

THE UNIFORMITY OF TAXATION PENALTIES IN AUSTRALIA

ANDREW SMAILES* AND PETER M MCDERMOTT**

Taxation penalties are a significant yet often ignored factor in the consideration and evaluation of tax systems when considering reform. The purpose of this article is to explore the arguments for and against the uniformity of taxation penalties using the Australia uniform tax penalty system in pt 4-25 of the Taxation Administration Act 1953 (Cth) as an illustrative case in point. This article firstly assesses the system in Australia for internal congruency and examines whether pt 4-25 has successfully created a 'one stop shop' for penalties. The answer to this is that pt 4-25 has certainly reduced undesirable complexity. The seamless addition of the Minerals Resource Rent Tax has proved one of the advantages of such a system, but there are some issues that are worthy of further reform. The article secondly examines whether the uniformity of penalties ought to be prescribed and concludes that there are arguments against uniformity that have contributed to a number of jurisdictions retaining a more specific penalty regime.

I INTRODUCTION

For most taxpayers, voluntary compliance consists of preparing an accurate return, filing it timely, and paying any tax due. Efforts made to fulfil these obligations constitute compliant behaviour. Most penalties apply to behaviour that fails to meet any or all of these obligations. ... The following factors support the public conviction that the tax system is fair and the penalty is in proportion to the severity of the noncompliance. Penalties encourage voluntary compliance by:

- Defining standards of compliant behaviour;
- Defining consequences for noncompliance; and
- Providing monetary sanctions against taxpayers who do not meet the standard.¹

— US Internal Revenue Service

* BBusMan, LLB (Hons) (Qld), GradDip Legal Practice (Dist) (ANU); Masters of Taxation Student, University of New South Wales.

** LLB (Hons), LLM (Qld), PhD (Griffith); Associate Professor and Reader in Law, University of Queensland; Senior Member, Administrative Appeals Tribunal.

1 Internal Revenue Service, *Internal Revenue Manual* (2011) [20.1.1.2] <http://www.irs.gov/irm/part20/irm_20-001-001r.html>.

Australian tax law has from the earliest days contained provisions under which the relevant statute directly imposes as additional tax, penalties for failure to properly comply with taxation obligations. The notion is that the taxpayer concerned should ultimately not only pay the amount of tax itself but also an additional amount of such magnitude that delay or other failure in complying has not left the taxpayer with an advantage over others whose compliance was correct and timely. In the case of omission of income from an income tax return, for example, a taxpayer should not have the odds to nothing in chancing that only the requisite tax on that income will be payable once the omission is detected and corrected, perhaps long after the event. In order that the outcome in each case broadly reflected the scale of the delinquency, the Commissioner was given power to appropriately remit the level of statutorily-imposed additional tax.²

— Trevor Boucher, Australian Taxation Office

Optimal tax theory, one of the guiding theories of taxation reform,³ has been focused for a great many years on distortion costs. However, for a long time it largely ignored administrative and compliance costs, as well as evasion costs.⁴ However, this trend is certainly changing with a range of academics contributing to a burgeoning discourse about administrative and compliance costs, and their impact in tax design.⁵ This is a reflection of the fact that, in reality, the assumption underpinning optimal tax theory that ‘tax liability can be ascertained and collected costlessly is patently untrue’ and that, as Shaw, Slemrod and Whiting add, ‘[i]t turns out that the standard optimal tax framework can be extended straightforwardly to incorporate the other costs of taxation, and to address details of tax system implementation, such as penalties’.⁶ While the incorporation of a consideration of administrative and compliance costs into the overall reform process has been notable,⁷ the incorporation of a consideration of penalties has not been as pronounced. In the words of Richard Bird: ‘The structure, severity and coverage of penalties are important and unduly neglected questions in many countries’.⁸ Taxation penalties are a significant yet often ignored factor in the consideration and evaluation of tax systems when considering reform.

2 Trevor Boucher, Australian Taxation Office, *Blatant, Artificial and Contrived: Tax Schemes of the 70s and 80s* (2010) 349.

3 J A Mirrlees, ‘An Exploration in the Theory of Optimum Income Taxation’ (1971) 38 *Review of Economic Studies* 175; Peter A Diamond and James A Mirrlees, ‘Optimal Taxation and Public Production I: Production Efficiency’ (1971) 61(1) *American Economic Review* 8.

4 Jonathan Shaw, Joel Slemrod and John Whiting, ‘Administration and Compliance’ in Sir James Mirrlees et al (eds), *Dimensions of Tax Design: The Mirrlees Review* (Oxford University Press, 2010) 1100, 1101.

5 See, eg, Chris Evans, ‘Studying the Studies: An Overview of Recent Research into Taxation Operating Costs’ (2003) 1 *eJournal of Tax Research* 64; Cedric Sandford (ed), *Tax Compliance Costs: Measurement and Policy* (Fiscal Publications, 1995).

6 See Shaw, Slemrod and Whiting, above n 4, 1107.

7 See, eg, Cedric Sandford, *Why Tax Systems Differ: A Comparative Study of the Political Economy of Taxation* (Fiscal Publications, 2000).

8 Richard M Bird, ‘Administrative Dimensions of Tax Reform’ (2004) 10 *Asia Pacific Tax Bulletin* 134, 143.

The discourse surrounding taxation penalties has been focused on a small number of things. One approach has been to lump the study of taxation penalties in with a consideration of all penalties, as part of studies in relation to sanctions and behavioural effects, which has tended to focus more on the criminal aspects of tax evasion.⁹ A second school of thought, which has been put into practice in Australia, has considered penalties based on the normal points of reference of simplicity, fairness and equity, with simplicity being the dominant focus.¹⁰ This approach has favoured measures which have aimed to rationalise, review and revise penalties in isolation. The case in point in Australia is the 2000 reform of the penalty system from one with penalties particular to each tax to one applying penalties uniformly across almost all taxes. Penalties have in effect been relegated to a secondary level of consideration, after primary taxes, for which the predominant approach is to make the penalties as simple or as uniform as possible. However, there has been little if any focus on how the design of penalties fits within overall tax system reform and whether a degree of differentiation or complexity is in fact desirable. It is the aim of this article to consider the predominant approach of a uniform penalty system in Australia, and to propose and discuss a number of questions ultimately aimed at reviewing this approach. To this end, this article will address the following questions:

1. What are the purposes of penalties in general, and what are the arguments for uniformity of penalties in general?
2. What are the purposes of taxation penalties, and what are the arguments for uniformity of taxation penalties?
3. How uniform is the Australian tax penalty system?
4. How does the uniformity of the Australian tax penalty system compare with other jurisdictions?
5. Are there any arguments against the uniformity of taxation penalties?

It is hoped that these types of questions will form part of a detailed body of knowledge in relation to how taxation penalties and their uniformity fit within the overall tax system. Moreover, it is hoped that they will contribute to the understanding of how penalties support the myriad of taxes in effect throughout the globe — each having its own different purpose, tax base, tax gap and structure. But to do so, some theoretical groundwork must be established. Therefore, this article will now turn to the first two of these questions.

9 See generally Anthony Ogus, 'Corrective Taxes and Financial Impositions as Regulatory Instruments' (1998) 61 *Modern Law Review* 767; Anthony Ogus, 'Corrective Taxation as a Regulatory Instrument' in Christopher McCrudden (ed), *Regulation and Deregulation: Policy and Practice in the Utilities and Financial Services Industries* (Clarendon Press, 1999) 15.

10 See, eg, Michael D'Ascenzo, 'Sustaining Good Practice Tax Administration' (2009) 38 *Australian Tax Review* 76, 84. See also John Smith, 'Administrative Tax Penalties' (2001) 30 *Australian Tax Review* 182, 187.

II WHY UNIFORMITY?

A *The Purposes of Penalties in General and the Case for Uniformity*

The benefits of a uniform system of civil and administrative penalties are in some ways readily apparent at first glance. Uniformity, of anything, innately appeals to those seeking order and a grand thread linking everyday events and occurrences. Just as there has been a growth in supermarkets and malls where a consumer can ‘buy it all’, there is often a desire for ‘one stop shops’ in regulation as well.¹¹ One development has been the growth in the promotion of administrative procedures legislation which applies across a range of penalties and administration bodies.¹² Sweden and the United States have such statutes that guarantee minimum procedural standards.¹³ However, the UK notably dispensed with the notion due to the need for procedural differentiation.¹⁴ A range of academics have similarly developed arguments in favour of the need for differentiation.¹⁵

Turning now to more specific uniformity, the readily apparent answer is that a uniform system of penalties in relation to taxation laws makes the definition of correct conduct (to use the rationale of the IRS detailed above) more consistent *and* more accessible. While a taxpayer may have a difficulty in understanding the exact nature of any one of the multitude of taxes that are in existence, with a uniform penalty system perhaps they can say: ‘I may not understand that tax, but I am sure that there is a penalty if I don’t pay’. However, when we examine the question more closely, the argument for uniform penalties is slightly more complex than this, and the starting point for such arguments is the nature and purpose of penalties in general. However, it should be noted that discussions about the nature and purposes of penalties are extensive, and this article will only touch on these matters lightly.

According to the Australian Law Reform Commission:

Penalties seek to punish undesirable behaviour and thereby to promote desired behaviour. The form and level of penalty applied will depend on its purpose as well as on the area of activity, the type of wrongdoer and the nature of the wrongdoing. Several purposes, not all of which may be

11 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) 264 [6.205]–[6.207] (*‘Principled Regulation Report’*).

12 *Ibid.*

13 *Ibid* [6.206].

14 *Ibid* [6.207].

15 See, eg, Geoffrey A Flick, *Natural Justice: Principles and Practical Application* (Butterworths, 2nd ed, 1984) 24–5, cited in *Principled Regulation Report*, above n 11, 264 n 255; M C Harris, ‘A Critical Analysis of the Composition, Hearing Procedures, and Appellate Structure and Powers of South Australian Administrative Tribunals’ (1972) 4 *Adelaide Law Review* 389, 407–9; J A Farmer, ‘A Model Code of Procedure for Administrative Tribunals — An Illusory Concept’ (1970) 4 *New Zealand Universities Law Review* 105, 109–10.

consistent, can often be discerned in any one penalty but the deterrence of wrongdoing is ultimately an aim of all penalty regimes.¹⁶

This is a simple Pavlovian argument — that penalties are a negative stimulus which is a disincentive to certain undesirable behaviour. This ‘punish to promote’ argument, however, is not the only purpose for penalties. The Australian Law Reform Commission further outlines these other purposes as including:

- retribution (‘just deserts’ for having committed the contravention);
- social condemnation (expressed through the stigma of a criminal record or severe penalty such as imprisonment);
- specific deterrence (deterrence of the person sanctioned from repeating the contravention);
- general deterrence (deterrence of others from engaging in the prohibited behaviour);
- protection of third parties or the public at large; and
- payment of reparation or compensation.¹⁷

Regulatory theorists represent one of the schools of thought contributing to the discourse about penalties and they are focused significantly on the idea of deterrence.¹⁸ Such theorists promote a differentiated approach to the imposition of penalties,¹⁹ which, as the ALRC states, ‘values proportionality between harm done, the seriousness of the penalty and degree of procedural protection and complexity’.²⁰ It also strikes the more economically inclined that there is an element of penalties touching on externalities, that is, the imposition of a cost on an actor in a market in relation to costs that are felt by society at large, but not normally by the actor specifically. Such a rationale is reflective of a number of the purposes outlined above including deterrence, protection and reparation.²¹ This is closely linked to ‘optimal penalty’ theories, and the school of thought which has promoted them, which seek to have penalties that are reflective of the costs

16 *Principled Regulation Report*, above n 11, 104 [3.4] (citations omitted).

17 *Ibid* 104 [3.5].

18 *Ibid* 787 [25.1].

19 See, eg, Arie Freiberg, ‘Reconceptualizing Sanctions’ (1987) 25 *Criminology* 223, 224; Arie Freiberg, ‘Reward, Law and Power: Toward a Jurisprudence of the Carrot’ (1986) 19 *Australian and New Zealand Journal of Criminology* 91, 94; Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 4–5; Malcolm K Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings Institution Press, 2000) 151; Ogus, ‘Corrective Taxes and Financial Impositions’, above n 9; Ogus, ‘Corrective Taxation as a Regulatory Instrument’, above n 9.

20 *Principled Regulation Report*, above n 11, 787 [25.1].

21 See, eg, Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 2nd ed, 2012) 2–3, 9–11; S Breyer, ‘Typical Justifications for Regulation’ in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press, 1998) 59, 81–2.

to society of contraventions, such as the costs of detection and enforcement.²² However, as noted above, this article is not an adequate forum in which to do justice to the dense and developing literature on the purposes of penalties. It is sufficient for an understanding of a uniform taxation penalty system to note that there are a range of purposes underlying the imposition of penalties and a range of schools of thought about these purposes which are pre-eminent.

B The Purposes of Taxation Penalties and the Case for Uniformity

Penalties may be an instrument of behavioural change, retribution, condemnation (similar to behavioural change but focused on the message to society at large rather than individuals), deterrence, protection or reparation. Taxation penalties, like nearly all penalties, are imposed taking into account all of these reasons, in varying degrees.²³ For instance, taxation penalties are generally secret and thus their imposition in individual cases does not achieve a wide societal deterrence. However, as the damage caused by a taxation 'offence' is more capable of quantification, taxation penalties are more tailored toward reparation.²⁴ The IRS notes that taxation penalties define standards of compliant behaviour, define the consequences for noncompliance and provide sanctions for those that are not compliant — an approach which shows the very essence of the 'punish to promote' purpose.²⁵ The conventional argument about taxation penalties, therefore, is that they promote and facilitate compliance.²⁶ However, it is far from certain that an imposed penalty will lead to compliance.²⁷ This stems in part from a lack of empirical evidence available. However, there are some studies from which tentative conclusions can be drawn.²⁸ For instance, a 2008 study prepared by Ipsos MORI for the UK's Her Majesty's Revenue and Customs found that, in relation to late payment:

the taxpayers taking part in this research said they were *not purposefully avoiding payment*. In nearly all cases, participants felt that they couldn't pay rather than wouldn't pay because other financial commitments had a

22 *Principled Regulation Report*, above n 11, 791 [25.19] nn 23–4, quoting *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd [No 2]* (2002) 190 ALR 169 (Finkelstein J).

23 See Richard K Gordon, 'Law of Tax Administration and Procedure' in Victor Thuronyi (ed), *Tax Law Design and Drafting* (International Monetary Fund, 1996) vol 1, 95, 112–34; Shaw, Slemrod and Whiting, above n 4, 1105–7.

24 Gordon, above n 23, 112–34.

25 This approach is echoed in Australia: see, eg, Inspector-General of Taxation, *Review into Improving the Self Assessment System: A Report to the Assistant Treasurer* (2012).

26 See generally Michael Doran, 'Tax Penalties and Tax Compliance' (2009) 46 *Harvard Journal on Legislation* 111; Gordon, above n 23, 117–27; Michael G Allingham and Agnar Sandmo, 'Income Tax Evasion: A Theoretical Analysis' (1972) 1 *Journal of Public Economics* 323; Shaw, Slemrod and Whiting, above n 4.

27 Gordon, above n 23, 132; Richard Bird, 'Smart Tax Administration' (Economic Premise Note No 36, Poverty Reduction and Economic Management, World Bank, October 2010) 2–4 <<http://siteresources.worldbank.org/INTPREMNET/Resources/EP36.pdf>>.

28 See generally Gordon, above n 23.

higher priority and all cited that they did not have cash available at a given moment in time to pay their tax, which led them into debt.²⁹

The same study found that the same participants felt that penalties, applied evenly and broadly, were necessary for fairness.³⁰ An illustrative quote from one of the participants is: ‘At the penalty stage I don’t really care, I just know I’m going to have a chunk of money to pay — just tell me how much money it is in total then I’ll get the money together’.³¹

Thus, for many people, the imposition of penalties has minimal impact on compliance behaviour, which is a complex concept based on, amongst other things, culture and perceptions of utility and punishment.³² As well, the deterrence argument does not have the same impact when one is considering penalties imposed on corporations where penalties are paid, ultimately, by shareholders while the behaviour in question is driven by directors.³³ So the conventional ‘punish to promote’ argument linking tax penalties and compliance cannot be the *sole* reason for the imposition of tax penalties.³⁴ Instead, taxation penalties are imposed because they influence compliance — in some cases — and because they serve purposes of fairness, reparation, retribution and social condemnation.³⁵ With this groundwork established, this paper will now turn to the key question of ‘why uniformity?’ in more detail.

Reforms in relation to taxation penalties, which focus on uniformity, rather than penalty rates or penalty imposition procedures, have a range of underlying reasons. To understand these, it is perhaps illustrative to explore the creation of such a system in Australia. Prior to 2000, taxation penalties in Australia were administered under a series of Acts which were sometimes significantly different and at-times confusing.³⁶ Two good examples of this in practice are raised in the Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No 2) 2000 (Cth). For example, under the old regime:

Late lodgment of an FBT return attracts a penalty under section 114 of the FBTA 1986 of double the amount of tax payable for the year, whereas late lodgment of an income tax return by the same person attracts a penalty of \$10 for each week that the return is outstanding, up to a maximum of \$200.

29 Ipsos MORI, *Late Payment of Tax: Motivations and Sanctions* (Research Report No 63, HM Revenue and Customs, 2008) 1 (emphasis in original).

30 Ibid 2.

31 Ibid 36.

32 Gordon, above n 23, 132; Bird, ‘Smart Tax Administration’, above n 27; Shaw, Slemrod and Whiting, above n 4, 1115–8; Cynthia Coleman and Lynne Freeman, ‘Cultural Foundations of Taxpayer Attitudes to Voluntary Compliance’ (1997) 13 *Australian Tax Forum* 311; Pauline Niemiowski, Steve Baldwin and Alexander J Wearing, ‘Tax Related Behaviours, Beliefs, Attitudes and Values and Taxpayer Compliance in Australia’ (2003) 6 *Journal of Australian Taxation* 132.

33 Shaw, Slemrod and Whiting, above n 4, 1118.

34 Eric M Zolt, ‘Deterrence via Taxation: A Critical Analysis of Tax Penalty Provisions’ (1989) 37 *UCLA Law Review* 343, 345; Doran, above n 26; Gordon, above n 23, 127–30; Ken Devos, ‘Penalties and Sanctions for Taxation Offences in Selected Anglo-Saxon Countries: Implications for Taxpayer Compliance and Tax Policy’ (2004) 14 *Revenue Law Journal* 32.

35 Gordon, above n 23, 127–30.

36 Explanatory Memorandum, A New Tax System (Tax Administration) Bill (No 2) 2000 (Cth) 8.

... Where a taxpayer understates GST, the penalty is double the amount of the shortfall amount. This is high compared to the penalty for understated income tax of 25% of the understated tax where the taxpayer failed to exercise reasonable care. If the person did exercise reasonable care there is no penalty imposed on the shortfall amount.³⁷

While both examples make it clear to a taxpayer that they 'have the odds to nothing in chancing that only the requisite tax on that income will be payable once the omission is detected and corrected',³⁸ to use former Tax Commissioner Boucher's language, the scale of penalty applied to the instances was patently inconsistent. It is already possible to see how these incongruences may interact with the 'punish to promote' argument. Therefore, a uniform administrative and civil penalty was proposed to alleviate the situation.

The impetus for a uniform penalty system emerged during 1999 and 2000, at the same time as the development and release of a landmark report prepared by the Review of Business Taxation in the Australian Treasury. This report proposed a more understandable and consistent tax system which promoted compliance.³⁹ Therefore, the tone of reform at the time put great weight on system features such as the ability to understand elements and internal consistency which ultimately linked with simplicity and complexity. Simplicity, however, was not an end goal by itself but a means to ensure greater compliance. This linkage between simplicity, complexity and compliance is supported by a range of independent commentators, using both Australian⁴⁰ and international perspectives.⁴¹ This was also emphasised by the previous Tax Commissioner in his academic writing.⁴² Richard Gordon summarised the relationship between simplicity and compliance nicely in the following extract from a tax law drafting guide, published by the IMF:

A simple tax law may fulfill the twin requirements of being easy to obey and hard to disobey because it both allows the taxpayer, or taxpayer intermediary, to know more easily what is expected of him or her and

37 Ibid.

38 Boucher, above n 2, 349.

39 Review of Business Taxation, Australian Government, *A Tax System Redesigned: More Certain, Equitable and Durable* (1999) 2.

40 Australian Government, *Australia's Future Tax System Review: Architecture of Australia's Tax and Transfer System* (2008) 305; Margaret McKerchar, 'The Effects of Complexity on Unintentional Noncompliance for Personal Taxpayers in Australia' (2002) 17 *Australian Tax Forum* 3, 4; John Braithwaite, 'Making Tax Law More Certain: A Theory' (2003) 31 *Australian Business Law Review* 72, 74; Chris Evans, 'Containing Tax Avoidance: Anti-Avoidance Strategies' (Working Paper No 2008-40, University of New South Wales Faculty of Law Research Series, 22 June 2008) 9 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1397468>; Inspector-General of Taxation, *Review into Improving the Self Assessment System*, above n 25; Chris Evans and Binh Tran-Nam, 'Controlling Tax Complexity: Rhetoric or Reality?' in Chris Evans, Richard Krever and Peter Mellor (eds), *Australia's Future Tax System: The Prospects After Henry: Essays in Honour of John W Freebairn* (Thomson Reuters, 2010) 439, 439-48.

41 Ern Chen Loo, Margaret McKerchar and Ann Hansford, 'An International Comparative Analysis of Self Assessment: What Lessons Are There for Tax Administrators?' (2005) 20 *Australian Tax Forum* 669, 708.

42 D'Ascenzo, above n 10, 78, 84. See also Smith, above n 10, 186-7.

also reduces manipulability of the law, thereby reducing the possibilities of tax avoidance. Complexity, and the chance to avoid tax obligations, can come from a number of sources. Inconsistency within the coverage of the law certainly can be one. Exceptions or special rules that provide for reduced obligations in certain circumstances not only add complexity, but they also create an incentive for taxpayers to try and fit into those circumstances. The converse is also true: the more special circumstances where taxpayers have increased obligations, the more those circumstances will be avoided.⁴³

Of more specific relevance in relation to uniform taxation penalties is the further guidance by Richard Gordon:

Looking first to the question of general deterrence, sanctions that are easily understood by taxpayers, and that are therefore easily applied and determined, are more certain in their outcome and more likely to affect a taxpayer's behavior, given that person's utility function. Also, sanctions that are easily applied and determined are likely to take fewer administrative resources and are less likely to be subject to arbitrariness.⁴⁴

Using similar guiding principles, the enactment of pt 4-25 was part of a wider tax system redesign and reform which also included the addition of the GST.⁴⁵ In short, the policy objective for the uniform system was as follows:

The proposed change to the law is part of a broad move to streamline administrative processes in line with the Government's key reform objectives of *certainty, robustness, fairness* and *simplicity*. . . . The purpose of the proposed change is to introduce a new penalty regime to the laws administered by the Commissioner that is uniform, simple and equitable. The new penalty regime is necessary to support the 'New Tax System' that commences on 1 July 2000. The new regime will also remove weaknesses that are evident in the current penalty rules such as the poor structure of penalties for late lodgement of returns by individuals and difficulties in the administration of GIC penalties which don't relate to late payment.⁴⁶

Thus the rationale for a uniform penalty system is capable of fairly clear elucidation. In the words of a UK review into taxation penalties by HM Revenue and Customs: 'An effective deterrent must be clear and comprehensible to the affected person; if it is not, the person will not be aware of the consequences of noncompliance, and thus cannot be effectively deterred from failing to comply with their obligations'.⁴⁷

43 Gordon, above n 23, 116 (citations omitted).

44 Ibid 127-8 (citations omitted).

45 See Explanatory Memorandum, A New Tax System (Tax Administration) Bill (No 2) 2000 (Cth) 8-9 [1.7]-[1.12].

46 Ibid 5 (emphasis added).

47 HM Revenue and Customs, 'Modernising Powers, Deterrents and Safeguards: The Simplification of Regulatory Penalties' (Consultation Document, Parliament of the United Kingdom, 17 June 2011) 8 [2.5].

Ultimately, using the purposes for penalties outlined above as a lens, more understandable and more consistent regulations through a uniform penalty system theoretically lead to more effective compliance because the 'stick' element of the system is more clear to all. This encompasses 'certainty', 'simplicity' and 'robustness', however the government in Australia also made mention of 'fairness'. From the Australian Government's stated point of view, this relates to the inconsistencies outlined above where taxpayers committing purportedly similar offences are penalised differently. However, fairness is also reflected in the now uniform procedural standards applicable to such penalties which is further reflective of the arguments for administrative procedures statutes, outlined above. There are also benefits from a uniform system in that any new taxes can easily be accommodated within the existing system by a simple addition to a definition section, schedule or similar provision.

Understandably, with the increase in complexity due to the addition of a GST in Australia contemporaneously with the addition of a uniform penalty system, a measure like pt 4-25, aimed at simplification, was also acceptable for political reasons. For practical reasons, a uniform penalty system was a logical addition to the taxation system that now included a uniform reporting mechanism, ie a BAS.⁴⁸ However, the political rather than practical acceptability is apparent from the fact that, from both sides of politics, the concept of a uniform penalty system is met with support. For example, Senator Rod Kemp (Liberal Party), Assistant Treasurer, stated that the new penalty system is 'desirable in its own right because it makes penalties easier to understand and calculate but [is] also necessary to avoid problems with the BAS'.⁴⁹ Senator Peter Cook (ALP) stated that '[a]s a matter of principle, it has to be said that Labor support the objective of a consistent regime across taxes for similar behaviour'.⁵⁰ Senator Aden Ridgeway (Democrats) also expressed his support for the system at the time and labelled the Bill 'not a controversial piece of legislation'.⁵¹ It may well be that around 1999 and 2000 the taxation system had reached a tipping point where the expense and effort required to reform the entire penalty system was outweighed by the need to offset increased complexity in other areas, or at least be seen to do so. Thus, one should not underestimate the fact that another benefit of a uniform penalty system may be its political acceptability.

Thus, the current uniform administrative and civil penalty system, contained in pt 4-25 of the *Taxation Administration Act 1953* (Cth) ('TAA'), aims to 'streamline the existing penalties framework and to support compliance under the new tax system'.⁵² The uniform system also aims to 'standardise' and 'rectify

48 Explanatory Memorandum, A New Tax System (Tax Administration) Bill (No 2) 2000 (Cth) 9 [1.11].

49 Commonwealth, *Parliamentary Debates*, Senate, 29 June 2000, 16 091 (Rod Kemp, Assistant Treasurer).

50 *Ibid* 16 086 (Peter Cook).

51 *Ibid* 16 087 (Aden Ridgeway).

52 Explanatory Memorandum, A New Tax System (Tax Administration) Bill (No 2) 2000 (Cth) 7 [1.3]; Senate Economics Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to Committee: A New Tax System (Tax Administration) Bill (No 2) 2000* (2000) 3 ('*Legislation Referred to SELC Report*').

current anomalies' in the penalty framework.⁵³ The benefits of a uniform system arguably include easier understanding for consumers, easier administration by the Australian Taxation Office, less duplication of regulation and greater equity between the penalties imposed under different tax laws for similar tax offences.⁵⁴ The Senate Economics Legislation Committee, in endorsing pt 4-25, further stated that pt 4-25 is aimed at streamlining the penalty system in order to reduce confusion and misunderstanding and improve compliance.⁵⁵ So the benefits of a uniform penalty system have been widely promoted in Australia. The ease with which these benefits could be articulated and 'sold' has meant that uniform penalty system has been implemented without great recourse to the other often used yard sticks for revenue proposals such as economic efficiency and horizontal and vertical equity but instead the system has been sold largely on simplicity.

The preceding section of the paper has explored the theoretical underpinnings of a uniform penalty system, and the reasons for its use. In order to have a complete, and not just theoretical, understanding of the nature of a uniform penalty system, the next section of this paper will outline the Australian uniform penalty system (as contained in pt 4-25 of the *TAA*) as an illustrative case in point. Just how much this system is representative of all Australian tax penalty schemes will be examined in the penultimate section. In particular, the next section will examine how the Minerals Resource Rent Tax (MRRT) is 'grafted' onto the existing penalty system as this is also illustrative of the key nature, and proposed benefit, of such a system, ie providing a common core that can accommodate any and all new taxes. It will also examine how uniform the system really is and what could be done to make it more uniform, if it is accepted that uniformity is a worthwhile end goal in itself. Finally, the questions that have been posited at the beginning of this paper, ultimately whether uniformity *is* such a worthwhile end goal, will be returned to in the last section.

III THE UNIFORMITY OF THE AUSTRALIAN TAX PENALTY SYSTEM IN ISOLATION

A Interest Charges

The first division of pt 4-25 imposes a shortfall interest charge (SIC), which is aimed at neutralising benefits taxpayers could receive from shortfalls of income tax, petroleum resource rent tax (PRRT) and excess contribution tax (ECT).⁵⁶ As can be seen, the very first division of the uniform penalty system challenges the

53 Explanatory Memorandum, A New Tax System (Tax Administration) Bill (No 2) 2000 (Cth) 7 [1.3]; *Legislation Referred to SELC Report*, above n 52, 2 [1.12].

54 Explanatory Memorandum, A New Tax System (Tax Administration) Bill (No 2) 2000 (Cth) 7-9 [1.3]-[1.12]; *Legislation Referred to SELC Report*, above n 52, 1-2 [1.8]-[1.14].

55 *Legislation Referred to SELC Report*, above n 52, 2 [1.9].

56 *TAA* sch 1 s 280-50; Explanatory Memorandum, Tax Laws Amendment (Improvements to Self Assessment) Bill (No 1) 2005 (Cth) 14-15 [2.18]-[2.24].

notion of a uniform penalty system because the GST, Fringe Benefits Tax (FBT) and a number of other taxes are not included. Instead, in relation to a number of these taxes, when there is an amendment shortfall, a general interest charge (GIC) is applied (see below). The SIC is imposed when the Commissioner amends a taxpayer's assessment and increases the amount of tax that a taxpayer has to pay in a year.⁵⁷ The liability for this SIC occurs between the day on which tax for the first assessment was due to be paid and the day on which the Commissioner gave the taxpayer the amended assessment.⁵⁸ The amount of interest payable on the outstanding amount compounds daily⁵⁹ and the yearly interest rate is based on the interest rate declared by the Commissioner for each quarter.⁶⁰ As with all the other administrative penalties, the taxpayer must be notified, and this notice can be included with other notices.⁶¹ SIC can be fully or partially remitted if the Commissioner considers it fair and reasonable.⁶² If the Commissioner decides not to remit an amount of SIC, there is an ability to appeal the decision under pt IVC in certain circumstances only.⁶³ The MRRT becomes the fourth tax within the SIC provisions. Item 13 of the *Minerals Resource Rent Tax (Consequential Amendments and Transitional Provisions) Act 2012* (Cth) ('CATPA') inserts s 280-101 into sch 1 to the TAA, which reads:

280-101 Liability to shortfall interest charge — minerals resource rent tax

- (1) You are liable to pay shortfall interest charge on an additional amount of MRRT that you are liable to pay because the Commissioner amends your assessment for an MRRT year.
- (2) The liability is for each day in the period:
 - (a) beginning at the start of the day on which MRRT under your first assessment for that MRRT year was due to be paid, or would have been due to be paid if there had been any; and
 - (b) ending at the end of the day before the day on which the Commissioner gave you notice of the amended assessment.
- (3) However, if an amended assessment reinstates all or part of a liability in relation to a particular that had been reduced by an earlier amended assessment, the period for the reinstated liability begins at the start of the day on which MRRT under the earlier amended assessment was due to be paid, or would have been due to be paid if there had been any.

57 TAA sch 1 ss 280-100, 280-102, 280-102A.

58 Ibid.

59 Ibid sch 1 s 280-105(1).

60 Ibid sch 1 s 280-105(2).

61 Ibid sch 1 s 280-110.

62 Ibid sch 1 s 280-160.

63 Ibid sch 1 s 280-170.

However, there is a second interest charge within the uniform penalty system. Though not strictly part of pt 4-25,⁶⁴ GIC was the first part of the reforms aimed at creating a uniform penalty system.⁶⁵ The way that GIC operates is by reference. The core operation provisions for GIC are set out in ss 8AAA–8AAH in pt IIA of the *TAA*. Then there are over 50 references to the GIC in other Acts and within the *TAA* where there are situations in which a person is made liable to pay GIC.⁶⁶ Generally, GIC is imposed from the time an amount is not paid by the due date for payment.⁶⁷ However, this is not always the case. For instance, in the case of GST shortfalls there is both GIC applied to late payment and GIC applied to amendment shortfalls in a manner similar to SIC. The administrative provisions are similar to those for the SIC, including the requirement of notification.⁶⁸ There is also a discretion to remit held by the Commissioner where the liability to pay the GIC is due to:

- circumstances beyond the control of the taxpayer where the taxpayer has taken reasonable actions to mitigate the circumstances; or
- circumstances within the control of the taxpayer where the taxpayer has taken reasonable actions to mitigate the circumstances and it is fair and reasonable to do so; or
- where special circumstances make it fair and reasonable or otherwise appropriate to do so.⁶⁹

However, the defining feature of the GIC is that it is a far broader based interest charge. It applies to withholding tax, income tax, GST, FBT, ECT and Family Trust Distribution Tax (FTDT), for instance.⁷⁰ Under the amendments carried out by the *CATPA*,⁷¹ the references in s 8AAB *TAA* are updated to include s 50-15 of the *Minerals Resource Rent Tax Act 2012* (Cth) (*MRRTA*) (in relation to payment of the MRRT) and ss 115-30 and 115-65 of sch 1 to the *TAA* (in relation to MRRT installments). As already stated, the GIC is not used as an amendment shortfall interest charge in relation to MRRT, as with the GST.

B Penalties Relating to Statements

Of more general relevance are administrative penalties for shortfalls and for failing to lodge documents on time, which cover a whole range of innocent as well as intentional errors. The first liability ground is that the taxpayer is 'liable' for an administrative penalty if the taxpayer, or their agent, makes a false or misleading statement in a material particular, whether by omission or commission, to the

64 Ibid pt IIA.

65 Explanatory Memorandum, A New Tax System (Tax Administration) Bill (No 2) 2000 (Cth) 7 [1.5].

66 *TAA* s 8AAB(4).

67 Ibid pt IIA.

68 Ibid.

69 Ibid s 8AAG.

70 Ibid s 8AAB(4).

71 *CATPA* sch 1 items 1, 2.

Commissioner or other entity exercising powers under a taxation law.⁷² Note however, that there is no requirement for intent so this ground covers situations where there is an innocent mistake in filling out a tax return and those where there is intentional deceit. The second ground sets out that there is a liability for a penalty if a statement is made by the taxpayer or their agent and in the statement, an income tax law is applied but such a position is not reasonably arguable.⁷³ For a position to be reasonably arguable, it must be concluded that based on the relevant authorities, which include tax laws and ATO rulings, it is 'about as likely to be correct as incorrect, or is more likely'.⁷⁴ The third ground of liability is if the taxpayer or agent has failed to give a return or other document to the Commissioner by the due date and that document is necessary for the Commissioner to determine the taxpayer's tax liability and the Commissioner determines the liability without the document.⁷⁵ The fourth ground of liability is that a statement purporting to be one required or permitted by a taxation law is provided to someone other than the Commissioner or an entity exercising power under a taxation law and it is false or misleading.⁷⁶

If both a taxpayer and their agent took reasonable care in relation to a statement, and it is false or misleading, then there is no penalty under the first or fourth ground of liability.⁷⁷ There is no liability under either the first or fourth grounds of liability if the taxpayer retains a tax agent in certain circumstances.⁷⁸ Apart from this safe harbour, a taxpayer will generally be liable for the mistakes of their tax agent and while the agent may have lodged and drafted the false or misleading statement, it is always the taxpayer that is ultimately responsible. For the ground of liability relating to unarguable positions, there must also be a shortfall amount.⁷⁹ Previously, there also had to be a shortfall for a false or misleading statement, however now this only impacts on the base penalty and there can still be a penalty where there is no shortfall. There is a shortfall if a tax liability is smaller than it would have been had the statement not been not reasonably arguable or false or misleading.⁸⁰ There is also a shortfall if a refund is larger than it would have been had the statement not been false or misleading or not reasonably arguable.⁸¹ The shortfall amount is understandably the difference between the higher and lower refunds or liabilities.⁸² The definition of shortfall now includes the MRRT.⁸³ Interestingly, payments of MRRT are tax deductible under s 40-751 of the *Income Tax Assessment Act 1997* (Cth) ('ITAA 1997'). As a result, any shortfall in relation to MRRT will often result in an overpayment of income tax. Thus any penalty

72 TAA sch 1 ss 284-75(1)(a)–(b).

73 Ibid sch 1 ss 284-75(2)(a)–(b).

74 Ibid sch 1 s 284-15.

75 Ibid sch 1 ss 284-75(3)(a)–(c).

76 Ibid sch 1 s 284-75(4).

77 Ibid sch 1 s 284-75(5).

78 Ibid sch 1 s 284-75(6).

79 Ibid sch 1 ss 284-75(2)(d).

80 Ibid sch 1 s 284-80(1).

81 Ibid.

82 Ibid.

83 CATPA sch 1 item 21.

decision will need to take into account the fact that the MRRT shortfall may be partly offset by a related credit under the existing penalty guidance from the ATO.⁸⁴ MRRT has been brought within the interest on overpayment system so the taxpayer should not be unduly penalised for this overpayment.⁸⁵

Three of the penalties apply in relation to taxation laws and tax-related liabilities while the unarguable position penalty only applies in relation to income tax laws,⁸⁶ so for the most part these penalties have a broad application.⁸⁷ The MRRT is covered by all of these penalties. Firstly, sub-s (2)(a) of s 284-75 of sch 1 to the *TAA*, outlining the unarguable position penalty has been amended to include an MRRT law *or* income tax laws.⁸⁸ Secondly, the MRRT is included within the definition of tax-related liabilities in s 250-10 of sch 1 to the *TAA*.⁸⁹ Finally, as the Commissioner has general administration of the *MRRTA*, the MRRT comes within the definition of 'taxation law'. Thus, all the statement penalties are potentially applicable in relation to the MRRT, even the unarguable statement penalty which has in the past normally only applied to income tax laws.

The liability provisions cover a broad range of errors. They encompass the most usual and most innocent mistakes as well as deliberate, wilful and substantial forms of tax avoidance and most errors in between these two extremes. This is factored in at the penalty amount phase.⁹⁰ In relation to the first and fourth grounds of liability outlined above, false and misleading statements, the base penalty is 75 per cent of the shortfall amount for shortfalls resulting from intentional disregard of tax laws by the taxpayer or their agent or 60 penalty units, currently \$170 per unit⁹¹ if there was no shortfall.⁹² It drops to 50 per cent for those shortfalls resulting from recklessness by the taxpayer or their agent, or 40 penalty units, and 25 per cent for those resulting from failure to exercise reasonable care by the taxpayer or their agent, or 20 penalty units.⁹³ The base penalty is 25 per cent of the shortfall in relation to the second ground of liability — unarguable positions — where the shortfall from the taxpayer or agent taking a non-reasonably arguable position is more than the greater of \$10 000 or one per cent of the income tax payable in that income year.⁹⁴ For the third ground of liability — failure to lodge

84 Australian Taxation Office, *Administration of Penalties for Making False or Misleading Statements that Result in Shortfall Amounts*, PS LA 2012/5, 23 August 2012.

85 *Taxation (Interest on Overpayments and Early Payments) Act 1983* (Cth) ss 3(1), 3C.

86 *TAA* sch 1 ss 284-75(1)(a), (2)(a), (3)(b), (4)(b).

87 For further discussion on scheme penalties, see Part III.E.

88 *CATPA* sch 1 items 19–20.

89 *Ibid* sch 1 items 9–10.

90 *TAA* sch 1 s 284-90(1).

91 *Crimes Act 1914* (Cth) s 4AA.

92 *TAA* sch 1 s 284-90(1).

93 *Ibid*. See further the judgment of Deputy President Tamberlin in *Mezrani v Commissioner of Taxation* (2009) 76 ATR 959 for an excellent explanation of the sometimes ambiguous difference between recklessness and a lack of reasonable care: 'It is well settled that recklessness requires something more than an oversight or inadvertence and something less than deliberate or intentional conduct. It involves an attribution of a state of mind. It can be inferred having regard to what a reasonable person would consider to be something more blameworthy than oversight yet not amounting to intentional conduct': at 964 [31].

94 *TAA* sch 1 s 284-90(1).

— the base penalty is 75 per cent of the tax-related liability in question.⁹⁵ If two or more of these base penalty amounts apply, the legislation requires the greater to be selected as base penalty.⁹⁶ However, this is only the base penalty amount and can be reduced or increased or even removed altogether by the legislation to take into account the specific circumstances of the situation.⁹⁷

The rules relating to adjustments of the base penalty amount encourage compliance post-error. The amount of penalty is reduced if a taxation law was applied by the taxpayer or their tax agent in a certain way which agreed with advice from the Tax Commissioner, general administrative practice under the law or a statement in a publication approved in writing by the Commissioner, to the extent that the penalty is due to that application.⁹⁸ This may mean that the penalty is reduced entirely. The base penalty is increased by 20 per cent if the taxpayer:

- (a) ... took steps to prevent or obstruct the Commissioner from finding out about a shortfall amount, or the false or misleading nature of a statement, in relation to which the base penalty amount was calculated; or
- (b) [the taxpayer]:
 - (i) became aware of such a shortfall amount after a statement had been made to the Commissioner about the relevant tax-related liability; or
 - (ii) became aware of the false or misleading nature of a statement made to the Commissioner or another entity after the statement had been made;

and ... did not tell the Commissioner or other entity about it within a reasonable time.⁹⁹

Also, there is a 20 per cent increase if there was a previous penalty under the uniform provisions.¹⁰⁰ For scheme penalties, there is a 20 per cent increase if steps were taken to prevent or obstruct the Commissioner from finding out about the scheme shortfall amount or there was a previous scheme penalty.¹⁰¹ Therefore, a base penalty amount of 75 per cent would be increased to 90 per cent if the taxpayer tried to conceal the mistake. Conversely, there is a reduction by 20 per cent if the Commissioner informs the taxpayer that an audit will occur and the taxpayer voluntarily tells the Commissioner of the shortfall and the voluntary disclosure can reasonably be estimated to have saved the Commissioner a significant amount of time or resources.¹⁰² If the taxpayer voluntarily discloses

95 Ibid.

96 Ibid sch 1 s 284-90(2).

97 Ibid sch 1 s 284-85.

98 Ibid sch 1 s 284-224.

99 Ibid sch 1 s 284-220.

100 Ibid.

101 Ibid.

102 Ibid sch 1 s 284-225(1).

the shortfall to the Commissioner before an audit is announced or before the day that the Commissioner makes a public statement requesting voluntary disclosure, then the penalty is to be reduced by 80 per cent if the shortfall is \$1000 or more and 100 per cent if the shortfall is less than \$1000.¹⁰³ The Commissioner is able to treat a voluntary disclosure as occurring before an audit is announced if it is appropriate based on the circumstances.¹⁰⁴ This is effectively a power of remission residing with the Commissioner. Thus these provisions provide an incentive to voluntarily disclose errors and thus comply with the tax laws post discovery of an error. The important thing is that since the statement penalties have application to taxation laws in general, so do the incentives that come with these adjustments.

C Specific Administration of the MRRT Tax Penalties

As demonstrated above, the MRRT has been grafted onto the existing penalty provisions in pt 4-25. Due to this, the administration of the MRRT penalties should largely fall within the existing administrative arrangements comprising tax rulings and law administration practice statements. The ATO has published a document outlining the ATO administrative approach to the MRRT.¹⁰⁵ An important principle outlined in this guidance is that it is a relevant consideration when determining penalties that the MRRT is a new tax. As such the ATO refers to a 'transitional period'. The notion of a transitional period for the MRRT was first raised during the consultation when the *Minerals Resource Rent Tax Act 2012* (Cth) was merely a bill. In the publication, *Proposed Resource Rent Tax Arrangements — ATO's Approach to Administrative Penalties during the Transitional Period*, a number of other principles have been espoused.¹⁰⁶ It is specifically stated in the publication that 'this material is not a publication that has been approved to allow you to rely on it for any purpose and therefore will not provide protection from primary tax'.¹⁰⁷ However, it is then stated that 'reliance on the most current version of the information in early guidance materials available at the time will be taken into account in determining the extent to which any penalties and interest imposed might be remitted'.¹⁰⁸ As a result, the information in the publication is of some relevance until further guidance is provided. As stated, though the MRRT is currently, and was evidently intended to be, included within the uniform penalty system, some guidance is given in this publication as to:

103 Ibid sch 1 ss 284-225(2)–(3).

104 Ibid sch 1 s 284-225(5). For the Commissioner's approach to this question, see Australian Taxation Office, *Administrative Penalties: Voluntary Disclosures*, MT 2012/3, 11 July 2012.

105 Australian Taxation Office, *The ATO's Administrative Approach to MRRT* (17 April 2013) <<http://www.ato.gov.au/content/00320068.htm>>.

106 Australian Taxation Office, *Proposed Resource Rent Tax Arrangements — ATO's Approach to Administrative Penalties during the Transitional Period* (26 April 2012) <<http://www.ato.gov.au/content/00317581.htm>>.

107 Ibid.

108 Ibid.

- whether a position would be reasonably arguable regarding obligations under the law in the Minerals Resource Rent Tax Bill 2011 (Cth) (*MRRT Bill 2011*); and
- whether reasonable care has been taken in relation to a false or misleading statement to the Commissioner regarding obligations under the laws in the MRRT Bill 2011 or the PRRT Assessment Amendment Bill 2011.¹⁰⁹

The publication provides a number of principles specifically with relevance to determining whether a position taken is reasonably arguable. The guide states that, based on paragraph 43 of the ATO's Miscellaneous Taxation Ruling, MT 2008/2:

it may be some time before there are court decisions or taxation rulings on the MRRT law itself which can be used as sources of relevant authority for establishing a position. In these circumstances with limited, if any, relevant authority on the MRRT law, it may be more likely that taxpayers will be able to establish a reasonably arguable position.¹¹⁰

The guidance states that in such circumstances, a taxpayer may establish a reasonably arguable position based on both of: a 'well-reasoned construction of the relevant provision, informed by an appreciation of the statutory history and a consideration of relevant extrinsic material such as the explanatory memorandum ... [and] principles and precedent drawn from areas outside the MRRT'.¹¹¹

Perhaps the most similar tax to the MRRT is the PRRT, so it would ordinarily be a useful source of the reasoning by comparison and analogy outlined in point two above. However, there are few penalty decisions in relation to the PRRT. Likewise, the explanatory memorandum for the MRRT Bill does little more than state that the MRRT is brought within the existing uniform penalty provisions.¹¹² However, even in this instance of fairly little guidance, the strength of bringing the MRRT within the uniform penalty provisions is seen since the existing guidance from the ATO in relation to the application of the uniform penalty provisions will still apply. As a result, for instance, the overall ATO position as to the definition of 'reasonably arguable' is still available in the new context of MRRT. In addition, the early guidance publication has given some more specific guidance on culpability concepts.

The early guidance materials provide some relevant points in relation to the administration of penalties. Apart from reiterating that the MRRT is brought within the existing uniform penalty provisions, the following is noted in relation to reasonable care: 'Subsection 30-25(5) of the MRRT Bill allows a taxpayer to choose a safe harbour method to work out its mining revenue. Choosing the safe

¹⁰⁹ Ibid.

¹¹⁰ Australian Taxation Office, *Shortfall Penalties: Administrative Penalty for Taking a Position That is Not Reasonably Arguable*, MT 2008/2, 11 July 2012.

¹¹¹ Australian Taxation Office, *Proposed Resource Rent Tax Arrangements — ATO's Approach to Administrative Penalties during the Transitional Period* (26 April 2012) <<http://www.ato.gov.au/content/00317581.htm>>.

¹¹² Explanatory Memorandum, Minerals Resource Rent Tax Bill 2011 (Cth).

harbour method has no impact on whether or not reasonable care is taken.¹¹³ The guidance includes the following example of reasonable care:

A miner has two projects, one a mining project interest (MPIA) and the other a pre-mining project interest (PMPiB) and chooses to use the market value approach to determine the values of its starting base assets for both interests. The miner conducts appropriate research and locates published ATO guidance explaining good practices for working out market valuations of starting base assets. The miner follows those guidelines and chooses to appoint a professional and appropriately qualified valuer to complete the valuations. The valuer follows good industry practices to value the assets identified by the miner.

Subsequently the miner identifies that the asset register for MPIA incorrectly included assets for PMPiB because of an inadvertent error. Shortly after the error was detected the miner notified the Commissioner and requested its starting base return be amended. Furthermore, the miner demonstrated that it had adequate internal control procedures in place at the time and that errors of this nature would be unlikely to be repeated. The inadvertent error resulted in a higher starting base loss being claimed for MPIA.

On the facts the miner took reasonable care, such that an administrative penalty is not imposed on the reduction of the claim for a starting base loss for MPIA.¹¹⁴

Conversely, an example of a failure to take reasonable care is also demonstrated:

An iron ore miner decides to use the market value approach to determine the values of its starting base assets. The miner decides that it will complete its valuation in-house, following generally accepted industry practices on obtaining market valuations and following published ATO guidance explaining good practices for working out market valuations. The valuations are prepared by an in-house accountant. The accountant asks the geologist to provide all the geo-technical information so that the accountant can form an opinion on the value of the assets identified. The geologist does not provide all the requisite technical information. Rather than following up with the geologist, the accountant makes do with the data he has received and consequently makes incorrect assumptions as to the data, which results in an overvaluation of the resource. The facts indicate that the miner has failed to take reasonable care in conducting its valuations. A reasonable person, having doubts about the quality of data, would be expected to follow up and resolve this doubt before using it. In this instance the accountant failed to do that.¹¹⁵

113 Australian Taxation Office, *Proposed Resource Rent Tax Arrangements — ATO's Approach to Administrative Penalties during the Transitional Period* (26 April 2012) <<http://www.ato.gov.au/content/00317581.htm>>.

114 Ibid.

115 Ibid.

Both examples show how the existing guidance about culpabilities and penalties can largely be extended to cover the MRRT with minor alterations and explanations.

D Late Lodgement Penalties

There is a further penalty for failing to lodge documents on time. This understandably overlaps with the third type of statement penalty outlined above however this second penalty is imposed simply for the time during which the failure occurs, while that above covers any errors that the Commissioner makes without the document. This is a rather simple liability provision. A taxpayer is liable to an administrative penalty if they are required under a taxation law to give a document to the Commissioner in an approved form by a particular day and they, *or their agent*, don't give such a document in the approved form by that day.¹¹⁶ The base penalty is one penalty unit for every 28 days or part thereof that the document remains outstanding, up to a maximum of five penalty units.¹¹⁷ The base penalty amount is multiplied by two if the taxpayer has an assessable income or GST turnover between \$1 million and \$20 million for the income year when the contravention occurs, or is a medium withholder.¹¹⁸ It is multiplied by five for entities with an assessable income or GST turnover above \$20 million or those that are large withholders.¹¹⁹ The penalty under this subdivision can be imposed by the Commissioner at any time after the due date for lodgement and can then be increased if necessary.¹²⁰ Once again, this penalty is subject to a safe harbour for those taxpayers that engage a tax agent in certain circumstances.¹²¹ While this penalty covers statements under all taxation laws, which is an initially broad position, a number of statements under certain acts are removed from its ambit.¹²² Importantly, included within these are statements under the:

- *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (Cth);
- *Superannuation Guarantee (Administration) Act 1992* (Cth); and
- *Superannuation (Self Managed Superannuation Funds) Supervisory Levy Imposition Act 1991* (Cth).¹²³

Therefore, a number of statements relating to superannuation which have broad applicability are not covered by this late lodgement penalty. The MRRT is included within the late lodgement penalty in s 286-75 of sch 1 to the *TAA* by specific reference in the new sub-s (2AA).¹²⁴

116 *TAA* sch 1 s 286-75.

117 *Ibid* sch 1 s 286-80.

118 *Ibid*.

119 *Ibid*.

120 *Ibid*.

121 *Ibid* sch 1 s 286-75(1A).

122 *Ibid* sch 1 s 286-75(2).

123 *Ibid*.

124 *CATPA* sch 1 item 24.

E Scheme Penalties

A great number of errors, oversights and activities are covered by administrative penalties under pt 4-25. One area of specific concern is in relation to schemes, which consequentially have specific penalty provisions. There is both a penalty for participants for the entering of a scheme and for promoters for the promotion of schemes. The first of these penalties applies to the taxpayer who actually gained the primary benefit from the scheme or would have had a tax law not prevented such a benefit. The taxpayer is liable for a penalty if the taxpayer would have obtained a scheme benefit from a scheme, but for any provision of a taxation law or an adjustment provision, and it is reasonable to conclude that an entity, not necessarily the taxpayer, entered into or carried out the scheme with the sole or dominant purpose of that entity or another entity getting a scheme benefit.¹²⁵ Cases where the taxpayer has actually benefited and cases where the law prevents such a benefit are thus covered so that the taxpayer may still be liable for a penalty when their actions are unsuccessful. Like with many criminal charges, both the attempt and the act are covered. The definitions that underpin this penalty provision are vitally important. A scheme benefit occurs if a tax-related liability of the taxpayer is or could reasonably be expected to be reduced by the scheme.¹²⁶ It also occurs when a tax-related refund of the taxpayer is or could reasonably be expected to be increased by the scheme.¹²⁷ Schemes can occur inside or outside Australia.¹²⁸ Under s 3AA of the *TAA*, 'scheme' has the same meaning as under the *ITAA 1997*. Therefore 'scheme' is a broad concept covering 'any arrangement' or 'any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise'.¹²⁹ An 'arrangement' is also subject to a broad definition and includes 'any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings'.¹³⁰

Just as the definitions of 'scheme' and 'arrangement' give the first of the scheme penalties a wide potential application, the definition of 'tax-related liability' also is widely drafted. Under s 255-1(1) of sch 1 to the *TAA*, a tax-related liability is a 'pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable)'. Likewise, 'taxation law' means:

- (a) an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or

125 *TAA* sch 1 s 284-145(1).

126 *Ibid* sch 1 s 284-150(1)(a).

127 *Ibid* sch 1 s 284-150(1)(b).

128 *Ibid* sch 1 s 284-145(3).

129 *ITAA 1997* s 995-1.

130 *Ibid*.

- (b) legislative instruments made under such an Act (including such a part of an Act); or
- (c) the *Tax Agent Services Act 2009* or regulations made under that Act.¹³¹

So a taxpayer who obtains a benefit from a scheme in relation to a liability under an Act administered by the Commissioner, or would have except for an Act administered by the Commissioner, is liable for a penalty administered by the Commissioner. There is a synchronicity in this outcome that makes the situation simple to understand for any taxpayer contemplating entering a scheme. However, this is only half of applicable scheme penalties under pt 4-25. Once again, the MRRT is included within the scheme penalty provisions as it falls within the ambit of ‘taxation law’ and ‘tax-related liability’.¹³²

F Assessment of Uniformity and Areas of Possible Reform

The MRRT shows therefore that the great strength of a uniform penalty system is that it can accommodate new taxes with minimal amendments as the notion of a uniform penalty system creates core behavioural standards that can be applied broadly across taxes. Previously, it was questioned whether pt 4-25 has successfully created a system of uniform penalties under the many various tax laws that are administered by the Commissioner. This is about the internal consistency of the argument for uniformity. The answer to this is that pt 4-25 has certainly reduced complexity and increased uniformity, but there are some issues that are worthy of further reform.

In relation to statement penalties for instance, false and misleading statement penalties and the failure to lodge penalty are applicable to tax laws, while the unarguable position penalty is only applicable to income tax laws. It was specifically stated when pt 4-25 was enacted that ‘[t]he reasonably arguable standard applies only to an income tax law, and does not apply to other tax laws, for example, FBT and GST matters’.¹³³ Scheme penalties are likewise applicable in relation to tax laws in general as are the stand alone late lodgement penalties. The question is whether there is a need for such distinctions. With the MRRT brought within the failure to take a reasonably arguable position penalty, there would seem to be few philosophical barriers to bringing other indirect taxes within the ambit of this penalty. Once again, the objectives of ‘certainty, robustness, fairness and simplicity’ could be better served if the application of the penalties applied across all ‘tax laws’ and ‘tax-related liabilities’. If this reform were instituted, there would also be an added benefit that the process of bringing a new tax within the penalty system would be as simple as giving the Commissioner the general administration of the tax in question. Likewise, when such taxes are repealed, there would be no need to repeal references to such taxes within the provisions. So there is no perfect ‘one stop shop’ in terms of penalties and one potential

¹³¹ Ibid.

¹³² *CATPA* sch 1 item 24.

¹³³ Explanatory Memorandum, A New Tax System (Tax Administration) Bill (No 2) 2000 (Cth) 12 [1.21].

area of reform would be to enhance the uniformity and comprehensiveness of pt 4-25. While penalties are not perfectly uniform they are at least fairly uniform. That is, a taxpayer can, with general confidence, conclude that if a tax liability is understated, they will pay interest for some period and will pay a penalty of 25 per cent if they fail to take reasonable care, and zero per cent if they take reasonable care. However, while the imposition of penalty is fairly uniform, the objection and appeal rights available to the taxpayer are not.

The GIC provisions are already used in a number of different ways (that is, to cancel the benefits of late payment and amendment shortfalls) and by a number of different acts. Therefore, if reform aimed at simplifying the ordinary interactions of taxpayers is pursued, GIC represents an important lever with which to achieve real outcomes for a large number of taxpayers. Perhaps the first area of reform to be investigated is whether it would be possible to make SIC as broad based as GIC. The SIC was proposed by the 2004 *Report on Aspects of Income Tax Self-Assessment*.¹³⁴ This report stated:

in shortfall cases, taxpayers are unaware of their debts. Therefore, any differential between the GIC and their alternative borrowing rate strikes them as a penalty that has been imposed irrespective of whether the conditions for a formal culpability penalty (such as lack of reasonable care) have been triggered. Because taxpayers are not usually in a position to respond to the GIC in shortfall cases, the Review has concluded that full statutory GIC should not apply to shortfalls during the pre-amendment period.¹³⁵

The review's specific recommendation was for a SIC that applied only to income tax liabilities. This was necessary because of the scope of the terms of reference of the review (that is, a review of *income tax* self assessment). However, with the PRRT and now the MRRT brought within the SIC provisions, the question must be asked: why not GST, FBT and all other taxes that the Commissioner has general administration of? It is not that these taxes, GST in particular, will not be subject to amendments. It would perhaps create a situation characterised by more 'certainty, robustness, fairness and simplicity' — to use the policy objectives for the uniform system in the first place — if there was one broad GIC for late payment and one broad SIC for amendment shortfalls. A related issue is how uniform the administrative process surrounding penalties is, and in addition, how to appeal the imposition of penalties.

A specific area of reform is in relation to objection and appeal rights. A taxpayer may object formally under pt IVC of the *TAA* to either the Administrative Appeals Tribunal (AAT) or the Federal Court both in relation to the assessment of penalties and a decision not to remit penalties. While the imposition of penalty is automatic, the choice between the culpability standards is obviously not automatic and therefore carries a corresponding right of objection. The same does not apply in relation to interest charges. There is no formal objection right under pt IVC in

¹³⁴ Treasury, Australian Government, *Report on Aspects of Income Tax Self Assessment* (2004).

¹³⁵ *Ibid* 51 [5.2] (citations omitted).

relation to a decision not to remit GIC; there being no need for an objection right in relation to imposition of GIC since it is automatic and follows the primary tax payable decision, which is generally a decision that can be objected to under pt IVC. This seems strange considering that just as pt 4-25 contains the uniform penalty provisions, pt IVC of the *TAA* contains the general objection provisions. There is a limited right to object under pt IVC in relation to SIC however, provided the SIC is more than 20 per cent of the additional amount of tax imposed by the relevant amendment to the assessment. Thus, if a taxpayer is seeking an objection right in relation to a failure to remit GIC, they must turn to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*). This situation can mean that a taxpayer objecting to an amended assessment which carries penalties, SIC and GIC may have to commence a parallel proceeding in the Federal Court under both pt IVC and the *ADJR Act*. An example of this occurring is in the case of *Melbourne Car Shop Pty Ltd v Commissioner of Taxation*.¹³⁶ In that case, there was an appeal under pt IVC in relation to penalties and primary tax in relation to a GST shortfall, and a proceeding under s 5 of the *ADJR Act* with regard to the refusal to remit GIC. The limits of the *ADJR Act* appeal are that the Court is more limited in its ability — compared to the AAT — in relation to pt IVC for instance, to consider the merits of the remission decision. So there is an artificial situation where the remission of SIC and penalties may proceed under different scope of review than the remission of GIC. Considering that SIC is only applicable to income tax, PRRT, ECT and now MRRT, that means that the ability to appeal the remission of penalties and interest in relation to income tax and GST will be somewhat different. Thus, it would perhaps be better if there were a consistent objection right that applies across SIC, GIC and penalties.

Therefore, it can be concluded that the taxation penalties system in Australia is fairly uniform but not perfectly so. In order to have a degree of internal consistency, it would be beneficial if the remaining discrepancies discussed above were dealt with. That is, if uniformity is a worthwhile end goal in itself, then there may as well be complete uniformity across the board in relation to taxation penalties, and the associated procedures, which is not currently the case. The remaining sections of this paper will assess whether this uniformity is such a worthwhile end goal.

IV THE UNIFORMITY OF THE AUSTRALIAN TAX PENALTY SYSTEM IN COMPARISON WITH OTHER JURISDICTIONS

When examining the most relevant Organisation for Economic Co-Operation and Development (OECD) compiled data about tax administration, it becomes apparent that uniformity of taxation penalties is not a universal administrative practice. The OECD breaks down responses in relation to the three main taxation penalties: failure to file, failure to pay on time and failure to correctly report. In relation to penalties for the failure to file returns, under half of the OECD countries

¹³⁶ (2010) 76 ATR 42.

have a consistent penalty across the three major taxes being personal income taxes (PITs), corporate income taxes (CITs) and value added taxes (VATs).¹³⁷ In relation to penalties for failure to pay on time, it becomes 'just over half'.¹³⁸ Finally, in relation to penalties for failure to report correctly, 'around half' have consistent penalties across the three main taxes.¹³⁹ Therefore, in around half the OECD countries, there is no real degree of uniformity between the same type of penalty for different taxes, and consequently there is little chance of there being the uniformity between all types of penalties across all taxes. Some illustrative examples in relation to failure to file penalties, the failure to pay penalties in time and the failure to report penalties are outlined in the following tables.¹⁴⁰ The information contained therein is based on the OECD's definition of a penalty.

A Failure to File Penalties in Selected Countries

Country	Personal Income Tax	Corporate Income Tax	VAT
OECD Members			
<i>Austria</i>	Penalty of up to 10 per cent of tax due.		
<i>Canada</i>	Five per cent for a return with a balance owing, plus one per cent of balance owing for each full month that return is late, to a maximum of 12 months.	1 per cent of amount overdue, plus ¼ of overdue amount multiplied by the number of complete months the return was overdue (up to 12).	
<i>France</i>	Penalty of 10 per cent of tax payable, in addition to late payment interest of 0.4 per cent per month.		
<i>Iceland</i>	15 per cent penalty charge.	1 per cent for each day that runs over the deadline up to 10 per cent	
<i>Luxembourg</i>	Up to 10 per cent of tax assessed.		€50 – €5000
<i>Portugal</i>	Maximum amount of penalty: €2500	Maximum amount of penalty: €5000	Maximum amount of penalty: €5000

137 Forum on Tax Administration, 'Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series (2010)' (Information Series Note, OECD, 3 March 2011) 254.

138 Ibid.

139 Ibid 255.

140 Ibid 257.

<i>Country</i>	<i>Personal Income Tax</i>	<i>Corporate Income Tax</i>	<i>VAT</i>
OECD Members			
<i>United Kingdom</i>	Fine of £100 is due if filed late; additional fine of £100 if not filed within six months of due date; further fine up to 100 per cent of tax due if not filed within one year.	Fine of £100 and another £100 fine three months later. For a third consecutive failure, the fine escalates to £500 fine and another £500 fine three months later.	Automated system of progressive surcharges based on number of times the payment is late during rolling 12 month period which is extended for each subsequent late return or payment. After a warning is issued surcharge starts at two per cent of VAT unpaid and rises to 5 per cent, 10 per cent and 15 per cent tax geared to the amount paid late.
Non-Members of the OECD			
<i>Argentina</i>	Fine of ARS200.	Fine of ARS400.	Fine of ARS200 for individuals and ARS400 for corporate.
<i>China</i>	When noncompliance occurs, tax authority recovers the delinquent tax and late fee (0.05 of the delinquent tax) as well as a fine of 50 per cent up to 500 per cent of the delinquent tax.		

As can be seen, there is no consensus with a number of different models used. Some countries have a consistent penalty across all three major taxes, however some differentiate between income taxes and VATs (which are inherently different) and taxes imposed on individuals and corporations. Other countries have entirely different penalties for all three taxes (for example, the UK). The same occurs in relation to penalties for failure to pay on time.¹⁴¹

B Failure to Pay on Time Penalties in Selected Countries

<i>Country</i>	<i>Personal Income Tax</i>	<i>Corporate Income Tax</i>	<i>VAT</i>
OECD Members			
<i>Austria</i>	Surcharge of two per cent is imposed; additional one per cent after three months; and additional one per cent after six months.		

¹⁴¹ Ibid 260.

<i>Country</i>	<i>Personal Income Tax</i>	<i>Corporate Income Tax</i>	<i>VAT</i>
OECD Members			
<i>Canada</i>	Compound daily interest calculated at four per cent above the average rate of 90 day government of Canada treasury bills. In addition, for VAT, criminal offences for wilful failure to pay, collect, or remit tax can result in a fine of not more than the total of \$1000 and 20 per cent of the tax due, plus a prison term of up to six months, in addition to any other penalties imposed under the legislation.		
<i>France</i>	Penalty of 10 per cent of tax payable, in addition to late payment interest of 0.4 per cent per month.	Penalty of five per cent of tax payable, in addition to late payment interest of 0.4 per cent per month.	
<i>Iceland</i>	15 per cent penalty charge.		
<i>Luxembourg</i>	Monthly interest of 0.6 per cent.		7.2 per cent interest per year.
<i>Portugal</i>	Maximum penalty: 50 per cent of the unpaid tax; compensatory interest — four per cent by year until the delivery of the taxes returns.		
<i>United Kingdom</i>	Interest is due on all tax paid late at a variable rate. A surcharge of five per cent is payable on any unpaid tax after 28 days from due date; a further five per cent surcharge is payable if still unpaid after six months.	Only interest regime.	Automated system of progressive surcharges based on number of times the payment is late during rolling 12 month period which is extended for each subsequent late return or payment. After a warning is issued surcharge starts at two per cent of VAT unpaid and rises to five per cent, 10 per cent and 15 per cent tax geared to the amount paid late.
Non-Members of the OECD			
<i>Argentina</i>	Fine: between 50 per cent and 100 per cent of the tax evaded. Interest: compensatory interest of 2 per cent per month calculated from due date; additional penal interest of three per cent per month from the date of filing the claim.		
<i>China</i>	When noncompliance occurs, the tax authority recovers the delinquent tax and late fee (0.05 of the delinquent tax) as well as a fine the amount of 50 per cent up to 500 per cent of the delinquent tax.		

With failure to pay on time penalties, there appears to be more uniformity, however there is certainly no consensus. Once again, some countries differentiate

between different taxes, and others between different taxpayers. Turning finally to penalties for failure to report, the pattern is similar.¹⁴²

C Failure to Report Correctly Penalties in Selected Countries

Country	Personal Income Tax	Corporate Income Tax	VAT
OECD Members			
<i>Austria</i>	Penalties of up to double the amount evaded.		
<i>Canada</i>	Repeated omissions within three years, the penalty is 10 per cent of the unreported income. The taxpayer will be assessed in relation to both federal and provincial penalties. For intentional false statements or omissions, a penalty of 50 per cent of the tax attributable to the false statement/omission may be applied.	Repeated omissions within three years, the penalty is 10 per cent of the unreported income. If a false statement or omission is made knowingly or through gross negligence on a filed return, the penalty is \$100 or 50 per cent of the amount of understated tax, whichever is more. In addition, CRA can file criminal charges leading to a fine of 50 per cent to 200 per cent of the understated tax and imprisonment for up to five years.	Intentional false statement or omission subject to a penalty of the greater of \$250 or 25 per cent of the net tax advantage gained. False statements, omissions or destruction or alteration of documents can carry a fine of between 50 per cent and 200 per cent of the amount evaded or gained, or between \$1000 and \$25 000 if the amount cannot be verified. In addition, a prison sentence of up to two years can be imposed, plus any others penalties imposed under the legislation.
<i>France</i>	Penalty ranging from 10–80 per cent of tax evaded in addition to late payment interest of 0.4 per cent per month. For criminal tax fraud, penalty of fine up to €37 500, and/or prison sentence of up to five years; higher penalties for repeat offences. Court may also suspend driving licence and/or prohibit operation of business for up to three years.		
<i>Iceland</i>	15 per cent penalty charge.		One per cent for each day that runs over the deadline up to 10 per cent.
<i>Luxembourg</i>	Up to 400 per cent of tax evaded. If fraud, imprisonment for one month to five years and fines up to €1250 or 10 times of the tax evaded.		

¹⁴² Ibid 263.

<i>Country</i>	<i>Personal Income Tax</i>	<i>Corporate Income Tax</i>	<i>VAT</i>
OECD Members			
<i>Portugal</i>	Maximum amount of penalty: €15 000 (PIT) or €30 000 (CIT and VAT); Compensatory interest — four per cent by year until the delivery of the tax returns. After taxpayer knows the right amount in debt, he will pay interest arrears at one per cent per month.		
<i>UK</i>	Penalty of up to 100 per cent of additional tax payable, according to the seriousness of the offence.		
Non-Members of the OECD			
<i>Argentina</i>	Fine of 50 per cent to 100 per cent of the tax evaded. Compensatory interest of two per cent per month calculated from due date; additional penal interest of three per cent per month from the date of filing the claim.		
<i>China</i>	When noncompliance occurs, the tax authority recovers the delinquent tax and late fee (0.05 per cent of the delinquent tax) as well as a fine the amount of 50 per cent up to 500 per cent of the delinquent tax.		

Once again, there are instances of uniformity but no consensus.¹⁴³ From a comparison across these selected countries, there appears to be the most uniformity across penalties for failure to report correctly. However the preceding two penalty types are equally, if not more, important in building a robust revenue base as they effectively bring taxpayers into the revenue system. Thus, such penalties should, in some cases, be the strongest and best designed.¹⁴⁴ Despite the laudable arguments for uniformity outlined in the sections above, the Australian approach profiled does not accord with the global experience. While Australia is in many ways a leading tax administration jurisdiction, there must be some reason why uniformity of taxation penalties is not more widely embraced; there must be arguments against uniformity.

V ARGUMENTS AGAINST UNIFORMITY

The argument against uniformity of taxation penalties is ultimately that differentiation is also preferable in some situations and circumstances. The arguments can be broken down into a number of threads: (1) that differentiation of taxation penalties is revenue accretive (the practical argument); and (2) that differentiation of taxation penalties is more appropriate when taxes themselves have different purposes (the purposive argument).

143 Forum on Tax Administration, 'Tax Administration 2013: Comparative Information on OECD and Other Advanced and Emerging Economies' (Information Series Note, OECD, 17 May 2013).

144 Bird, 'Administrative Dimensions of Tax Reform', above n 8, 143–4.

A Tax Gap, Revenue Collections and Differentiation

There are perhaps some practical arguments in favour of differentiation that have as their basis a consideration of maximising underlying revenue collection. It should not be forgotten that the tax gap remains a significant issue in a number of countries.¹⁴⁵ Richard Bird, while writing for the World Bank, has noted that '[t]o enforce compliance and reduce evasion, the [tax] administration needs to understand the extent and nature of the potential tax base to estimate the tax gap, preferably by sector and type'¹⁴⁶ and that only then can effective strategies be put in place. The tax gap in many countries is often characterised by blocks or groups of taxpayers (or non-taxpayers) who are not known to administrators or who are habitual under-reporters.¹⁴⁷ There is, in many developing countries, a shadow economy that is so sizable that there are almost two economies. In such a case, '[a]n adequate penalty structure is needed to ensure that those who should register do so, that those who should file do so, and that those who under-report their tax bases are sufficiently penalized to deter tax evasion'.¹⁴⁸

In effect, revenue authorities must be able to 'reward' those that are within the system while trying to identify and capture those who are not. Unfortunately, a uniform penalty system is a partial roadblock in relation to dealing with these issues because a uniform system does not allow differentiated penalties between taxes that have a high tax gap and those that do not. Likewise, a uniform penalty system does not allow differentiation between those that are in the system and those that are not. As a result, there can be an inability to provide a differentiated response for each of these different groups. While it may be possible to introduce an aggravation or reduction factor as in Australia, ultimately all taxpayers (or non-taxpayers) start from the same place which prevents base line differentiation. The paradox is that in order to deal with an entrenched shadow economy and large tax gap, revenue authorities must be presented with tailored (read differentiated) compliance solutions, which include penalties. However, this increases the risk of corruption.

It is also argued that in developing and developed countries alike where taxpayers have multiple overlapping tax obligations (for example, VAT and income tax), taxation penalties should be differentiated to take into account the comparative ease of evasion for each tax.¹⁴⁹ The rationale for this is that the combined effect of taxation penalties should provide an incentive to try to evade the tax which is the easiest to detect. In this way, there is a maximisation of revenue and the possibility of more efficient resource allocation. Uniform taxation penalties prevent this type of revenue system optimisation and while there may be reduced

145 See, eg, Sandford, above n 7.

146 Bird, 'Smart Tax Administration', above n 27, 2.

147 Ibid.

148 Ibid.

149 Taking an example from Richard Bird, 'if VAT is easier to monitor than (say) corporate income taxes, then penalties for evasion should be higher on the latter': Bird, 'Administrative Dimensions of Tax Reform', above n 8, 144.

evasion in one tax type, there may be merely a migration of efforts to other taxes which are subject to the same penalties but are manifestly easier to evade. In most tax systems, taxes are not stand-alone and if a taxpayer pays VAT for instance, that will ultimately affect deductions for income taxes¹⁵⁰ or if a taxpayer pays a resource extraction tax (such as the MRRT) then that is deductible as well. Thus taxpayers can, if they so wish, move tax liability between taxes in some ways. Thus, there are perhaps some practical arguments in favour of differentiation that have as their basis a consideration of maximising underlying revenue collection. Other arguments in favour of differentiation dispense with a consideration of optimisation of revenue.

B Different Taxes and Different Taxpayers

The basis of such non-revenue arguments is that differentiation of taxation penalties is advisable because there are different taxes and different taxpayers. The essence of this argument is not only about fairness and equity — though that is a common theme — but about the congruence between taxes which are applied for different purposes and with different underlying policy rationales and common penalties which are applied regardless of these factors.

In a multi-tax system, it is inescapable that the taxpayers of each tax will be different.¹⁵¹ For instance, in Australia, the MRRT has a limited, highly sophisticated group of taxpayers, while the GST covers businesses that are expected to have some level of sophistication, and the income tax covers all taxpayers, from ASX listed companies with capitalisation in the billions to wage earners with no more complexity than the occasional deduction. For these disparate groups of taxpayers, there are different expectations; each is required to pay the right amount of tax but their efforts in striving for this figure are without doubt judged differently, from a cultural and social point of view. While a uniform penalty system, as in Australia, is able to adjust depending on a taxpayer's circumstances, all taxpayers start at the same place. This is despite the fact that, taxpayers are fundamentally different. For instance, particular practical problems emerge when trying to apply a penalty to an individual when compared with a corporation.¹⁵² There is an ephemeral quality to the 'intent' or 'mindset' of a corporation that makes it more difficult to determine that the corporation has intentionally disregarded tax obligations. While a corporation can hide behind the protection of the corporate veil, an individual cannot and therefore to place both at the same starting point for penalties may seem to be unfair. Similarity of penalties 'should depend on the similarity of the offence to actions which are punishable under other laws, given the cultural context'.¹⁵³ Thus, perhaps similarity of penalties should apply to a given group (such as corporations), and

150 See, eg, Alan Schenk and Oliver Oldman, *Value Added Tax: A Comparative Approach* (Cambridge University Press, revised ed, 2007) 446–8.

151 See generally Sandford, above n 7.

152 Shaw, Slemrod and Whiting, above n 4, 1116.

153 Bird, 'Administrative Dimensions of Tax Reform', above n 8, 143.

could instead unify corporations law, competition law and taxation penalties which apply to one segment of the population.

As well as differences between taxpayers, differences between taxes may also favour differentiation of taxation penalties. Firstly, new taxes are different from established ones which are deeply embedded in the applicable culture,¹⁵⁴ and the imposition of a penalty which would ordinarily not accept ignorance as an excuse would not be appropriate. Similarly, when a new tax is enacted, there may be a need to adjust penalties to institutionalise compliance against the inherent resistance whereas for an established tax, compliance has a certain inertia which may require a lesser penalty. Secondly, some taxes are earmarked as the revenue source for closely matched expenditure.¹⁵⁵ For instance, many resource extraction taxes have revenues which significantly flow into sovereign wealth funds. Finally, taxes have different policy bases. For instance, an annual wealth tax is disproportionately about reallocation of wealth, or at least being seen to do so, rather than revenue adequacy to support wide sweeping government programs. This obviously contrasts with VATs and income taxes which are often general revenue sources.¹⁵⁶

A uniform penalty system on the other hand perhaps does not allow these differences to be adequately reflected and dealt with in order to ensure that there is fairness and a congruent argument for a tax. Importantly, while it may be possible to adjust the impact of the penalty provision through administrative action and guidance, little can be done about the underlying message communicated to the taxpayer viz that there is, in reality, differing importance placed on different taxes. Even taking into account the different reactions of taxpayers to penalties,¹⁵⁷ the underlying message would still be clear to many: if I fail to take reasonable care and underpay my income taxes by \$1, it is largely the same as if I underpay my wealth levy by \$1. While this may be true from a global revenue perspective (\$1 less is \$1 less), it is not true from a social or a cultural point of view. Take, for instance, a common example of a developing country in which the bulk of taxation revenue is derived from a small group of taxpayers extracting natural mineral resources, and the bulk of the population is below the tax-free threshold or is taxed through a final salary and wages withholding tax. In such an economy an underpayment by any one of the small group of taxpayers is disproportionate to one by any other taxpayer simply because the many rely on the few and any underpayment impacts on all. In such an economy, the question should be asked: shouldn't taxation penalties be proportionate to the importance that any one taxpayer has to the overall economy, and therefore provide a clear message to the taxpayer to take proportionate care with their tax affairs? A uniform penalty system naturally would not allow this.

154 Brian Mace, 'Commentary' in Sir James Mirrlees et al (eds), *Dimensions of Tax Design: The Mirrlees Review* (Oxford University Press, 2010) 1189, 1192.

155 See generally Sandford, above n 7.

156 See further Schenk and Oldman, above n 150; Reuven Avi-Yonah, Nicola Sartori and Omri Marian, *Global Perspectives on Income Taxation Law* (Oxford University Press, 2011) 17–23.

157 See Gordon, above n 23, 130–3.

VI CONCLUSION

As stated, the purpose of this article is to explore the arguments for and against the uniformity of taxation penalties using the Australia uniform tax penalty system (pt 4-25 *TAA*) as an illustrative case in point. This article, firstly, assessed the system in Australia for internal congruency and examined whether pt 4-25 has successfully created a 'one stop shop' for penalties. This article, secondly, examined whether uniformity is or should be uniformly prescribed. As to the first purpose, the current uniform administrative and civil penalty system, contained in pt 4-25 of the *TAA*, aims to 'streamline the existing penalties framework and to support compliance under the new tax system'. This article examined these provisions as they stand and a number of reform options have been proposed for further discussion. In particular, it is perhaps worthwhile looking at the interest and appeals system as well as whether it would be possible to move to a penalty system solely based on 'tax-related liabilities' and 'tax laws'. This article has concluded that for the most part, pt 4-25 has created a uniform system with some exceptions noted in this article. In particular, this article has examined how the MRRT has been brought within the uniform penalty system. The usefulness of a penalty system that is as uniform and multipurpose as possible is demonstrated in this instance, as the integration of MRRT required very few substantive changes. Instead, the MRRT was largely grafted onto the system by simply being an act that the Commissioner has general administration for. The MRRT has not reduced the uniformity of the tax penalty system and instead has further shown how beneficial a uniform penalty system can be.

As to the second purpose, the conclusion is perhaps less emphatic. While there is a range of arguments that support uniformity of taxation penalties, there are also counter arguments. Therefore, it cannot be stated that it is self-evident or absolute that the reform of taxation penalties should be specifically and discretely about unification or simplification. As Gordon writes, 'when one considers policy justifications for particular taxes, legal simplification can turn out not to be a very simple task',¹⁵⁸ and surely the same can be said about taxation penalties. This is also apparent from the comparative evidence, which indicates that some countries are persevering with differentiation. As noted in the last section, the design of penalties *can* theoretically have an impact on revenue collections. A uniform system may very well be advisable in Australia, due to the current situation and revenue mix, but it is not solely because it is simpler. It is because it is simpler *and* the resulting revenue gains outweigh possible losses through a lack of differentiation. However, further studies would be needed to confirm this argument, and it is clear that this would not be the same in all countries. There is surely therefore a need for further empirical studies that take the discourse about taxation penalties from being a consideration about simplification and unification in isolation to one about how differentiation or unification can support multifaceted overall tax system reform objectives.

158 Ibid 116.