

From capital gains to tax administration, and everything in between: in honour of Professor Chris Evans

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Abstract

This Essay describes and connects the dots between three strands of scholarship—concerning capital gains taxation, tax compliance costs, and tax system complexity—produced by Professor Chris Evans over two decades.

Key words: capital gains, compliance, complexity

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1. PREFACE

I am honoured to participate in this symposium celebrating the scholarship of Chris Evans. I first met Chris—by email in 2009, and then in person in 2010—when he, along with Judith Freedman, Michael Devereux, and Rick Krever, invited me to participate in a symposium entitled *Revenue Authority Discretion and the Rule of Law*. I was a junior scholar at the time. That symposium was my first ever outside the United States. In fact, before I accepted Chris's invitation, I remember asking one of my senior colleagues if he thought the invitation was real or some sort of a scam.

When I arrived in Prato for the conference, Chris welcomed me warmly. He introduced me to people. He encouraged me to attend an upcoming conference on tax administration hosted by the University of New South Wales. When I followed that advice, again, Chris welcomed me warmly. He introduced me to people.

I have had other opportunities to engage with Chris as a scholar since then, including when he accepted my invitation to speak at the University of Minnesota. I have gained new insights from his scholarly work, which is extensive. I have sought his advice, which has been graciously given and gratefully received. I have enjoyed his company when given the opportunity, sharing good food and travel stories, and trying to understand the mysteries and appeal of cricket.

I know I am not alone in benefiting from Chris's mentorship. I know many other scholars with similar stories. And I know many of those scholars because of Chris's efforts to bring us together in exchanging ideas—whether in Prato, in Australia, or elsewhere. I honour Chris today both as a scholar and as a role model for the kind of senior colleague I hope to be.

The topic of the symposium for which this essay is written is comparative capital gains taxation—a topic about which Chris has written extensively. My own work intersects with other strands of Chris's considerable scholarship concerning tax administration and tax simplification. And we approach our work from distinctly different backgrounds—UK and Australia versus United States, business school versus law school. Nevertheless, taking the full body of Chris's work as a whole, one can easily connect the dots from one topic to the next—it's all interrelated. The following essay endeavours to bring those connections to the fore.

2. THE ROLE OF A SCHOLAR

Celebrating a colleague's scholarly career inspires some amount of introspection and reflection regarding this line of work that we have chosen. We think of ourselves as scholars, but what does that mean? Why do we do what we do? And what is it all for?

In defending academic freedom as a professional norm, one American law professor proclaimed that scholars 'search for truth, which will redound to the benefit of society at large'.¹ From my own experience, at least, such a lofty description seems a little too selfless. Certainly many scholars want ideally to contribute meaningfully to the world around them, to make a difference. But a significant motivation—if not the primary

¹ J Peter Byrne, 'Book Review: Matthew W Finkin and Robert C Post, *Neo-Orthodoxy in Academic Freedom for the Common Good: Principles of American Academic Freedom* (2009), and Stanley Fish, *Save The World On Your Own Time* (2008)', (2009) 88(1) *Texas Law Review* 143, 145.

driving force—for many or even most scholars seems instead to be the need to satisfy their own intellectual curiosity, combined with the compulsion to share any resulting findings or insights, irrespective of whether society at large actually benefits or even cares.

In reviewing a biography of Chief Justice Harlan Fisk Stone (who was a professor and dean at Columbia Law School before his appointment to the United States Supreme Court), another American law professor described the scholarly enterprise as ‘to seek out all relevant information, to weigh impartially the information thus secured, and to render an unbiased judgment on it’.² Certainly most scholars endeavour to approach their work with an open mind, rather than merely to reinforce their own preconceived opinions. But the author then went on to talk about scholars as if they were mere spectators of the world around them. To the extent that many scholars do hope their work will contribute meaningfully to the world around them, and actively endeavour to engage the real world and promote their work accordingly, the notion of scholar as spectator seems far too passive.

An essay celebrating the work of Yale Kamisar, a prominent American legal scholar, described a man whose work combined advocacy and scholarship:

[s]cholarship requires thorough research and careful analysis of competing considerations, but having done that, why should the scholar avoid drawing a conclusion as to which side ha[s] the better of the argument, and forgo explaining in detail the grounding for that conclusion?³

At least in the area of tax scholarship, this portrayal of a scholar’s work may come a little closer to the right balance between the ideals of the ivory tower and its relationship with the world outside. The ideal tax scholar combines serious, careful, and impartial inquiry into how the real world actually works with a desire or even a need to engage that real world. Anyone familiar with the work of Chris Evans can see that ideal in action.

3. CAPITAL GAINS TAXATION IN AUSTRALIA AND ELSEWHERE

Tax experts are forever questing for the ideal, or at least best possible, tax system—one that not only raises revenue, but also is equitable, efficient, and simple. The difficulty is that those attributes are often in tension with one another, so that no tax system can maximise all three simultaneously. Each attribute must be sacrificed to some extent to achieve the optimal balance. Moreover, even if we could be sure empirically of the effects of each reform proposal with respect to equity, efficiency, and simplicity—which we cannot—reasonable people will disagree over the extent to which we ought, for example, to preference equity over simplicity, or vice versa. Ultimately, then, the best we can do is contemplate both existing tax laws and reform proposals in terms of equity, efficiency, and simplicity.

² Philip B Kurland, ‘Book Review: Alpheus Thomas Mason, *Harlan Fiske Stone, Pillar of the Law* (1956)’ (1957) 70(7) *Harvard Law Review* 1318, 1318.

³ Jerold H Israel, ‘Seven Habits of a Highly Effective Scholar’ (2004) 102(8) *Michigan Law Review* 1701, 1714.

The subject of capital gains taxation features this tension in spades. Capital gains taxation alone yields a ‘relatively insignificant’ amount of revenue,⁴ yet is a common feature of many countries’ tax laws. In ‘The Australian Capital Gains Tax: Rationale, Review and Reform’, Evans considered capital gains taxation in relation to the classic formulation that the ideal tax system combines equity, efficiency, and simplicity.⁵ He concluded that capital gains taxation is never simple. Capital gains taxation may or may not be entirely efficient, although a case can be made for its efficiency. But capital gains taxation is essential if a tax system is to be equitable. Equity demands that income from capital be taxed the same as income derived from labour. ‘[A] buck is a buck is a buck.’⁶ Moreover, capital gains taxation is essential to backstop the income tax, ‘protect[ing] the integrity of the income tax base by preventing leakage through dressing up or converting income to capital’.⁷ And, of course, governments all over the world rely heavily on income taxes to support their activities.

Globally, however, capital gains taxation suffers from tremendous structural inconsistency across jurisdictions. In ‘Capital Gains Tax—The Unprincipled Tax?’, Evans and Cedric Sandford surveyed capital gains taxation across six English-speaking countries.⁸ Evans and Sandford found a few similarities across jurisdictions—for example, that all of the countries examined taxed capital gains when realised rather than as accrued. But they found more differences than similarities. Not only did rates vary tremendously, but countries differed in whether they integrated capital gains taxation with their income tax, whether they distinguished between short-term and long-term capital gains, whether they treated death as a realisation event, which assets or events they gave preferences, and how they addressed the bunching problems associated with taxing gains only upon a realisation event. Reasons for the inconsistencies included differences in fiscal and political cultures, but also the fact that, while all capital gains represent income as accessions to wealth, taxpayers perceive at least some capital gains as something other than income. In short, however, according to Evans and Sandford, capital gains taxation lacks a single, principled baseline against which to evaluate any one country’s approach. And that lack of a coherent baseline to taxing capital gains means that ‘[t]he “ideal” is unattainable, and the objective should be to find the best second best that can be achieved within the framework of practical constraints and the politics of the real world’.⁹

So how does one go about pursuing that ‘best second best’ approach to capital gains taxation? In ‘Taxing Capital Gains: One Step Forwards or Two Steps Back?’, Evans offered five propositions for that near-ideal capital gains tax.¹⁰ Here, I paraphrase:

- (1) ‘So far as practicable’, treat capital gains like other forms of income.

⁴ Chris Evans, ‘The Australian Capital Gains Tax: Rationale, Review and Reform’ (1998) 14 *Australian Tax Forum* 287, 306.

⁵ *Ibid* 293-299.

⁶ *Ibid* 293.

⁷ *Ibid* 299.

⁸ Chris Evans and Cedric Sandford, ‘Capital Gains Tax—The Unprincipled Tax?’ [1999] 5 *British Tax Review* 387, 388-393.

⁹ *Ibid* 403.

¹⁰ Chris Evans, ‘Taxing Capital Gains: One Step Forwards or Two Steps Back?’ (2002) 5(1) *Journal of Australian Taxation* 114, 121-122.

- (2) Tax capital gains when realised rather than when accrued to minimise liquidity and valuation issues.
- (3) Treat death as a realisation event.
- (4) Tax capital gains at prevailing marginal income tax rates in order to minimise arbitrage.
- (5) To the extent possible politically, minimise concessions and preferences.

To exemplify particularly that last proposition, Evans recognised that politics may dictate giving preferential treatment to gains associated with the sale of a family home, but he suggested capping the preference.¹¹ For that matter, Evans acknowledged that attaining all five of these propositions would be impossible. Rather, they must be compromised and balanced. But these five propositions offer that theoretical baseline against which to evaluate any single approach to capital gains taxation. Evans went on to evaluate the Australian capital gains tax as of that time against the five propositions.

Of course, Evans's work on capital gains taxation is much more extensive than these three articles. Among other publications, Evans published a book discussing the implications of the Australian and UK approaches to taxing personal capital gains for the operating costs of those countries' tax systems.¹² Also, for several years, Evans co-authored the *Australian CGT Handbook*, 'to provide tax practitioners and students of taxation with a definitive guide to' capital gains taxation in Australia.¹³ Evans's contributions to the literature on capital gains taxation alone would reflect a solid and respectable academic career. But Evans has not limited his work to capital gains taxation.

4. FROM CAPITAL GAINS TAXATION TO COMPLIANCE COSTS

More than two decades ago, the team of Evans, Katherine Ritchie, Binh Tran-Nam and Michael Walpole undertook an extensive study of tax compliance costs in Australia.¹⁴ All had written previously about tax compliance costs. But, this study was a huge effort, surveying more than ten thousand individual and business taxpayers with respect to the 1994-95 income year, undertaken at the behest of the Australian Taxation Office.¹⁵ The team found that federal tax compliance costs in Australia represented '7% of all federal tax revenue and 1.36% of Gross Domestic Product'.¹⁶ Also particularly notable, they observed that tax compliance costs for both individual and business taxpayers are regressive, with small businesses bearing a particularly high burden.¹⁷ By comparison,

¹¹ Ibid.

¹² Chris Evans, *Taxing Personal Capital Gains: Operating Cost Implications* (Australian Tax Research Foundation, 2003).

¹³ See, eg, Gordon Cooper and Chris Evans, *Australian CGT Handbook 2015-16* (Thomson Reuters, 7th ed, 2015).

¹⁴ The full report of the study was published as Chris Evans et al, *A Report into Taxpayer Costs of Compliance* (Australian Government Publishing Service, 1997).

¹⁵ Chris Evans et al, 'Taxation Compliance Costs: Some Recent Empirical Work and International Comparisons' (1998) 14 *Australian Tax Forum* 93, 94-96.

¹⁶ Ibid 99.

¹⁷ Ibid 100, 104.

large business taxpayers experience negative compliance costs, in that their tax benefits outweigh their costs of complying with tax system requirements.¹⁸

That initial study formed the foundation and perhaps inspiration as well for a much more extensive body of scholarly literature on tax compliance costs, not only by the members of that original team but by other tax scholars as well. Evans and Tran-Nam published a critical evaluation of the work of Cedric Sandford and its impact on their own scholarship and that of other tax administration scholars.¹⁹ With one or more of that original team as well as with later co-authors, Evans's work in the area of tax compliance costs in Australia prompted him to compare the Australian experience with that of other countries—as, for example, in 'The Tax Compliance Costs of Large Corporations', with Tran-Nam and Philip Lignier.²⁰ In a much more recent study, Tran-Nam, Evans and Philip Lignier demonstrated that tax compliance costs in Australia continue to be large and regressive, notwithstanding at least some efforts at amelioration.²¹

Perhaps most helpfully to the larger body of tax compliance cost scholarship, however, after wrapping up their own study, that initial group of Evans, Ritchie, Tran-Nam and Walpole published an article, 'Tax Compliance Costs: Research Methodology and Empirical Evidence from Australia', outlining their methodological approach to evaluating tax compliance costs, along with the many choices and the thinking that went into that methodology.²² Such documentation is of tremendous value and service to tax administration scholars worldwide.

Katherine Ritchie is, unfortunately, no longer with us. But the work of Evans, Ritchie, Tran-Nam, and Walpole in this area laid a foundation that helped make the University of New South Wales one of the world's leading academic centres—if not *the* leading academic centre—for the study of tax compliance costs. The importance of Evans's work on tax compliance costs for the field of tax administration cannot be underestimated.

5. FROM COMPLIANCE COSTS TO COMPLEXITY

Too often, in designing the ideal tax system, tax academics lose sight of the implications of tax policy reform for the day-to-day of tax administration and tax compliance. The most equitable and efficient tax reform proposal from the perspective of economists may prove to be frustratingly complicated for the administrators tasked with implementing it, for the taxpayers who must comply with it, or both. Although tax scholars like to talk about tax system design in terms of equity, efficiency, and simplicity, frequently, simplicity gets short shrift.

On several occasions, Evans has acknowledged that, although capital gains taxation is essential for an equitable tax system, it is unavoidably complicated. Particularly in his

¹⁸ Ibid 103.

¹⁹ Binh Tran-Nam and Chris Evans, 'The Impact of Cedric Sandford on the Discipline of Tax Compliance Costs' (2002) 17 *Australian Tax Forum* 389.

²⁰ See, eg, Chris Evans, Philip Lignier and Binh Tran-Nam, 'The Tax Compliance Costs of Large Corporations: An Empirical Inquiry and Comparative Analysis' (2016) 64(4) *Canadian Tax Journal* 751.

²¹ Philip Lignier, Chris Evans and Binh Tran-Nam, 'Tangled up in Tape: The Continuing Tax Compliance Plight of the Small and Medium Enterprise Business Sector' (2014) 29(2) *Australian Tax Forum* 217.

²² Binh Tran-Nam et al, 'Tax Compliance Costs: Research Methodology and Empirical Evidence from Australia' (2000) 53(2) *National Tax Journal* 229.

early work, Evans accepted that complexity as the cost of equity. As his compliance work correspondingly observes, however, complexity drives up compliance costs. Perhaps recognising that relationship inspired Evans to contemplate tax simplification. As with capital gains taxation and compliance costs, Evans has written quite a lot on the topic of tax complexity and tax simplification.

Indeed, in 2012, Evans himself connected the relevant dots among these topics. In ‘Tax Governance Issues: Managing System Complexity’, Evans observed that most taxpayers voluntarily do their best to comply with the tax laws.²³ They file their returns and pay their taxes. They generally trust that their tax system is fair and efficient. They have faith, and it is that faith that drives their voluntary compliance.

But tax system complexity, as Evans recognised, ‘gives rise to both intentional and unintentional non-compliance’.²⁴ That non-compliance ‘leads to tax revenue losses and it also causes deadweight losses’.²⁵ Thus, ‘tax complexity itself is a kind of tax’.²⁶ Pulling together the costs of complexity with his other work, however, Evans focused particularly on the relationship of compliance costs and the corresponding disincentive to engage in entrepreneurial activity, although he also acknowledged that complexity ‘reduces the [tax] system’s transparency and undermines trust in its fairness’.²⁷

Tax system complexity is mostly the fault of the legislature. Revenue authorities have no choice but to implement what the legislature enacts. Yet revenue authorities receive the blame when taxpayers are unhappy with the tax system. Tax specialists in the United States frequently contend that fear of the Internal Revenue Service motivates people to comply with the tax laws. But fear breeds resentment, which discourages compliance. By embracing a responsive regulation approach to tax administration and enforcement, Australia is at least somewhat more advanced in recognising that fear is not always the best way to motivate taxpayer compliance.²⁸

Regardless, toward this same goal, in ‘Tax Reform and “Rough Justice”: Is It Time for Simplicity to Shine?’, Evans and Jason Kerr suggested that the time has come for greater focus on simplifying the tax system, even at the expense of some amount of equity and efficiency.²⁹ The article is mostly a commentary on the Australia’s Future Tax System Review, or Henry Review, and its failure to go far enough in pushing for simplification of the personal income tax.³⁰ Nevertheless, the article offers two additional observations worth noting.

²³ Chris Evans, ‘Tax Governance Issues: Managing System Complexity’ (2012) 31(1) *Economic Papers* 30.

²⁴ *Ibid* 32.

²⁵ *Ibid*.

²⁶ *Ibid* (quoting Sen. Max Baucus, Chair of the US Senate Finance Committee).

²⁷ *Ibid* (quoting the US President’s Economic Recovery Advisory Board 2010 report, *The Report on Tax Reform Options: Simplification, Compliance, and Corporate Taxation*).

²⁸ See, eg, Sagit Leviner, ‘A New Era of Tax Enforcement: From “Big Stick” to Responsive Regulation’ (2009) 42(2) *University of Michigan Journal of Law Reform* 381, 410-425 (exploring the Australian taxing authority’s pursuit of the ‘responsive regulation’ model).

²⁹ Chris Evans and Jason Kerr, ‘Tax Reform and “Rough Justice”: Is It Time for Simplicity to Shine?’ (2012) 27(2) *Australian Tax Forum* 387, 390-391.

³⁰ For further commentary by Evans and co-authors regarding the aftermath of the Henry Review, see also Binh Tran-Nam et al, ‘Managing Tax Complexity: The State of Play after Henry’ (2016) 35(4) *Economic Papers* 347.

The first is a distinction ‘between legal simplicity and effective simplicity’.³¹ Anyone who has read the legal literature on rules versus standards, or the more contemporary literature on principles-based taxation and regulation, should intuitively appreciate that there is a difference between simplicity in the law and simplicity in the implementation and administration of that law. Policy-makers make a mistake in equating the two.

Second, Evans and Kerr recognise and call out the Henry Review for a mismatch between the political rhetoric of tax simplification and the reality of tax reform proposals.³² We see this in the United States as well. Political actors, and political reports, often speak of a need to make particularly the personal income tax simpler and easier for non-tax specialists to follow. In the United States, for example, politicians frequently express the desire to make individual income tax returns no larger than a postcard.³³ But when it comes to the actual policy reforms needed to accomplish that goal, all of the political will goes the other way. Existing tax expenditures are often viewed as untouchable. Politicians and tax scholars alike routinely propose new and expanded tax expenditures to satisfy other policy goals, at the expense of tax simplification.

6. WHEN ALL ELSE FAILS, CALL FOR BACKUP

The academic enterprise is often rewarding but sometimes frustrating. Scholars continue to diligently survey the data, evaluate competing theories, and offer our best suggestions for improving the law and the societies in which we live. We hope to inspire real, practical change, but often our voices go unheeded by those who hold the power actually to effect that change. Yet, like Sisyphus rolling that rock back up the hill, we keep at it—collecting more data, considering new theories, and developing more proposals for reform. When pursuing real world change, it helps sometimes to have a little outside assistance.

In ‘The Office of Tax Simplification: The Way Forward?’, with Jeremy Sherwood and Binh Tran-Nam, Evans considered the efficacy of the UK’s Office of Tax Simplification (OTS).³⁴ The OTS was established as a small, temporary office within HM Treasury with the mission of pursuing tax simplification. As documented by Evans, Sherwood and Tran-Nam, the OTS has enjoyed some success in that direction.

Much of what the OTS has accomplished seems best described as ‘small ball’. Sensibly, given its size and its temporary status, the OTS has eschewed large, sweeping reform proposals in favour of building relationship and pursuing small and achievable initiatives: for example, ‘a new cash basis for small businesses, the abolition of nearly 40 minor tax reliefs and replacement of the unwieldy paper-based HM Revenue and Customs approval process for employee share schemes with an automated self-approval system’.³⁵ But small simplification measures, taken collectively, can make a measurable difference. Describing the OTS’s achievements as ‘both encouraging and welcome’,

³¹ Evans and Kerr, above n 29, 392.

³² *Ibid* 401-406.

³³ See, eg, Thomas Franck, ‘Republicans say you can file your taxes with a postcard if new bill passes; H&R Block shares drop’, *CNBC* (2 November 2017), <https://www.cnbc.com/2017/11/02/republicans-say-you-will-file-your-taxes-with-a-postcard-if-new-bill-passes.html>.

³⁴ Jeremy Sherwood, Chris Evans and Binh Tran-Nam, ‘The Office of Tax Simplification: The Way Forward?’ [2017] 2 *British Tax Review* 249.

³⁵ *Ibid* 253.

Evans, Sherwood and Tran-Nam suggest that other countries mimic the OTS model and offer key principles for attaining similar success.³⁶

7. CONCLUSION

It is difficult to summarise twenty plus years of scholarly accomplishments in a single essay. I harbour no illusions that I have done more than scratch the surface of Evans's prodigious scholarly career in these pages. And Evans clearly is not yet finished with this work. For example, at the symposium in his honour, after outlining all of the above, I was handed my very own, hot-off-the-presses copy of *Comparative Taxation: Why Tax Systems Differ*, co-authored by Evans with John Hasseldine, Andy Lymer, and Robert Ricketts, which draws from and builds on an earlier book by Cedric Sandford with a similar title, and which covers all of the above-described topics and more. Keeping up with Chris Evans is a daunting task. He is a scholar's scholar—a tax scholar to emulate, and to honour, as we do with this symposium.

³⁶ Ibid 262-263.