PLAIN LANGUAGE IN NEW ZEALAND TAX LEGISLATION[1]

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Background

In December 1994, the New Zealand Government, through the Inland Revenue Department, published a discussion document titled "Rewriting the Income Tax Act"[3]. This document was the culmination of a series of reports by the Valabh Committee and the Working Party on the Reorganisation of the Income Tax Act 1976. Broadly speaking the Valabh Committee was charged by the government in 1990 to examine the Income Tax Act 1976 with a view to simplifying the imposition of tax, examining the feasibility of a capital tax and reducing the cost of compliance. While the capital tax was shelved indefinitely, it became a theme of the reports of the Committee that the Income Tax Act itself should be reorganised and rewritten in such a way as to make it easier for tax professionals to use and understand. This included the recommendation that the Act be rewritten using "plain language".

At the same time, the Law Commission in New Zealand was working on a series of reports that dealt with the drafting of statutes. These included the report on a proposed new Interpretation Act (Report No. 17 in 1990)[4], the report on the format and layout of legislation (No. 27 in 1993)[5] and the report on a new drafting style for legislation (No. 35 in 1996)[6].

Reorganisation

The Income Tax Act 1976 was reorganised and re-enacted in 1994 in 3 separate Acts; the Income Tax Act 1994, the Tax Administration Act 1994 and the Taxation Review Authorities Act 1994. The re-enacted Income Tax Act 1994 stated in the second section that:

> "The purpose of this Act is to re-enact the law, excluding certain administrative provisions, contained in the Income Tax Act 1976 in a reorganised form within soundly based and coherent structures of Parts and Subparts."

Numbering System

The reorganisation adopted a new alphanumeric system of numbering the sections of the Income Tax Act 1994 as follows:

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[1] This article was first published in *The Loophole* in March 1997. Copyright: The Commonwealth Association of Legislative Counsel and the author.

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[3] A discussion document published jointly by the Treasury Department and the Inland Revenue Department in December 1994.

[4] A new Interpretation Act to Avoid "Prolixity and Tautology", published December 1990.

[5] The Format of Legislation, published December 1993.

[6] Legislation Manual, Structure and Style, published May 1996.

B	Part
BB	Subpart
BB 3	Section
BB 3 (3)	Subsection
BB 3 (1) (a)	Paragraph

The letters are intended to let the reader know at all times the location of the section in the scheme of the Act. This aspect has worked and, when one has some familiarity with the Act, cross references begin to make some sense without further explanation. For example a cross reference in Part D (Deductions) to a section numbered "GB" should signal that the section referred to relates to tax avoidance.

One of the justifications for this new numbering system, given when it was proposed, was that it would more easily allow for the addition of parts, subparts and sections. To a certain extent this is true, in that it is easier to insert new provisions without doing the type of damage that is done to statutes with a conventional sequential numbering system. But it does not solve all the problems of numbering. Thus a section that would have been section 194A when added between sections 194 and 195 still becomes DE 14A when added between sections DE 14 and DE 15.

It is not always possible, as was suggested by the Valabh Committee, to add all new provisions at the end of the relevant subpart and have the subject make some sense. A major problem with tax legislation is that the sections themselves are too long. Breaking them down in the rewrite process into a more manageable size, with each being more specific, may help us to use the new numbering system to greater advantage.

Drafting guidelines

A major part of the 1994 discussion document consisted of proposed drafting guidelines for the rewrite of the *Income Tax Act 1994*. It is these guidelines and their application in the *Taxation (Core Provisions) Act 1996* (which was assented to on 26 July 1996) that I want to spend some time on today.

The first paragraph in the drafting guidelines reads as follows:

> *These drafting guidelines have been developed in consultation with the Law Commission and based on their draft legislation manual. The guidelines are intended to be flexible to deal with the complexity of tax legislation. They are not exhaustive because it is important that they be free to develop over time.*

We have found the guidelines on the whole to be workable. Although we have not yet begun rewriting the very technical parts of the Act, their application as we rewrote the core provisions of the *Income Tax Act 1994* for the *Taxation (Core Provisions) Act 1996* was a positive experience.

I propose to touch on some of the guidelines very briefly in the order in which they appear in the discussion document, relating some of our experiences as they were applied.

(1) Summary of contents and table of provisions

At the beginning of the Act there will be a summary of contents, showing part and possibly subpart headings. This will be placed before a more detailed table of provisions.

A table of provisions will set out in sequence all headings, including section and schedule headings. It will include part, subpart, section and schedule numbers.

At the moment in New Zealand, each statute has an "Analysis" at the beginning which consists of the marginal notes for each section. This is the type of "table of contents" that occurs in most jurisdictions. For the next stage of the rewrite we are considering including a summary table of contents for each part of the Act as it is rewritten. The addition of a summary of contents at the beginning of the Act and at the beginning of each part is a positive move and it will probably be followed, but at the end of the rewrite process.

We are also going to use a table of contents for each subpart and section for our own purposes as drafters. This technique will be useful as we progress through rewriting a part, but its use for the reader generally will be assessed later, and we are not yet committed to it as part of the rewritten Act.

(2) Schedules

Schedules will have descriptive headings and will be numbered consecutively in Arabic numerals - schedule 1, schedule 2 and so on. They will be ordered according to the placement in the Act of the substantive provisions to which they relate.

Schedules will be used, where practical, to separate detail from substantive provisions in order to improve accessibility. The type of detail suitable for schedules includes tax rates, methods of valuation, classes of expenditure and lists of various kinds.

Tables, flowcharts or any other graphic means of communication may be used to present the information in a schedule.

Schedules are extensively used now in New Zealand, including for consequential amendments to a dictionary of defined terms and to the statutes. In the *Taxation (Core Provisions) Act 1996* we used tables to make common changes to terminology that effected many sections, for example changing "assessable income" to "net income". This was originally done because we did not have time to make the massive number of consequential amendments required to be made by any more conventional means. It worked well and we have decided to keep the technique.

(3) Purpose provisions

There will be a purpose provision for the Act as a whole placed near the beginning of the Act.

Purpose provisions for parts, subparts or groups of sections will be placed at the start of the relevant part, subpart or sections.

Purpose provisions will be used where they assist taxpayers and other users of the legislation to appreciate the general intention of the particular part, subpart or sections to which they relate. Purpose provisions can also assist in the resolution of unforeseen ambiguities. Purpose provisions will be primarily concerned with why the law was enacted, rather than with providing a description of the law. However, a description may be useful in some cases.

Purpose provisions are easier to recommend than to draft well. There is always a great deal of discussion on the true purpose of a taxing provision (and a lot of cynical remarks). However we intend to continue to include them and are proceeding with the next phase on the basis that they will be included for each part and subpart. We are fully aware that they may not be appropriate, or necessary, in some parts; but we will make the decision to include them or not on a part by part basis after we have examined the ones we have drafted. They are never a waste of time because, at the very least, they focus the drafter's mind on what the part is there for.

(4) General interpretation provision

A general interpretation provision requiring consideration of scheme and purpose will be included in the Act. This will give operative effect to the purpose provisions.

We have found that it may be necessary to include several interpretation provisions in the Tax Act in addition to the original one that was included in the *Taxation (Core Provisions) Act 1996*. It reads as follows:

> "The meaning of a provision of this Act is found by reading the words in context and, particularly, in light of the purpose provisions, the core provisions and the way in which the Act is organised."

We are looking into augmenting the New Zealand *Acts Interpretation Act 1924* by including in the tax Act provisions that deal with matters that are not adequately dealt with in the *Acts Interpretation Act 1924* for the purposes of the tax Act. For example the pronouns "he" and "she" are interchangeable but not with the pronoun "it"; there are standard meanings for words relating the beginning of a period of time but not the end. Both of these matters are crucial to an Act that interchanges corporations with people and commonly deals with the beginning and the end of a period in applying its provisions. We will be drafting appropriate interpretation provisions to deal with these matters for the purposes of tax.

(5) Definitions

Definitions will be placed in the Act in the most user-friendly manner. Scattered definitions may obstruct understanding, so it is preferable for them to be gathered together largely in one place. In some situations it will be appropriate to place definitions in the particular part or subpart to which they relate. The insertion of definitions within the text of substantive provisions should be avoided if

possible.

The definitions are listed in a dictionary in Part 0 of the *Income Tax Act 1994.* Even the definitions that are in the section, part or subpart to which they relate are listed in Part 0, and the reader is referred back to the original section. There are problems with this that we are working on. A reader does not like being sent from place to place in the Act, but, at the same time, all the needed information cannot be on one page. To solve this dilemma may require both the referencing back and a repetition of the definition depending on the situation. This is being looked at.

For ease of reference, where a part, subpart or section uses a defined term a note should be inserted indicating the existence (but not the contents) of the definition. This may not apply to all defined terms. For instance, some terms (such as taxpayer, Commissioner, assessable income) occur so frequently that it would not be helpful to include them in notes on each page where they appear.

This looks good in theory but falls apart in its use. For the *Taxation (Core Provisions) Act 1996,* a list of the defined terms used in a section was included at the end of each section in Part B. For some sections, the list is almost as long as the section. We have not yet devised a satisfactory method of letting the reader know that common terms such as "taxpayer", "Commissioner" and "income year", which run repeatedly throughout the Act, will not always be included in the list. While we do not intend to discard this technique, it may require refinement.

Some of the other techniques that could be used are not available in New Zealand. For example, the defined term cannot be bolded because bolding section references is a technique used in a bill to alert the Clerk to a possible renumbering as a result of amendments made in the bill as it goes through the House.

(6) Explanatory material

Explanatory material in the form of formulas, flowcharts and tables will be used to assist communication. It will be made clear whether the explanatory material is or is not part of the Act itself.

Diagrams or flowcharts were included in the Core Provisions Part in the *Taxation (Core Provisions) Act 1996.* They were useful at two stages. In preparing the bill, they were used as a check to make sure that the scheme of the part worked. Readers have told us that the diagrams and flowcharts were useful to them when they were working out the scheme of the part.

Their inclusion also added to the problems with layout that we have. At the same time we were able to use them as an excuse to increase the amount of white space on a page of the Bill.

Layout is an aspect of plain language drafting that we have not yet come to grips with. It was originally thought that layout would not have to be dealt with as part of the rewrite process. One of the reasons was because layout is being examined by the Office of the Clerk on behalf of Parliament and by Parliamentary Counsel's Office as a part of their role as compilers of statutes. To date we have not

made major changes other than to create more white space around the marginal notes for the sections and subsections. These changes were not raised as creating problems by the Clerk and Parliamentary Counsel, and we will be augmenting them in later Bills.

The intention of the rewrite programme is always to make the statute more readable, and we will be relying on the Law Commission's report on format and legislation as a justification for some of the changes that are made in future. The final decisions on layout and format are to be made in time for the last Bill on the rewritten Act.

(7) Use of provisos

The traditional form of legal proviso beginning "Provided that" is archaic and should be avoided. It may be uncertain whether the proviso is intended to be a true proviso derogating from a general provision or a co-ordinate supplementary provision.

Provisos are too ambiguous. They may create an exception, a limitation, a condition or an addition, and it is not always clear which is intended.

There are 200+ "provisos" in the Income Tax Act 1994, an Act with between 350 and 400 sections. When they are examined, they tend to be the result of "last minute change" syndrome common in income tax drafting. The instructing department comes up with "what about" changes at the last minute and they are included by way of a proviso rather than by restructuring the section. They also often include double and triple negatives and are very difficult to decipher. We intend to systematically eliminate these as we rewrite a part. However, it is a style of tax writing that is comfortable to practitioners and any changes made will have to be consistent, clear and obvious.

Conclusion

I have only been able to touch briefly on some of the plain language drafting that we are incorporating in the rewrite of the tax Act. We are, of course, applying all the standard principles of removing archaic words, shortening sentences, eliminating double negatives, eliminating ambiguities, using the active voice where possible etc.

It is not always easy to persuade analysts that the plain version of a section with which they are comfortable is going to be interpreted as they wish it to be. Nor is it easy to encourage them to make the leap of faith needed to believe that practitioners and judges will interpret provisions as intended, especially when the specifics and qualifications etc are reduced or removed. But the provisions that are the subject of legal challenge today are not predictably interpreted by judges today. In some cases the judges are figuratively throwing up their hands and accepting the logic of a barrister before them because there is no clear meaning to the provision as written, yet it must mean something in the context. This is especially the case if the provision is laced with jargon, provisos, exceptions and convoluted thinking.

There are risks in writing and interpreting tax. The risk when the Act is rewritten, as with any

legislation, will still be there. We will never be able to eliminate it. However those of us involved in the rewrite are firmly of the opinion that the risk will be substantially reduced. That, and increasing the ability of users of the Act to understand the law, is our goal in this process.