarding the identity of the participants in this hypothesized process, and the nature of the principles emanating from the process. Thus, Rawls constructs his original position in identifying rational, neutral participants who hypothetically would agree on neutral foundation principles of government.<sup>145</sup>

This recourse to hypothesized rational discourse echoes the Platonic view that democracy gets in the way of correct policy. Plato propounded reliance on an elite overseer class that, schooled in philosophy, would reach right policy answers. Presumably, the “real world” views of rational and disinterested experts would represent a good starting point for determining what the right answer on any particular question would be. It is a short step from this acceptance of expert discourse to formal adoption of a consensus of experts (if such a thing is possible) as the basis of legitimate tax policy formation. While that model does not preclude the opportunity for direct public participation in public policy deliberation, that participation is considered a distraction. Victor Thuronyi described the legislative process in terms of a deal brokered between crucial institutional players, accepting that there may be a need for consultation with business groups, and made fleeting reference to the possibility of public consultation:

Once tax proposals have been publicly announced, efforts should be made to organize seminars between tax officials and private sector representatives to discuss the provisions of the proposed law. If these are open to the public, then the problems of conflict of interest and favoritism alluded to above can largely be avoided.<sup>146</sup>

John Witte<sup>147</sup> and Thomas Reese<sup>148</sup> similarly seem to accept that tax reform is for the “expert” vanguard. They imply that “we tried democracy and

<sup>140</sup>Kenneth J. Arrow, *Social Choice and Individual Values*, (2nd ed., 1963), 2-3.

<sup>141</sup>For consideration of the significant role of interest groups, at least in the context of the United States legislature, see W. Landes and R. Posner, “The Independent Judiciary in an Interest Group Perspective” (1975), 18 *J.L. & Econ.* 875, 877; Jonathan R. Macey, “Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model” (1986), 86 *Colum. L. Rev.* 223. For application of public choice theory to the Australian taxation context, see Simon Blount, “The Art of Taxation” (2001), 16 *Australian Tax Forum* 345. For a critique of Blount’s thesis, see Burton, *supra* note 34.

<sup>142</sup>See, e.g., Landes and Posner, *supra* note 140, 877; Richard Doernberg and Fred S. McChesney, “Review Essay: Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986” (1987), 62 *N.Y.U.L. Rev.* 891, 896-9. Doubtless, there is a kernel of truth in this proposition: Sarah Baxter, “Scales Fall From US Eyes on ‘Democracy,’” *The Australian*, Jan. 9, 2006, 9. The question, of course, is whether all politicians are always corrupt.

<sup>143</sup>Burton, *supra* note 34.

<sup>144</sup>Rawls, *supra* note 107.

<sup>145</sup>*Id.*

<sup>146</sup>Richard K. Gordon and Victor Thuronyi, “Tax Legislative Process,” in: Thuronyi, *Tax Law Design and Drafting*, IMF, Washington, 1996, vol. 1, 9.

<sup>147</sup>John F. Witte, *The Politics and Development of the Federal Income Tax* (Madison, Wisconsin: University of Wisconsin Press, 1985).

it got us into the mess we are in, so let's just leave tax reform to the experts." Under that expert-oriented political theory, the public is only grudgingly acknowledged and allowed to participate, and only then as and when required by the experts, with their contributions mediated by the experts.

The official discourse regarding tax policy formation draws on this Kantian-inspired conception of the neutral state dispassionately setting neutral laws. The OECD noted:

In choosing specific policies, governments are influenced by the perceived efficiency of the measures in question compared to their direct and indirect budgetary and other costs, but also by their more general stand taken with regard to the desirability of interventions as opposed to a more neutral or non-interventionist approach.<sup>149</sup>

Likewise, the Australian government seems to take every opportunity to reassure the public that rational deliberation of policy is the norm. For example, the explanatory memorandum accompanying the small-business capital gains concessions said that the concessions were a part of the New Business Tax System:

The New Business Tax System is designed to provide Australia with an internationally competitive business tax system that will create the environment for achieving higher economic growth, more jobs and improved savings, as well as providing a sustainable revenue base so the Government can continue to deliver services for the community.<sup>150</sup>

This discourse of expert, rational policy formation is also reflected in the consultation procedures promulgated by the Australian Treasury, with Treasury experts controlling the timing, extent, and nature of public consultation. In its "Public Consultation" position paper, it said:

Consultation may occur at all or some of the stages of the tax design process. The approach chosen depends on circumstances such as timing constraints, the stage of the development process at which consultation occurs and any commercial, political, revenue or other sensi-

tivities. Consultation may not be appropriate where these sensitivities are significant.<sup>151</sup>

It is clear that there is no general entitlement to participation in public consultation, particularly because virtually any tax law will have commercial, political, revenue, and other sensitivities.

If we trusted the experts to get it right — or at least to act frankly and fearlessly in the public interest — that might be enough to ground widespread perceived legitimacy. Despite the reassuring narrative of dispassionate policy formulation, there are three criticisms of the expert-oriented political theory. The first is that the experts do not necessarily act in the public interest. That government experts may act in their own personal interest or in the interest of the government of the day, rather than in the interests of the public at large, is illustrated by the earlier discussion of the Treasury reticence to disclose information regarding bracket creep.

The second criticism is that expert-oriented political theory assumes that there is a coherent body of universal tax reform principles, so that all neutral tax experts can agree on a tax reform template of universal application. Unfortunately, this assumption does not reflect reality. Public finance is intrinsically value-laden in the sense that the content of a particular principle is governed by the standpoint from which it is framed.<sup>152</sup> Given that many standpoints are incommensurable, no rational consensus can be achieved. Even if the tax policy elite could be defined as one person, that person could not adhere to an immutable hierarchy of value preferences in rationally closing conflict between incommensurable standpoints. Moreover, any contingent hierarchy of preferences will vary depending on a range of contextual factors. There may well be well-intentioned debate that aspires to the closure of a rational consensus, but that consensus will only ever be a chimera. One need only consider the critical literature regarding the relevance of tax policy,<sup>153</sup> horizontal equity,<sup>154</sup> vertical equity,<sup>155</sup> and neutrality<sup>156</sup>

<sup>151</sup>Commonwealth of Australia, "Engaging in Consultation on Tax Design," Treasury, Canberra, 2003, 2.

<sup>152</sup>Framed in the discourse of economics, public finance principles carry the value assumptions of mainstream economics. For an exposition of such assumptions, see Deidre N. McCloskey, *The Rhetoric of Economics* (Madison, Wisconsin: University of Wisconsin Press, 1998) (2nd ed.). See also Louis Eisenstein, *The Ideologies of Taxation* (New York: Ronald Press, 1961).

<sup>153</sup>Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford: Oxford University Press, 2000).

<sup>154</sup>Boris Bittker, "A 'Comprehensive Tax Base' as a Goal of Income Tax Reform" (1967), 80 *Harvard Law Review* 925; (Footnote continued on next page.)

<sup>148</sup>Thomas Reese, "The Politics of Tax Reform" (1979), 32 *National Tax Journal* 248; Thomas Reese, *The Politics of Taxation* (Westport, Connecticut: Quorum Books, 1980), xvii.

<sup>149</sup>OECD, *supra* note 5, 8.

<sup>150</sup>Explanatory memorandum accompanying New Business Tax System (Capital Gains Tax) Act 1999, para. 4.3.

to see that promoting any particular view of tax policy as the right answer will be an exercise of power that will inevitably encounter resistance from those viewing the same issue from another standpoint.

The problems with relying on rational discourse as the foundation of legitimate state power manifest in bureaucratic practice. In his study of regulatory practices in the United States, Thomas McGarity differentiated between what he calls “techno-bureaucratic rationality” and “comprehensive bureaucratic rationality.”<sup>157</sup> Techno-bureaucratic rationality is a second-best rationality in that it “recognizes the limitation that inadequate data, unquantifiable values, mixed societal goals, and political realities place on the capacity of structured rational thinking, and it does the best that it can with what it has.” The techno-rational bureaucrat will rely on intuition and muddle through to some proposed regulatory outcome that is most likely to win the support of a majority of interests. Comprehensive rationality is influenced by neoclassical economic theory and tries to overcome the subjectivity of techno-bureaucratic rationality by adopting a rigorous cost/benefit analytical approach. However, time pressure and the absence of data (or the existence of too much data) means that the expert must also apply heuristics in arbitrarily bringing the regulatory process to a conclusion.<sup>158</sup> Under either version of rationality, closure built on an actual or hypothetical rational consensus is never possible.

The third shortcoming is that even if there were a consensus of all experts, expert-driven tax reform can meet difficulties when it encounters opposition

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Boris Bittker, “Accounting for Federal Tax Subsidies in the National Budget” (1969), 22 *National Tax Journal* 244; Stanley Surrey and William Helmuth, “The Tax Expenditure Budget — Response to Professor Bittker” (1971), 22 *National Tax Journal* 528; Boris Bittker, “The Tax Expenditure Budget — A Reply to Professors Surrey and Hellmuth” (1971), 22 *National Tax Journal* 538; W. Blum, “Book Review” (1975), 1 *Journal of Corporate Taxation* 486; William Andrews, “Personal Deductions Under an Ideal Income Tax” (1972), 86 *Harvard Law Review* 309, for a response to which see S. Surrey, *Pathways to Tax Reform* (1973), 19-21.

<sup>155</sup>H. Blum and W. Kalven, *The Uneasy Case for Progressive Taxation* (Chicago: University of Chicago Press, 1963).

<sup>156</sup>For a discussion of the application of the principle of neutrality, see Burton, *supra* note 48, para. 6.1.

<sup>157</sup>Thomas O. McGarity, *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy* (Cambridge, Massachusetts: Cambridge University Press, 1991), 5.

<sup>158</sup>*Id.*, 10ff. For further discussion of cognitively bounded regulatory practice, see Cass Sunstein, Daniel Kahneman, David Schkade, and Ilana Ritov, “Predictably Incoherent Judgments” (2002), 54 *Stan. L. Rev.* 1153; Cary Coglianese, “Bounded Evaluation: Cognition, Incoherence, and Regulatory Policy” (2002), 54 *Stan. L. Rev.* 1217.

from those with incommensurable standpoints. In extreme cases, the conflict between incommensurable standpoints engenders a tax revolt that, history shows, often provokes a political-social crisis.<sup>159</sup>

The hypothesized rational consensus of Kantian-inspired political theory offers a token gesture to democratic government by grudgingly conceding the prospect of widespread public participation in policy formation. According to that political theory, governmental engagement with its citizenry in a systematic fashion is anathema to good deliberative government. However, the epistemological limitations of public finance theory, and the vagaries of the human element involved when experts interpret and apply those principles, offer no foundation for widespread perceived legitimacy. The recent history of the Australian Treasury’s secrecy exacerbates the crisis of perceived legitimacy.

### 7. Communitarian Theory

The political theories reviewed thus far have excluded the prospect of any systematic and substantial active engagement in the political process on the part of the citizenry at large, despite that all of those theories begin with the proposition that government will be legitimate if it is formed on a consensus. The individualist theories focus on the disparity in power between the individual and the state and adopt a hierarchical social structure. According to this depiction of society, relatively weak individuals have conferred considerable collective power on an omnipotent leviathan. Having conferred their power on that leviathan, the mass of the polity is a spent political force, allowed only token participation in the political process. The principle of state neutrality is therefore the liberal answer to this perceived power disparity: Weak individuals will be protected from state abuses of power by the requirement of state neutrality. But the hypothesized state neutrality is of little comfort to the citizenry in the real world who are reminded almost daily of substantive tax inequity, political cynicism, and bureaucratic obfuscation. In formulating a neat theoretical legitimation of state power, liberal political theory has forgotten the real world where perceived legitimacy matters.

However, the Hobbesian depiction of a conferral of power on a leviathan horrified Locke. Although he also proposed a social contract theory, Locke’s conception of the state as the conferral of a trust underpins a different concept of the relationship of individual and government. Under the “government as trust” view, government and individual are conceived as an organic whole united by a common

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<sup>159</sup>For a discussion of tax crises in the United States, see Kornhauser, *supra* note 28.

instrumental purpose, which was, according to Locke, to achieve God's will.

Civic republicans take this concept of trust further by envisaging government as more of a power-sharing arrangement akin to a partnership; they propose that all participants in the venture share mutual obligations. Philip Pettit proposed a political theory that grounds the legitimization of the state in freedom as nondomination.<sup>160</sup> Arguing for a republican model of rulemaking that values freedom from arbitrary rule rather than freedom from rules,<sup>161</sup> Pettit suggests that legislative deliberation would be founded on the contestability of truth claims proposed by participants in the legislative deliberation. That conceptualization of the interaction of individual and state in terms of a partnership recasts legitimate liberal democratic government as responsive government. Rather than legitimacy resting on the construct of an opportunity to participate in government, government will only be legitimate if it actively engages with its citizenry in formulating transparent policy decisions in an open process.

Individuals' opinions are respected for what they are — contributions to the discourse on public policy. The republican government would necessarily be grounded on transparency, be under threat of scrutiny, be under freedom of information, and so on. Pettit suggested that the state should play an active part in promoting the dissemination of objective information and fostering rational political deliberation by sponsoring deliberative polling.<sup>162</sup> Rather than as a subject within a social hierarchy, the public is characterized by the rhetoric of civic transparency as being a partner with government.<sup>163</sup> In contrast to the minimalist reporting of government policy and legislation consistent with fiscal transparency, that partnership entails the provision of

sufficient information to enable the public to actively engage in a policy dialogue with its government partner.

Despite the inclusive nature of civic republican theory, it is open to the criticism that it merely represents another form of Platonic elitism. Thus, in discussing public participation, Pettit observed that his theory makes contact with the civic republicanism of Cass Sunstein:

According to Sunstein, the traditional republican vision, in particular the vision which inspired Americans in the eighteenth century, is that of a polity within which citizens have equal claims and powers, public matters are decided by deliberation on the basis of considerations that have common appeal — they are not biased in favour of any group, or even in favour of the status quo — and agreement serves as a regulative ideal as to how things should be decided; the vision, in a word, is that of a deliberative democracy.<sup>164</sup>

The problem is that this policy formulation starts from “considerations that have common appeal.” In other words, Pettit and Sunstein assume a common standpoint that grounds their political theory, and they exclude any prospect of rational consensus with minorities.

Further, while Pettit refers to transparency as a critical element of his political theory, he, like others within the “civic republican” fold, does not elaborate on the specific content of the transparency concept. Despite the long history of the concept of “government as trust,” the literature regarding civic transparency is thus far limited in several respects:

- Consideration of what amounts to “sufficient information” in particular contexts such as tax law is limited. Similarly, consideration of what categories of information might justifiably be kept secret in specific contexts such as tax law is also limited.<sup>165</sup>
- The extent, if any, to which government should play a role in promoting a particular policy outcome is unclear.<sup>166</sup>
- The institutional framework necessary for incorporating civic transparency is unclear. If bureaucrats are subject to the control of their

<sup>160</sup>Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997).

<sup>161</sup>*Id.*, ch. 1. Thus, in the context of taxation, Pettit suggests that “traditional” liberals object to taxation because to them it represents an encroachment on individual rights, whereas the imposition of taxation is consistent with Pettit's concept of freedom as nondomination as long as the tax is not imposed arbitrarily (at 148-149).

<sup>162</sup>*Id.*, 169. Pettit refers to the elaboration of the technique of deliberative polling by James Fishkin in James Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (New Haven, Connecticut: Yale University Press, 1991); James Fishkin, “Bringing Deliberation to Democracy: The British Experiment” (1995), 5 *The Good Society* 45; James Fishkin and Cynthia Farrar, “Deliberative Polling: From Experiment to Community Resource,” in: John Gastil and Peter Levine (eds.), *The Deliberative Democracy Handbook*, *supra* note 99, ch. 5.

<sup>163</sup>OECD, *supra* note 5.

<sup>164</sup>Pettit, *supra* note 160, 188-189.

<sup>165</sup>For a discussion of the difficulties encountered in this regard in the United States, see Carolyn Kello, “Drawing the Curtain on Open Government? In Defense of the Federal Advisory Committee Act” (2003), 69 *Brooklyn L. Rev.* 345.

<sup>166</sup>See Abner S. Greene, “Government of the Good” (2000), 53 *Vand. L. Rev.* 1.

political masters, to what extent is it reasonable to expect politicians to sanction frank and fearless advice to the public at large, and what sort of institutional structures might be necessary if civic transparency in terms of public participation in policy setting is to be achieved? For example, is it necessary and sufficient that the government open up the channels to what has hitherto been confidential government information, leaving existing institutional frameworks for public consultation in place? Or is it necessary to develop an alternative consultative/participatory paradigm to take account of the public's newfound access to government information?

- How progress toward government founded on the principles of civic transparency might be measured.

### III. Participatory Transparency

#### A. Democratic Pluralism

The limitations of civic republican theory are beyond the scope of this article and have been considered elsewhere.<sup>167</sup> Suffice it to say that the elitist discourse of rational, democratic consensus formed on the foundation of “considerations that have common appeal” conflicts with the liberal discourse of pluralism and individual rights.<sup>168</sup> Those who hold incommensurable minority views outside of the considerations that have common appeal would rightly be afraid of the state's monopoly of direct coercive power. Despite the efforts of some civic republicans in downplaying the fundamental opposition of world views,<sup>169</sup> it is doubtful that there will ever be a consensus on how those two discourses might be reconciled.

However, by focusing on the concept of government as a partnership and the means by which the polity may be actively engaged as partners in all aspects of government activity, civic republican theory suggests a positive program for action in addressing the continuing challenge of maximizing the perceived legitimacy of a tax system. That alternative vision of government as a partnership diminishes the rhetoric of a mute, disempowered polity and reinvigorates the quest for systemic reform that

enhances perceived legitimacy through active government engagement with the polity. However, civic republicanism fails when its commitment to such active engagement is equivocal: You are only welcome to actively engage in the processes of government if you share common considerations.

If pluralism and democracy are to constitute elements of the one political system, it must be recognized that government decisions cannot be grounded on some neutral foundation, so those decisions inevitably will be grounded on a particular vision of the good life. Unsavory as that may seem to liberals, it is the logical consequence of their acceptance of relativism regarding the good life. All government decisions will amount to an arbitrary exercise of power and so, in a sense, be tyrannical.

However, that acceptance of pluralism and the tyranny that it implies must be tempered by a strong communal commitment to the opportunity for and facilitation of widespread democratic participation. A commitment to democratic participation entails a preparedness to expose to public scrutiny the arbitrary political decision involved in the making or administration of any law. If tax laws are to achieve widespread perceived legitimacy according to that pluralist democratic political theory, the government must offer justifications for those laws that are credible in the eyes of the vast majority. Further, any government constrained by democratic institutions must, to some extent, win the support of a significant proportion of the voting population, at least at election time.<sup>170</sup> Acceptance of pluralism suggests that the task of winning that support will be rhetorical in nature rather than focused on presenting verifiable claims.

Rhetoric describes the process of winning support for a contestable viewpoint by appealing to as many discourses as possible.<sup>171</sup> Thus, for example, small-business tax concessions are commonly justified by recourse to discourses of entrepreneurialism, creating a competitive economy and fairness (but not fairness defined narrowly in the sense of horizontal equity). As discussed earlier, there is credible data that might verify that small-business tax concessions are appropriate to achieving the pragmatic

<sup>167</sup>See, e.g., Theodore Lowi, *The End of Liberalism: Ideology, Policy and the Crisis of Public Authority* (1969), 86-87; Sidney Verba and Norman Nie, *Participation in America: Political Democracy and Social Equality* (1972), 341-342.

<sup>168</sup>For discussion, see Chantal Mouffe, “Democracy and Pluralism: A Critique of the Rationalist Approach” (1995), 16 *Cardozo L. Rev.* 1533.

<sup>169</sup>Cass Sunstein, “The Republican Civic Tradition: Beyond the Republican Revival” (1988), 97 *Yale L. J.* 1539.

<sup>170</sup>Depending on the electoral institution, this need not be a majority. Thus, in the Australian federal election of October 3, 1998, the coalition government was returned with a total nation vote of just 49.02 percent: [http://www.aec.gov.au/\\_content/when/past/hor2party.htm/](http://www.aec.gov.au/_content/when/past/hor2party.htm/).

<sup>171</sup>In the context of statutory interpretation, I have outlined my approach to law as rhetoric in Mark Burton, “The Rhetoric of Tax Interpretation — Where Talking the Talk Is Not Walking the Walk” (2005), *Journal of the Australasian Tax Teachers Association* (forthcoming).

objectives associated with those discourses (promoting entrepreneurs, creating an Australian economy that can compete internationally, and achieving tax neutrality across different income categories and levels). It may be difficult or impossible to prove that allowing the capital gains 15-year-held asset exemption<sup>172</sup> will promote entrepreneurialism, but official and public acknowledgement of those logical leaps of faith may foster closer scrutiny of the rhetorical claims made by those proposing the laws. That scrutiny may never lead to the formation of a rational consensus on the law concerned, but at least the speculative arbitrariness of costly legislative measures will be more visible.

## B. A General Definition

The rhetorical aspect of political debate and the relevance of credible information in assessing the rhetorical power of contestable truth claims must be considered when framing a definition of participatory transparency. Those factors suggest a definition that specifies that government provide sufficient information to the public to enable the public to engage as partners in deliberations on public policy and make valid judgements regarding the performance of government and related agencies. That norm dictates that government freely provide “raw” information that might be obtained through various avenues by legitimate means. Further, that norm dictates that government ensure that raw information is provided and that appropriate explanatory information is included that enables individuals without expertise to educate themselves on the relevant issues in particular policy areas.

The participatory transparency norm entails the provision of credible information that:

- is provided by agencies that are sufficiently insulated from government to ensure that information that is critical of the current government, as well as information that is complimentary of the government, is readily available;
- is comprehensive in that it provides sufficient information to enable critical, active, and widespread understanding of the principles on which the tax system is built (or understanding of the arbitrary choices that have been made in framing tax legislation); and
- is timely, in that the citizenry is, as much as possible, promptly informed of the challenges and opportunities associated with the tax system and options for its reform.

It must be recognized that the civic transparency norm cannot be an absolute right. The general standard must be elaborated on a case-by-case basis

because the specific application of this principle will entail trade-offs between the public’s right to know, operational effectiveness, and cost. However, if a civic transparency norm were to be adopted, it would be the starting point from which departures must be justified in a manner that complies with the civic transparency requirement — that is, full critical exposition of the arguments for and against the departure as part of a reasoned justification for resiling from the adopting of the participatory transparency norm.

## IV. The Question of Adoption

### A. Fundamental Questions

In determining whether a broader concept of transparency should be adopted, it is necessary to determine the following:

- Should the government be small or big? If we opt for small government at the extreme end of the scale (that is, government provides limited services such as defense), presumably there is little need to worry about transparency because the cost of providing this would presumably exceed the benefits. However, the closer we move to big government, the greater the need to adopt some concept of transparency, because big government can exert considerable influence over private markets and private lives in myriad ways.
- What model of government do we wish to adopt? A broader concept of transparency, which requires government to offer critical appraisal of the reasons for a particular public policy outcome, is necessary only if government is conceived in terms of a partnership. More limited concepts of transparency are sufficient if the “conferral of power” model of government is adopted; there is no need for government to adopt a participatory transparency norm under a conferral of power political model, because the public is largely irrelevant to day-to-day policy deliberation, and there is no need for government to provide free information to interest groups that can presumably achieve information equilibrium in the information marketplace.

Assuming Australia continues to accept a bigger form of government, the critical question in selecting a concept of tax transparency is whether its government should adopt a norm of civic republicanism. That is a question to which there can be only a value-laden answer. In the following sections, I will outline the reasons why I believe that pluralist participatory transparency is appropriate, at least in the context of tax law.

<sup>172</sup>Income Tax Assessment Act 1997 (Cth), section 152-105.

## B. Continuing the Status Quo Is Untenable

From the discussion on Australia's current practice regarding the dissemination of tax policy information to the public and the deleterious consequences of that practice, it is difficult to see how the existing practice can be even optimal, even in our second best world. The ad hoc, piecemeal dissemination of information destructive of public confidence in the tax system refreshes the public consciousness of tax system dysfunction. Government manipulation of the supply of information for political purposes is not a solid foundation on which to repair widespread perceived legitimacy by building a widespread perception that the tax law and its operation are neutral and fair. It may well be that such a dysfunctional system reflects Pareto optimality in our second-best world, but the absence of any considered appraisal of the pros and cons of a concept of participatory tax transparency in the literature indicates that there is much work to be done before such a conclusion can be reached.

If a neutral taxation system is accepted as a valid foundation principle of public finance, one would have thought that neutrality, *a priori*, should be the foundation of any policy regarding access to government information. That principle of neutrality suggests that information regarding public policy and public administration should be readily available if that information could become available by legitimate means.

## C. Benefits of Participatory Transparency

Aside from the liberal humanist political theory that promotes the realization of the individual through, *inter alia*, engagement in the political process, there are many pragmatic benefits that could arise as a result of adopting deliberative democratic policymaking in the tax context.

### 1. Altering the Tax Discourse

Most mainstream tax policy discourse takes as its starting point the assumption that pretax income belongs to the person who in some sense generated that income.<sup>173</sup> From that starting point, the tax compliance literature considers the connection between voluntary compliance and the perception that taxation is a shared obligation to contribute private property to the state rather than the theft of private property. If conceived in terms of theft, there is a stronger moral claim for an individual to protect his property by adopting tax minimization strategies, or

<sup>173</sup>For the opinion that this assumption is a myth, see Murphy and Nagel, *supra* note 153. For discussion of this work, see A.P. Simester and Winnie Chan, "On Tax and Justice" (2003), 23 *Oxford Journal of Legal Studies* 711.

what Doreen McBarnet calls creative compliance.<sup>174</sup> However, if tax is conceived in terms of a mutual obligation, there is a moral obligation to contribute your fair share:

The expense of government is like the expense of management to the joint tenants of a great estate who are all obliged to contribute in proportion to their respective interests in the estate.<sup>175</sup>

As Kornhauser has observed,<sup>176</sup> there is a strong link between the perceived role of government and the perception of a government's taxes. If the government and the people are perceived to be in a partnership, it is more likely that the tax discourse will be cast in terms of shared obligation. However, if government is conceived as being above its people, there is a disposition toward viewing the government's taxes as theft.<sup>177</sup> That is the principal weakness of Hobbesian social contract theory, utilitarian theory, expert-oriented tax reform, and the elitist strand of civic republicanism. By contrast, a pluralist republicanism holds out the prospect of facilitating a paradigm shift in the way that the Australian community views its taxes, and that can be expected to produce a voluntary tax compliance dividend.

### 2. Enhancing Tax Reform Outcomes

Much of the literature that draws from civic republican theory takes as axiomatic the proposition that enhanced public participation in the deliberative process will serve to enhance public policy outcomes. However, some commentators are skeptical about the prospect of achieving deliberative decisionmaking within a civic transparency paradigm. For example, some suggest that opening up tax reform deliberation to public participation will benefit only interest groups.<sup>178</sup> However, that skepticism is founded largely on failed efforts to implement participation in rulemaking in circumstances in which there was no commitment to participatory transparency,<sup>179</sup> and implies that the status quo of expert-oriented deliberative decisionmaking is far superior.

<sup>174</sup>Doreen McBarnet, *supra* note 84.

<sup>175</sup>Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, R.H. Campbell, A.S. Skinner, and W. Todd (eds.) (1976), 825.

<sup>176</sup>Kornhauser, *supra* note 28.

<sup>177</sup>*Id.*, 882-883.

<sup>178</sup>Jim Rossi, "Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking" (1997), 92 *Nw. Univ. L. Rev.* 173; Aryeh Botwinick, *Scepticism and Political Participation*, 1990 (pluralism founded on value skepticism and hence inconsistent with expert deliberation).

<sup>179</sup>For discussion of such a failure in the context of the 1972 Consumer Product Safety Act (U.S.), see Jim Rossi, *supra* note 178, 181-182 and the sources cited therein.



Some critics of participatory government assert that many submissions to government reviews made by individuals are self-serving or vacuous.<sup>180</sup> However, that shortcoming can be minimized. There is a need for a beginner's guide to tax policy, and there are already such publications.<sup>181</sup> Not all contributors will avail themselves of the opportunity to inform themselves before making a submission. However, commercially available computer software can search and index documents, minimizing the costs associated with repetitive submissions while enabling new insights to be identified quickly.

Critics of participatory transparency also point to the perceived cost to government in generating relevant data and offering high-level critical appraisal of that data. However, in the context of tax reform, the costs of continuing the status quo are significant. The critics of participatory transparency downplay or ignore the following:

- A considerable amount of the information sufficient to create participatory transparency is already generated. That information includes the information generated for taxation reviews undertaken by various branches of government, including the Inspector General of Taxation, the Board of Taxation, the Commonwealth Auditor-General, various Parliamentary committees, existing Commonwealth government agency reports, public funded research, and reviews such as the Review of Business Taxation.
- Much of the relevant information and analysis is already generated by the executive branch of government for internal operational purposes.
- The requirement to provide comprehensive information and analysis might generate efficiency dividends by prompting reform of sub-optimal laws, reforms that offset any additional cost involved in generating the information.

Further, there is nothing to prevent government from trying civic transparency regarding some portfolios in order to identify efficient methods of generating dialogue with the public.

### 3. Restoring Confidence

Aside from the moral aspect, there are pragmatic justifications for reconceiving the relationship between individual and state in terms of a partnership. Recent social phenomena such as higher education levels, higher income levels, and access to multiple sources of information, as well as a decline

in respect for authority and hierarchy and expectations of professional service, necessitate a reorientation of political theory.<sup>182</sup> As noted in the discussion of perceived legitimacy, adopting participatory tax transparency could be the catalyst for turning around what can only be described as high levels of cynicism regarding the procedural aspects of the tax system. With more informed public debate regarding the tax policy embodied in the tax legislation, one might also hope that enhanced public confidence in the substantive fairness of the taxation system would follow.

## V. Conclusion

The current practice of the Australian government regarding the public disclosure of information on the Australian tax system is destructive to the system's efficient operation. The withholding and manipulation of tax information does nothing to promote public confidence, which is essential to promoting widespread perceptions of tax legitimacy. Maintaining the status quo is untenable on grounds of political theory and on pragmatic grounds in terms of voluntary tax compliance. The role that a broad, participatory transparency norm may play in reinvigorating public confidence in the tax system is acknowledged in the mainstream literature. However, that acknowledgement is a whimper in comparison with the strident discourses of the libertarians, utilitarians, and those who propose that public policy is best left to an intellectual elite. Within those strands of liberal political theory, public participation is reduced to a shadow of what it might be. As long as those discourses predominate in discussions on the nature of transparency, there is no prospect of widespread public participation in tax policy deliberation. Moreover, there is no prospect of widespread perceived legitimacy regarding the tax system.

Much work needs to be done in developing an alternative vision of a tax system framed on the principle of participatory transparency. Some of that effort must be directed toward understanding how the current tax system has come to be the weak shadow of democratic participation outlined in the first part of this article. The public choice literature has exposed some shortcomings of modern liberal democracy, but the central tenet of public choice theory — that individuals act to maximize a (generally) narrowly defined concept of self-interest — is the Achilles' heel of public choice theory. By excluding the ideological influences that shape an individual's perceptions of self-interest, public choice theory excludes consideration of how the public

<sup>180</sup>*Id.*

<sup>181</sup>Joel Slemrod and Jon Bakija, *Taxing Ourselves: A Citizen's Guide to the Great Debate Over Tax Reform* (Cambridge, Massachusetts: MIT Press, 1996).

<sup>182</sup>Dalton, *supra* note 72.

ideology is formed and modified. For example, public choice theory omits consideration of the interaction of interest groups, government, and media in shaping public ideological norms that are then relied on in promoting particular types of laws. In that manufactured ideological environment, small-business tax concessions are often justified because they promote entrepreneurialism without asking why entrepreneurs need government handouts. Perhaps a deeper commitment to democratic participation in tax system reform, which complies with participatory transparency, would expose those ideological norms to deeper critical appraisal.

Work also needs to be directed toward exploring the application of the norm of participatory transparency in specific taxation contexts. For example, the operation of this norm in relation to tax system

design, tax system administration, and tax adjudication remains to be considered. In each of those domains, there will be actual or perceived obstacles to the application of the norm. For example, the application of participatory transparency to tax administration may conflict with prevailing norms regarding the secrecy obligations of the tax administrator. How can the public's right to know that the tax administrator deals with all taxpayers equally be reconciled with the secrecy provisions that protect taxpayer information?

Undertaking that research will facilitate the creation of institutional structures that allow greater public participation in tax system design and operation and thereby offers the promise of greater perceived legitimacy and enhanced voluntary compliance. ♦