Principles-based drafting: experiences from tax drafting

Daniel Lovric[1]

1. Introduction

Principles based drafting has a lot to offer. It can be easier for the public to understand, avoids loopholes and gaps in the law, and brings order to complex regulatory systems. Critics say that it leads to uncertainty, or gives too much power to the executive and the judiciary. Nevertheless, the supporters of principles-based drafting have scored some recent victories, at least in Australia. For example, Australian income tax laws are now often developed according to a "coherent principles" approach. More broadly, however, the debate over principles-based drafting is ongoing, and it is difficult to tell how much impact it will have across the entire statute book.

My main experience with principles-based drafting has been in drafting income tax laws for the past 9 years. This has been a busy time in Australian tax law, with the introduction of major new schemes for corporate group taxation, superannuation and the taxation of financial arrangements. Each of these schemes has involved principles-based drafting, at least to some extent. I'll come back to some examples later.

This paper focuses on 3 aspects of principles-based drafting. Firstly, I will define what makes a draft principles-based, and identify particular kinds of principles-based provisions. Secondly, I will briefly run through the arguments for and against principles-based drafting. Thirdly, and lastly, I will describe 2 processes of principles-based drafting that I have seen in drafting tax law, which I call *top-down principles-based drafting* and *ground-up principles-based drafting*.

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[1] Senior Assistant Parliamentary Counsel, Australian Commonwealth Office of Parliamentary Counsel, Canberra.

2. What makes a draft principles-based?

A principles-based draft states a *broad* and *operative* principle. In many cases, such principles will be accompanied by surrounding provisions that provide examples, clarifications, add-ons and carve-outs. These surrounding provisions illustrate how the principle works in practice, or make explicit add-ons or carve-outs to its operation.

A provision states a *broad* principle if the principle is flexible and covers a wide range of circumstances at a high level of abstraction. Broad principles have a degree of uncertainty at their edges; they have a core of relatively clear application surrounded by a penumbra of uncertain application. Some aspects of this uncertainty may be clarified by surrounding provisions (as we will see later). Other aspects of this uncertainty may be clarified by subsequent amendments or case law.[2] Yet even with such clarifications, the entire operation of a broad principle is never fixed in a bright-line way.

A provision is *operative* if it is the source of rights, duties, powers or privileges. It states the preconditions for a legal result, and provides for that result. By contrast, if a provision merely provides context for the operation of other provisions (as is the case with an objects clause), it is not operative, and is therefore not principles-based in the sense used in this paper.

2.1 Examples of principles-based provisions

A good example of a broad principle is contained in subsection 6-5(1) of the Income *Tax Assessment Act 1997*:

> **6-5 Income according to ordinary concepts (ordinary income)**
>
> (1) Your ***assessable income*** includes income according to ordinary concepts, which is called ***ordinary income***.
>
> Note: Some of the provisions about assessable income listed in section 10-5 may affect the treatment of ordinary income.

Clearly, this subsection states a broad principle. The idea of "income according to ordinary concepts" covers a very wide range of circumstances, is flexible, and has a degree of uncertainty at its edges. This is not to say that the principle is totally plastic. A huge amount of case law surrounds it, concretises it, and gives it substance in particular situations.[3] Yet subsection 6-5(1) is clearly not drafted in a black letter or bright line style.

The principle in subsection 6-5(1) is also *operative*, because it is the legal source for the

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[2] There is an important choice to be made in drafting principles-based provisions as to whether to resolve a particular uncertainty immediately, or to leave this to further amendments, administrative practice and/or the courts. In practice, if an issue is raised during the initial drafting process, it tends to be resolved expressly in the first set of provisions, unless it is seen as merely theoretical, unimportant or clearly resolved by the basic principle standing alone.

[3] This surrounding case law is not a necessary feature of a principles-based provision. Nevertheless, it is likely to be a feature such a provision if it is important, and has been in existence for some time.

calculation of the ordinary income aspect of assessable income. Because of subsection 6-5(1), "income according to ordinary concepts" is included in assessable income. If the subsection were removed, there would be no legal basis for including ordinary income in assessable income. It is the legal source for the inclusion of ordinary income in assessable income, and is therefore an *operative* principle.

Subsection 6-5(1) is not surrounded by *examples, clarifications, add-ons and carve-outs*. However, some tax provisions do include this feature. An example is section 770-10 of the *Income Tax Assessment Act 1997*:

770-10 Entitlement to foreign income tax offset

(1) You are entitled to a *tax offset for an income year for *foreign income tax. An amount of foreign income tax counts towards the tax offset for the year if you paid it in respect of an amount that is all or part of an amount included in your assessable income for the year.

Note 1: The offset is for the income year in which your assessable income included an amount in respect of which you paid foreign income tax—even if you paid the foreign income tax in another income year.

Note 2: If the foreign income tax has been paid on an amount that is part non-assessable non-exempt income and part assessable income for you for the income year, only a proportionate share of the foreign income tax (the share that corresponds to the part that is assessable income) will count towards the tax offset (excluding the operation of subsection (2)).

Note 3: For offshore banking units, the amount of foreign income tax paid in respect of offshore banking income is reduced: see subsection 121EG(3A) of the *Income Tax Assessment Act 1936.*

Taxes paid on section 23AI or 23AK amounts

(2) An amount of *foreign income tax counts towards the *tax offset for you for the year if you paid it in respect of an amount that is your *non-assessable non-exempt income under either section 23AI or 23AK of the *Income Tax Assessment Act 1936* for the year.

Note 1: Sections 23AI and 23AK of the *Income Tax Assessment Act 1936* provide that amounts paid out of income previously attributed from a controlled foreign company or a foreign investment fund are non-assessable non-exempt income.

Note 2: Foreign income taxes covered by this subsection are direct taxes (for example, a withholding tax on a dividend payment) and not underlying taxes, only some of which are covered by section 770-135.

Exception for certain residence-based foreign income taxes

(3) An amount of *foreign income tax you paid does not count towards the *tax offset for the year if you paid it:

(a) to a foreign country because you are a resident of that country for the purposes of a law relating to the foreign income tax; and

(b) in respect of an amount derived from a source outside that country.

Exception for previously complying funds and previously foreign funds

(4) An amount of *foreign income tax paid by a *superannuation provider in relation to a *superannuation fund does not count towards the *tax offset for the year if:

(a) the tax was paid in respect of an amount included in the fund's assessable income under table item 2 or 3 in section 295-320; and

(b) the provider paid the tax before the start of the income year.

Note: Table items 2 and 3 in section 295-320 include additional amounts in the assessable income of superannuation funds that change their status from complying to non-complying or from foreign to Australian.

Exception for credit absorption tax and unitary tax

(5) An amount of *credit absorption tax or *unitary tax you paid does not count towards the *tax offset for the year.

The broad principle here is in subsection 770-10(1):

> An amount of foreign income tax counts towards the tax offset for the year if you paid it in respect of an amount that is all or part of an amount included in your assessable income for the year.

Here we have a *broad* principle: the idea of an amount of foreign tax in respect of an amount included in assessable income is flexible and has uncertainty at its edges. The principle is also *operative*: it is the legal source of the rule determining the amount of foreign income tax counting towards a foreign income tax offset.

Yet section 770-10 does not rely just on a broad and operative principle to achieve its purpose: it contains several carve-outs, add-ons and clarifications. For example, subsection (2) is an add-on, which extends the class of amounts counting towards the offset to include certain amounts in respect non-assessable non-exempt income. Subsections (3), (4) and (5) are carve-outs, restricting certain amounts from counting towards the offset. Notes 1 and 2 to subsection (1) clarify the operation of the basic principle.

Some more needs to be said about clarifications, as opposed to carve-outs and add-ons.

Clarifications can be divided into 2 broad classes. Firstly, there are clarifications that merely restate what is the clear operation of the broad principle. Secondly, there are clarifications that resolve real uncertainty in the operation of the broad principle. This is an important distinction, as it determines the form in which a clarification is drafted. The first type of clarification can be achieved by non-operative provisions such as an explanatory note (an example of which is given by Notes 1 and 2 to subsection 770-10(1) of the *Income Tax Assessment Act 1997*). Such clarifications can even be made in the Explanatory Memorandum to a Bill, as they merely

restate the operation of the law. By contrast, the second type of clarification must be achieved by an operative provision, as it may alter the content of the law.

An example of the second type of clarification is the kind of provision that clarifies that a particular matter is within the scope of a legislative principle. An example here can be seen in recent provisions dealing with foreign hybrid entities. These are entities that may be treated (particularly in the United States) as a flow-through entity for tax purposes, but as a separate legal entity for tax purposes in Australia. Subdivision 830-B of the *Income Tax Assessment Act 1997* essentially treats them for certain Australian tax purposes as a flow-through entity in the form of a partnership. The central provisions of Subdivision 830-B make this clear:

> **830-20 Treatment of company as a partnership**
>
> If a company is a *foreign hybrid company in relation to an income year, *[most Australian income tax provisions]* apply as if the company were a partnership, and for that purpose the following provisions of this Subdivision have effect.
>
> **830-25 Partners are the shareholders in the company**
>
> The partners in the partnership are the *shareholders in the company.
>
> **830-30 Individual interest of a partner in net income etc. equals percentage of notional distribution of company's profits**
>
> The individual interest of a partner in the *net income or *partnership loss of the partnership of the income year is equal to the percentage that, if the profits of the company for the income year were distributed at the end of the income year to its *shareholders:
>
> (a) if paragraph (b) does not apply—as dividends; or
>
> (b) if the company's *constitution or other rules provide for the distribution of profits other than as dividends—in accordance with the constitution or those rules;
>
> the partner, as a shareholder, could reasonably be expected to receive of the total distribution.

The central principle in section 830-20 is operative and broad, deeming a company to be a partnership for Australian income tax purposes. The consequences of the principle are, however, not entirely clear in a number of respects.[4] Firstly, it seems likely the partners in the notional partnership are the shareholders in the company - but there may be residual doubt here. Thus an

[4] Other provisions in Division 830, not reproduced here, provide further clarification of the general principle.

operative clarification is needed in the form of section 830-25. Secondly, the mere deeming of the company to be a partnership does not resolve the question of what interest each individual partner has in the annual income or loss of the notional partnership. By itself, the general principle in section 830-20 could allow a range of answers to this question. Thus section 830-30 provides certainty here with an operative clarification, using the benchmark of a shareholder's percentage share of the company's profit distribution.

The key point for our purposes is that the clarifications in Subdivision 830-B are not clear-cut applications of the broad principle. They therefore need to be expressed as operative provisions rather than as explanatory notes.

The practical problem for the legislative counsel is to distinguish between operative and non-operative clarifications, and between clarifications, add-ons and carve-outs. In many cases in the tax field, the difference between these categories can be hard to see. For example, it requires a fine judgement to say whether a broad principle achieves a particular result (thus allowing a clarification to be made by a non-operative note, or in the Explanatory Memorandum), or whether the degree of uncertainty involved is more than theoretical (in which case the clarification must be made by an operative provision). Similarly, there is a degree of judgment involved in distinguishing between an operative clarification on the one hand, and an add-on or carve-out on the other hand. Here, the legislative counsel must rely substantially (but not entirely) on the advice of experienced policy instructors, who should have a practical idea of how a principle will be applied by tax practitioners, the tax authorities and the courts. The importance of such policy expertise in principles-based drafting is a theme I will return to later in this paper.

For the present, it is enough to acknowledge that the concepts of principle, carve-out, add-on, operative clarification and non-operative clarification are not always easy to distinguish from one another. They tend to merge into one another at the margins. But we should still pay attention to them! They are ideal types that are very helpful design tools for the legislative counsel. It is a very useful discipline in designing principles-based legislation to classify each proposed provision into one of these categories. The result will be a much better organised draft - and presuming the principles are well-chosen - a draft well suited to apply in the real world.

One can contrast this approach to principles-based drafting with several similar-looking approaches that are not principles-based (at least, in the sense of principles-based drafting dealt with in this paper).

2.2 Examples of some provisions that are not principles-based

Several kinds of drafting styles produce provisions that look similar to principles-based provisions. However, they are not principles-based in the sense used in this paper. This is because they lack either or both of the essential characteristics of principles-based provisions: the characteristics of being both *broad* and *operative*.

I stress here that this is not a criticism of other drafting styles: each style has its appropriate role and its appropriate place.

A good example of a principle that is *not operative* is an objects clause. Here, the principle may be broadly expressed, with flexibility of application and grey areas at its edges. However, it is

not operative in the sense of being the source of rights, duties, powers or privileges. Other provisions create these legal results, while the objects clause merely colours the meaning of those other provisions.

There is a rather delicate judgement involved in choosing whether to express policy through an objects clause or through an operative principle. An operative principle is naturally more ambitious in its scope, while an objects clause is somewhat more conservative in its aims. The important point here is that the two styles of drafting are built on fundamentally different foundations. An operative principle is the source of legal rights, duties, powers and privileges, and is surrounded by specific rules that clarify the operation of the principle or provide carve-outs and add-ons. By contrast, where an objects clause is used, the source of such legal consequences are the specific rules and the objects clause merely alters the operation of those rules in cases of uncertainty or ambiguity.

This can be seen in the following example of an objects clause. Section 205-45 of the *Income Tax Assessment Act 1997* imposes a liability for franking deficits tax (under Australia's dividend imputation system, franking accounts can sometimes have a negative balance):

> **205-45 Franking deficit tax**
>
> *Object*
>
> (1) While recognising that an entity may anticipate *franking credits when *franking *distributions, the object of this section is to prevent those credits from being anticipated indefinitely by requiring the entity to reconcile its *franking account at certain times and levying tax if the account is in *deficit.
>
> *Franking deficit at end of income year*
>
> (2) An entity is liable to pay franking deficit tax imposed by the *New Business Tax System (*Franking *Deficit Tax) Act 2002* if its *franking account is in *deficit at the end of an income year.

Here, subsection (2) is the source of the legal operation of the provision. The subsection is not drafted in a principles-based style, but rather utilises a black letter approach. It imposes a liability for franking deficit tax where an entity's franking account is in deficit at the end of an income year: this is a bright line criterion for establishing a legal result. By contrast, the objects clause in subsection (1) is drafted using a broad principle, namely, the prohibition of indefinite anticipation of franking credits. Should a situation arise in relation to which subsection (2) has an indefinite operation, the objects clause will have the effect of encouraging any uncertainty to be resolved in harmony with this principle. However, the principle itself is not the source of legal consequences in the form of a liability for franking deficits tax; these consequences are provided by the black letter rule in subsection (2).

We can now see that objects clauses are broad but not operative, and are therefore not the kind

of principles-based drafting discussed in this paper. Let us now contrast objects clauses with a style of provision that is *operative but not broad*. An example here is what I call *results-based drafting*,[5] such as in subsection 301-35(2) of the *Income Tax Assessment Act 1997*:

> **301-35 Superannuation lump sum—taxable component taxed at 20%**
>
> (1) If you are under your *preservation age when you receive a *superannuation lump sum, the *taxable component of the lump sum is assessable income.
>
> ...
>
> (2) You are entitled to a *tax offset that ensures that the rate of income tax on the *taxable component of the lump sum does not exceed 20%.

Subsection 301-35(2) is drafted in terms of *results*. It does not tell you how to calculate the amount of the tax offset, but merely says that you must make that calculation so as to end up with an effective tax rate of 20% on the amount of the superannuation lump sum. In other words, its deals with results, not means. This is a very helpful way to avoid masses of complicated detail that can arise, for example, if the receipt of the lump sum brings the taxpayer into a higher tax bracket in Australia's system of marginal personal tax rates. Results-based drafting is quite a useful tool in avoiding complicated formulas and method statements.

Nevertheless, subsection 301-35(2) does not express a *broad* principle. There is no flexible principle here with greyness and uncertainty at its edges. The 20% rate cap on the lump sum is calculated with mathematical precision. There is no uncertainty or flexibility of operation of the rule.

Thus subsection 301-35(2) is not a principles-based provision. It is certainly operative in the sense of being the source of rights, duties, powers or privileges. However, it contains no broad principle.

> "Results-based" drafting often produces narrow operative provisions. They are extremely useful in dealing with particular mathematical problems such as that posed by the receipt of a superannuation lump sum. However, they are less useful in dealing with more complex situations involving unpredictable and unquantifiable matters, particularly those arising in more sophisticated commercial transactions. It is in dealing with these more complex situations that principles-based drafting shows its true worth.

This is now a useful point to turn briefly to the debate about whether principles-based drafting is

3. The debate over principles-based drafting

Opinions differ about the basic desirability of principles-based drafting. At the one extreme, one

[5] I have drawn on this term as used by Mr Keith Byles in a paper produced for internal use at OPC in Canberra.

may consider principles-based drafting to be a dangerous development that leads to uncertainty in the law and unrestricted administrative discretions. At the other extreme, one may see principles-based drafting as a universal cure for complexity in legislation. I think that very few legislative counsel take either of these extreme views. Instead, most legislative counsel see principles-based drafting as one approach among many, which is suited to some projects but not others. One should also not forget the political factors that may motivate a principles-based approach.[6]

The great advantage of principles-based drafting is its breadth and flexibility. Drafting in principles allows many rules to be compressed into one principle. This can be easier to read, can avoid loopholes and is often closer to original policy decisions. I'll give one example here. An Australian sociologist, John Braithwaite, compared principles-based nursing home regulation with a system of rules-based regulation.[7] The principles-based system required nursing homes to maintain a generally "home-like" atmosphere, whereas the rules-based system had detailed prescriptions, such as those requiring a particular number of pictures to be on bedroom walls. This led to situations where, prior to inspections, nursing staff would rip pictures out of magazines and sticky-tape them on to the walls. Another rule required recorded levels of participation in leisure activities. This led nursing staff to bring out sleeping residents in their wheelchairs so that they could be counted on the participation record. Braithwaite found that the principles-based system was applied with more empathy and common sense. This was due, in part,8 to the focus of the relevant legislation on intuitive principles rather than on complex rules.

The great disadvantage of principles-based drafting is the uncertainty that it can introduce into the law. Black letter drafting, for all its faults, at least provides certainty in the situations it deals with. Principles tend to advantage expert users of legislation, who are familiar with the various applications of broad principle. Occasional users of the legislation are left struggling without clues as to what the principles mean in practice. Furthermore, critics say that principles-based drafting leaves too much decision-making power to administrators and judges in applying the legislation.

My own view is that the uncertainty of principles can be dealt with quite well by extra provisions providing clarifications, add-ons and carve-outs. I take some heart here from the remarks of Anthony Mason, a well-known former Australian High Court Chief Justice who

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6 See R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner [2002] 1 All ER 776, [2002] 2 WLR 255, para. 45.

7 John Braithwaite, "Rules and Principles: A Theory of Legal Certainty", Australian Journal of Legal Philosophy, Volume 27 (2002) 47 at p. 60.

8 Another important reason was the skill and common sense displayed by the people administering the legislation. The skill of administrators should never be underestimated in making complex legislative schemes work. Indeed, it could be argued that the skill of the administrator is far more important than the good design of the legislation in the first place.

commands respect internationally: [9]

> The view that a taxing Act is to be construed literally has given way to the modern view that such an Act is to be subject to the ordinary principles which govern the interpretation of statutes. Once this is accepted, there is no reason for rejecting "general principle" drafting of a Tax Act except to the extent that, in many areas, precision is required.
>
> … I see no reason why the general provision and the particular exemplifications should not be included in the statute with an appropriate provision expressing the relationship between the two. I have a strong objection to splitting provisions between the Explanatory Memorandum and the statute.

Here is some support for a principles-based structure in tax law from the very highest levels of the judicial profession.

Nevertheless, the former Chief Justice is cautious in his support here. He stresses that "in many areas, precision is required". Furthermore, he warns against putting too much clarifying material in extrinsic material. Principles-based drafting is not an exercise to be undertaken with one's eyes closed to its risks.

Indeed, one can place too much reliance on principles in any scheme of legislation. Some legislative schemes are by their nature based on historical practice or political compromise, and are not well suited to principles-based drafting. Furthermore, developing good principles takes a lot of time - probably more time than developing black letter rules - and requires a fairly high level of policy expertise and drafting expertise. Finally, even if an initial draft uses principles successfully, later developments in the political process can result in urgent amendments that destroy the delicate harmony between operative principles and various clarifications made in the legislation.

These difficulties mean that principles-based drafting should be undertaken cautiously and without a crusading attitude. Depending on the time available, the experience available and the nature of the regulatory system, designing an entire piece of legislation around principles may be impractical.

We also have to keep in mind that some projects are ideally suited to principles-based drafting! Principles-based drafting has so much to offer in the regulation of complex situations, in terms of flexibility and durability. With well designed clarifications, a principles-based statute can also provide more clarity and certainty than a mass of black letter rules. Thus, principles-based drafting cannot be ignored - rather, it should be used with caution.

With these thoughts in mind, we can now look at two particular styles of principles-based drafting. These styles will illustrate some of the points made earlier in this paper.

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[9] Anthony Mason, "Part IVA Income Tax Assessment Act 1936: An Insoluble Problem?", ANU Staff Seminar, 23 August 2006.

4. Top-down drafting and ground-up drafting

From my experience in drafting tax provisions, it seems to me that there are 2 basic styles of principles-based drafting. I call these top-down drafting and ground-up drafting.

Top-down drafting is where the legislative counsel starts with an overarching principle, and then builds down by filling in its applications and details. This is what we traditionally think of as principles-based drafting. Here, the principle is defined from the outset, usually by policy experts. The task of the legislative counsel is to draft specific examples, add-ons, carve-outs and clarifications in a coherent way. It is a bit like building a house according to a framework supplied by an architect. The legislative counsel's job is to fit the examples, add-ons, carve-outs and clarifications into this framework. Sometimes, the framework needs to be altered in a minor way to accommodate a particular fitting. Most of the time, however, the structure is pre-determined.

By contrast, ground-up drafting does not begin with a principle. Rather, it begins with a mass of loosely linked specific rules. Traditionally, such rules would be drafted in a black letter way, without the use of principles. However, it is open to the legislative counsel to suggest a principles-based approach, by constructing a principle out of the mass of detail. This is ground-up drafting. It could also be called inductive drafting, as the basis process is to build principles through a process of induction. Again, the analogy of building a house is useful. In ground-up drafting, all that has been supplied is a pile of unorganised building materials. The legislative counsel's job is to figure out a way to put these materials together in a way that forms a coherent whole. That is, the legislative counsel does not merely fit the examples, add-ons, carve-outs and clarifications into a pre-determined framework, but also designs that framework (on the basis of the nature of the materials supplied).

We now turn to some practical issues in ground-up and top-down drafting principles-based drafting.

4.1 Ground-up drafting in practice

How can the legislative counsel help the ground-up process to succeed? I suggest 2 basic ideas here. Firstly, the situations to be regulated must be *identified*. Secondly, various candidate principles need to be developed and *tested* against those identified situations. Both points involve a fair amount of work for the legislative counsel: ground-up drafting is a rigorous process requiring a fair amount of discipline. It is not a process of sudden and spontaneous inspiration. Rather, ground-up drafting is an organised process involving the disciplined identification and testing of information.

The first basic point is an obvious one, but is often missed: the various situations to be dealt with by the provisions need to be identified in an organised way. It is not enough merely to identify one or two situations, devise a principle to deal with them, and then hope that this principle deals adequately with all other situations. The strength of a principle is proportionate to the variety of situations considered in devising it - much like a scientific hypothesis. Therefore, it is good practice in ground-up drafting first to identify (in a rigorous way) a wide range of situations that need to be regulated.

It is important to create a written record of the situations identified. It is too risky merely to

identity situations in a discussion, and hope to remember them later. If the regulatory system is complex, the relevant situations will be numerous: without a written record, many of them will be forgotten.

This might seem very familiar to a legislative counsel who is familiar with the process of drafting black letter rules. Indeed, the ground-up approach to principles-based drafting is very similar to black letter drafting in many ways. Using both styles, one must identify rigorously and systematically the individual rules that apply in specific cases. However, ground-up drafting goes a step further, and identifies operative principles that restate those rules in a more abstract form.

But where are these overarching principles to be found? There is no easy answer to this question. In some cases, the process of setting down the rules in a systematic way will make the principle obvious. In other cases more inspiration is needed. It certainly helps the legislative counsel to have a detailed understanding of the general policy area in which he or she is working. This understanding provides a bank of relevant concepts that can be drawn upon in developing new concepts. Also, as mentioned earlier, the expertise and experience of the instructor is crucial here. When inspiration is needed, it most often springs from a policy knowledge rather than a knowledge of legislative drafting. Thus the legislative counsel should be alert to remarks by instructors that reveal the way they think about a policy issue. It is my experience that the best principles in ground-up drafting often emerge from a passing comment, or from a remark in an informal conversation in a corridor. The legislative counsel should be alert to such fleeting comments, as they often supply very useful principles.

Having identified a possible principle to deal with the mass of relevant situations, the second basic point becomes relevant. One should not accept the first plausible principle that comes into view. Rather, one should identify a couple of competing principles, and test them against the identified situations. In other words, one should not accept that a principle is optimal until it has been tested against particular situations, and compared with other possible principles.

When one has reached this stage, the written list of the situations to be regulated becomes invaluable. This list forms the basis of testing the various candidate principles. The first round of testing will probably suggest refinements to one or more of the candidate principles. A second round of testing may also produce further refinements. Most probably, after the first or second round of testing, one of the candidate principles will become the frontrunner. The crucial point here is not to identify a frontrunner before doing the testing.

Of course, this is a somewhat idealised description of ground-up drafting, and the process may in reality involve many compromises. In many drafting projects, time and access to expertise are limited. However, the process as described can be a useful way give some order to what can otherwise be a rather chaotic process.

4.2 Top-down drafting in practice

Much of the legislative counsel's job in ground-up drafting is in the construction of the framework principle. If the framework is well designed, it should be obvious where all the identified parts fit into it. By contrast, in top-down drafting, much of the legislative counsel's role is to work out how best to fit in the various parts into the pre-determined framework. In

other words, in top-down drafting, the legislative counsel needs to ensure that various clarifications, add-ons, carve-outs and examples are expressed in a coherent way in accordance with the basic principle.

The task of the legislative counsel here is to ensure that each specific rule is compared against the basic principle, and ensure that the coherence of that principle is not compromised by the rule. If the example does not fit well with the principle, it should be drafted as a clear add-on or carve-out. If the rule is covered by the principle but needs to be stated for the sake of clarity, it should be drafted as an example or non-operative clarification of the principle and not as an add-on or carve-out. The difficult cases are where the legislative counsel is not sure whether the rule is covered by the principle or not. One possible solution here is to draft an "operative" clarification.

However, the best-designed draft will inevitably attract suggestion for change. Often such suggestions come at the very end of the design process, and come with an irresistible political force behind them. Here, the legislative counsel can play a useful role by examining each suggestion in the light of the basic principle, and advise whether it is best drafted as add-on, carve-out, non-operative clarification or operative clarification.

In summary, in top-down drafting, the legislative counsel should not simply add new rules to a draft in a higgledy-piggledy way. Rather, the legislative counsel needs to go the extra mile and analyse each new instruction in the light of the pre-existing principle. This analysis will indicate how the new rules will relate to the existing principles.

5. General comments

Some commentators call principles-based provisions "fuzzy law". However, in many cases the process of drafting such provisions is anything but "fuzzy". Drafting such provisions will usually consume more time than drafting black letter provisions, and often requires a very high degree of rigour and good organisation. Nevertheless, this work can save a lot of time and effort for later users of the provisions. Principles-based provisions - if well-designed - are easier to read than black letter law, and are flexible enough to deal with unexpected and changing situations. This is especially useful in complex regulatory areas such as taxation.

Yet, there are risks to drafting in principles. There may be insufficient time available to carry out a proper ground-up or top-down drafting process. Alternatively, the nature of the situation to be regulated may not allow a principles-based approach. An example is where accepted practices have solidified over a long period, without a particular organising theme. Another example is where the need for certainty is so great that clarifications, add-ons and carve-outs are not enough to support an effective principle.

One needs to keep in mind here that legislative provisions need to achieve a basic minimum of certainty. This is a basic principle of the rule of law, and is a constitutional requirement in most developed legal systems. This basic level of certainty varies according to the relevant subject matter. The requirement for certainty is particularly high in areas of vital interest to the citizen,

such as intrusions into protected areas of human rights, the definition of criminal offences and the definition of the jurisdiction of a court.10 In these and similar areas, the need for a high degree of certainty may rule out a principles-based approach. In other areas - such as the calculation of a tax liability - concerns with certainty can often be addressed by clarifications, add-ons and carve-outs.

Drafters therefore need to appreciate the advantages and limitations of principles-based drafting, its demands on the drafting process, and it potential benefits for the users of legislation. It is not an exercise to be started without considering the availability of time, drafting expertise and policy expertise. Nor can one try to impose principles-based provisions on any type of regulatory system. But in many cases, principles-based drafting can be the optimal drafting approach. It is likely to be an increasingly-common feature of modern legislative systems.

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[10] See for example cases from the European Court of Human Rights: *Sunday Times v. The United Kingdom*, 25 Mar. 1983, Series A, No. 30, para. 49; *Vogt v. Germany*, 26 Sep. 1995, Series A, No. 323, para. 48.