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Supporting Taxation's extended 'Purpose' to encompass the Objective of Socially Engineering Human Behaviours

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Supporting Taxation's extended 'Purpose' to encompass the Objective of Socially Engineering Human Behaviours

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Abstract

Taxation should not only be viewed as a legislative tool which provides revenues for policymakers to be able to then deliver social goods and services such as roads, health care, education and military protections. The fiscal raising aspect of taxation is also supplemented by another objective or purpose – the social engineering of human behaviours. This extended purpose of taxation can be supported by reference to three Pillars: Ethics, Law and Economics as brought together in this Article. This three Pillar approach can provide the basis for taxpayer confidence and acceptance of a policymaker's approach to extending the purpose of taxation to encompass objectives of socially engineering human behaviours. This is especially important where the positives of such a policy approach outweigh the harms associated with certain defined human behaviours, for the individual and for broader society.

SUPPORTING TAXATION'S EXTENDED 'PURPOSE' TO ENCOMPASS THE OBJECTIVE OF SOCIALLY ENGINEERING HUMAN BEHAVIOURS _____ **1**

| | | |
|---|-------|----|
| ABSTRACT | _____ | 1 |
| INTRODUCTION | _____ | 3 |
| PART 1: TAXATION – ITS PURPOSE | _____ | 5 |
| 1.1 <i>Extending the Purpose of Taxation</i> | _____ | 5 |
| PART 2: THE THREE PILLARS | _____ | 7 |
| 2.1 <i>Pillar 1: Ethics</i> | _____ | 7 |
| 2.1.1 Equity Considerations | _____ | 8 |
| 2.2 <i>Pillar 2: Law</i> | _____ | 9 |
| 2.2.1 Role of the Governments (Policymakers) | _____ | 9 |
| 2.2.2 Free Will | _____ | 10 |
| 2.2.3 Soft Regulatory Approaches | _____ | 11 |
| 2.3 <i>Pillar 3: Economics</i> | _____ | 12 |
| 2.3.1 Economics, Taxes and the Individual | _____ | 12 |
| 2.3.2 Economics, Taxes and Broader Society | _____ | 15 |
| 2.3.2.1 Pigouvian Tax Theory and Negative Externalities | _____ | 16 |
| CONCLUSION | _____ | 18 |

Introduction

In order to foster taxpayer support and confidence for taxes to be used as social engineering tools, three Pillars are brought together in this Article: Ethics, Law and Economics. This Article discusses each Pillar, where arguments are put forward that support extending the purpose of taxation to encompass objectives of social engineering rather than taking a doctrinal view, that taxation's purpose is merely to raise government revenues for the provision of social goods and services.

Part 1 of this Article provides an examination the various views of the 'purpose' of taxation. One view is that taxation is required as a government mechanism to facilitate forced contributions from people and property 'for the support of policymakers and for all public needs.'¹ Another view maintains that a tax's purpose is judged by 'its effect on the *public* of influencing their economic behaviour.'² In this Article, this latter view of the 'purpose' of taxation is expanded upon in order to support its use to socially engineer human behaviours.

Part 2 of the Article, explores Pillar 1: Ethics. Here, it is argued that the promotion of the well-being of many, in any one western society, should be a government's prevailing objective. It is noted that policymakers in countries such as Australia, have an 'overall obligation to maximise overall social welfare',³ therefore, in designing any new taxes or in implementing tax reform, consideration should be given to the 'maximisation of the sum across individuals of social utilities of consumption.'⁴ Arguments which posit that the imposition of taxes will impede upon free will are addressed by reference to the particular design of a tax, and counter arguments are presented which support their implementation in those circumstances where there are harmful effects for both the individual and society associated with certain defined human behaviours.

Part 2 of this Article then examines Pillar 2: Law, where it is firstly acknowledged that the taxing power of a policymaker is derived from the legislature. In Australia, it is the Australian Constitution. It is also recognised that the relationship a policymaker has with its people is

¹ Frederick N Judson, 'Public Purposes for Which Taxation Is Justifiable' (1908) 17(3) *The Yale Law Journal* 162, 162.

² Abba Lerner, *Economics of Employment* (McGraw-Hill, 1951) 131 (emphasis in original).

³ Nicholas Stern, *The Stern Review: The Economics of Climate Change* (HM Treasury, 2007) 28 <http://unionsforenergydemocracy.org/wpcontent/uploads/2015/08/sternreview_report_complete.pdf>.

⁴ *Ibid* 30.

vitaly important, especially in the formulation of policies and in the implementation of strategies that are designed to protect and maximise its peoples' welfare. Taking a paternalistic approach, it can be argued that a policymaker should know what is best for 'society as a whole'. On this basis, it is suggested that it is legitimate for a policymaker to formulate policies and implement strategies (including the imposition of taxes or tax reform) which regulate those identifiable socially concerning undesirable human behaviours.

Also, in Part 2 of this Article, Pillar 3: Economics, is presented and examined. A major consideration is whether the imposition of a tax on certain commodities is an efficient way in which to regulate personal behaviours and change peoples' consumption choices, while addressing associated negative harms (both internalities and externalities). To address these points, an economic overview from an individual perspective is firstly provided. Depending on whether the demand curves for particular commodities are elastic or inelastic, diverse outcomes for their consumption will result following the imposition of a tax on them. Supply elasticity and inelasticity will also have different impacts. The relative elasticities of both supply and demand also dictate who bears the burden of the tax imposed. This could rest on the consumer, the producer or importer, or a combination of both. In this Article, the Pigouvian tax theory is also referred to in order to explain the economic effect that applies after the imposition of a tax on a particular commodity.⁵ Based on this theory, following the implementation of tax on a commodity that has negative externalities associated with its consumption, consumer and producer surpluses can be diminished, where some of these losses can be converted into tax revenues for policymakers. Further, it is suggested that these tax revenues can then be directed to other policy initiatives that will be able to address the negative externalities directly.

It is concluded that the three Pillars: Ethics, Law and Economics, as brought together in this Article, connect three separate but interrelated foundations that support the extension of the purpose of taxation to encompass aspects of the social engineering of human behaviours. This Article demonstrates how taxation can be a supported policy approach available to policymakers, which can still foster taxpayer confidence and acceptance.

⁵ See Ronald Coase, 'The Problem of Social Cost' (1960) 3 *The Journal of Law & Economics* 1, 1-44. Also see Herbert Hovenkamp, 'The Coase Theorem and Arthur Cecil Pigou' (2008) 51 *Arizona Law Review* 633, 633-649.

Part 1: Taxation – its Purpose

There are two main schools of thought as to the purpose of taxation. Judson in 1908 noted that it is about applying the forced contributions from people and property ‘for the support of policymakers and for all public needs.’⁶ The public needs will include essential community goods and services such as education, health and roads; to achieve policymakers’ economic aims; and to also ‘redistribute income on a socially acceptable basis.’⁷ Taxes can thus ‘be considered as ex-ante payments for services obtained later on (allowing for de-coupling of the payment structure from consumption structure but not necessarily).’⁸ Supporting this view, the Australian Council of Social Service (ACOSS) maintains the position that ‘[t]he main purpose of taxation is to raise revenue for the services and income supports the community needs. Public revenues should be *adequate* for that purpose.’⁹

An alternative view is supported by Lerner. He states that:

...taxation is not a funding operation ... [and] decisions concerning taxation should be made only with regard to the economic effects in terms of promotion of full employment, price stability, or other economic goals, and not ever because the policymakers needs to make money payments.¹⁰

For Lerner, the ‘purpose’ of a taxation system is an economic one, where macroeconomic objectives are paramount, and ‘taxes should *never* be imposed for the sake of the tax revenues.’¹¹ He also states that a tax’s ‘purpose’ is judged by ‘its effect on the *public* of influencing their economic behaviour.’¹² Taking this view, the economic purpose of a tax can provide for a ‘broad benchmark against which variations can be measured and explained.’¹³

1.1 Extending the Purpose of Taxation

Regulation of persons’ actions or behaviours in a society can cover a number of aspects including the controlling, governing or directing, facilitating or influencing behaviour towards or away from some purpose. There are a number of regulatory approaches or techniques that

⁶ Judson (n 1) 162.

⁷ Clinton Alley and Duncan Bentley, ‘A Remodelling of Adam Smith’s Tax Design Principles’ (2005) 20 *Australian Tax Forum* 579, 583.

⁸ Valentina Piana, *Tax Revenue* (2003) Economics WEB Institute
<<http://www.economicwebinstitute.org/glossary/taxrev.htm>>.

⁹ See Australian Council of Social Service (ACOSS), *Tax Reform: Purpose, Principles and Process* (August 2013) <https://www.acoss.org.au/wpcontent/uploads/2015/06/Tax_reform_ACOSS_August_2013.pdf>. ACOSS is the Australian peak body of the community services and welfare sector and the national voice for the needs of people affected by poverty and inequality.

¹⁰ Lerner (n 2).

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Alley and Bentley (n 7) 584.

can be taken with respect to any one or a number of behaviours of people in a society to ‘influence industrial, economic, or social activity.’¹⁴ In many jurisdictions, taxation has not only been viewed as a pecuniary burden exacted by legislative authority, laid upon individuals or property to support policymakers in providing social services such as education, health care, defence and roads, but also as a tool to alter human behaviours in particular circumstances. In this regard, many policymakers have used their taxation systems to promote extraneous social, economic and political objectives.¹⁵ These approaches have focused on the consumption of commodities and the engagement in activities that have not only negative individual consequences, but also negative external consequences (externalities) that are not considered in the price of those commodities or activities (also referred to as market failures). The underlying premise is that when faced with coercive or punitive measures, delivered via the tax system, undesirable human behaviours and consumption of certain commodities, together with their associated negative internalities and externalities, can be addressed.

Taxation is one tool that can foster ‘good’ and discourage or punish ‘bad’ behaviours. However, the question remains – how do policymakers attain taxpayers’ acceptance and compliance, so that such an approach can have a positive long-term effect? Australia’s tax system has been recognised as one which is underpinned by the concepts of fairness and integrity. This sentiment was echoed by the 2010 Henry Review, which observed:

The operation of Australia’s tax system is fundamentally sound and there is general confidence in the system. The level of voluntary compliance is high, reflecting positive perceptions about the fairness and integrity of the system and how it is administered.¹⁶

In order to ensure that the purpose of taxation is extended to encapsulate its use to socially alter human behaviours, while still maintaining positive perceptions about the fairness and integrity of the Australian tax system and how it is to be administered, the three Pillars: Ethics, Law and Economics are drawn together in this Article. This approach can provide policymakers with a policy approach that can be supported and ultimately accepted by taxpayers.

¹⁴ Robert Baldwin and Martin Cave, *Understanding Regulation* (Oxford, 1994) 34.

¹⁵ For example, in 2018 the UK introduced a type of sugar tax (referred to as a levy) on sweetened sugary beverages (SSBs,) in order to deal with rising and concerning overweight and obesity issues for its people. See Katie Allen, Anushka Asthana and Rowena Mason, ‘George Osborne unveils sugar tax in eighth budget as growth forecast falls’, *The Guardian* (online), 17 March 2016 < <https://www.theguardian.com/uk-news/2016/mar/16/budget-2016-george-osborne-sugar-tax-growth-forecast-falls>>.

¹⁶ See Ken Henry et al, ‘Australia’s Future Tax System Review, Final Report’ (*Henry Review*) (Australian Government, Treasury, 2 May 2010) Parts 1 and 2. <http://www.taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs_reports.htm>.

Part 2: The Three Pillars

2.1 Pillar 1: Ethics

Utility refers to general well-being or happiness, where according to John Stuart Mill, it is a consequence of good actions.¹⁷ Taking a hedonistic view, Mill postulates that pleasure or happiness is to be considered the highest good in life. In the context of utilitarianism, Mill posits such utility is acquired at an overall society level, by considering the wellbeing of many people.¹⁸ It can be argued that because people desire well-being or happiness at an individual level, then it may follow that the whole of society does as well. According to Mill, however, utilitarianism is more than an ethics of self-interest, but one where one must not advantage their own happiness over that of any other person.¹⁹ The greatest good for all of society therefore refers to the well-being or happiness of the greatest number of people as measured against the total pain. If the measure of happiness is greater, then the utilitarian calculus can permit an action.²⁰ It may be thus argued that as part of a policymaker's objective when implementing any policies and actions, they should do so on behalf of all its peoples, and not just for a select few. It is here that the implementation of taxation can be ethically possible, since the 'pain' imposed by policymakers can be offset by the pleasure or happiness created by the government services provided, which are associated with the tax revenues collected.²¹

However, there are those that argue that the imposition of taxes as a tool of social engineering is unethical because it is inefficient, noting at the very least that '[i]ndividuals' responses to taxation are inefficient not only because they give rise to negative externalities.'²² Therefore it may be argued that the imposition of taxes cannot maximise the wellbeing or happiness of many. In addition, the question arises as to how does one measure the impact of taxes on different classes of people, within one society, across many societies, and for current and future generations?

In this Article, it is recognised that there are many complexities to consider when addressing these above questions. It is here that standard welfare economics and the underlying ethics that

¹⁷ See generally John Stuart Mill, *Utilitarianism* (1863) ch 2 <<https://www.utilitarianism.com/mill2.htm>>.

¹⁸ Ibid.

¹⁹ Ibid 57.

²⁰ Ibid 63.

²¹ Ibid 102.

²² Alex Raskolnikov, 'Accepting the Limits of Tax Law and Economics' (2013) 98(3) *Cornell Law Review* 523, 525.

underpins it can nevertheless assist. While policymakers have an overall obligation to maximise overall social welfare,²³ this of course depends on the welfare of each individual in society. Standard welfare economics looks at the consequences of actions ‘in terms of impacts on utility.’²⁴ Accordingly, an overarching objective of any policy should ‘consider the maximisation of the sum across individuals of social utilities of consumption.’²⁵ Based on this approach, policymakers determine which policies they should make on behalf of their constituents in order to ‘improve, or maximise, overall social welfare.’²⁶ Areas such as education, health and environment require close attention, as these are the areas that the international community has identified as important factors in determining human well-being.²⁷ Accordingly, policymakers, in the implementation of policies that deal with issues surrounding human well-being, should not only take into account individual concerns but also the impacts that such policies can have on society overall.

2.1.1 Equity Considerations

The imposition of taxation to socially engineer human behaviours is also arguably supported on the grounds of equity. While ethics examines the moral validity of choice, equity can be viewed as the expression of social justice, and rests on the notion of a fair distribution of benefits between human beings where ‘no one person or subgroup should reap a disproportionate share of benefit or bear a disproportionate share of costs.’²⁸ This too can relate to obligations owed by current generations to future ones. According to intergenerational equity principles, the current generation owes a duty to future generations to ensure that they leave a sustainable society intact. Based on the principles of Ecologically Sustainable Development (ESD) a sustainable society is ‘one that meets the needs of the present without compromising the ability of future generations to meet their own needs.’²⁹ In this regard, ‘[a] sustainable society is one that can persist over generations, one that is far-seeing enough, flexible enough, and wise enough not to undermine either its physical or its social systems of

²³ Stern (n 3) 28.

²⁴ Ibid 29.

²⁵ Ibid 30.

²⁶ Ibid 28.

²⁷ Ibid.

²⁸ Paul B Thompson, ‘Ethics and Equity’ in: K Ludlow, S Smyth and J Falck-Zepeda (eds), *Socio-Economic Considerations in Biotechnology Regulation. Natural Resource Management and Policy* (vol. 37) (Springer, New York, NY, 2014).

²⁹ World Commission on Environment and Development, *Our Common Future: Report of the Commission*, (Oxford University Press, 1987) ch 2 <<http://www.un-documents.net/our-common-future.pdf>>.

support.³⁰ Indeed, the intergenerational equity concept establishes that humans ‘hold the natural and cultural environment of the Earth in common both with other members of the present generation and with other generations, past and future.’³¹ How to ensure these responsibilities are supported beyond individual obligations lies at the heart of a policymaker’s objective to ‘improve, or maximise, overall social welfare’³² for both current and future generations. Further, in 2015, the United Nations (UN) member countries adopted the 2030 Agenda for Sustainable Development together with the 17 Sustainable Development Goals whose aim is to ‘build a better world with no one left behind.’³³ Taxation, in this context can be utilised as one policy tool to alter human behaviours in those circumstances where individual behaviours have negative external effects on broader society – both for present society and for future ones.

2.2 Pillar 2: Law

Taxes can be viewed as mandatory payments, ruled by laws. In the Australian context, the power to impose taxation is derived from the *Australian Constitution*.³⁴

2.2.1 Role of the Governments (Policymakers)

From a legal perspective, a governments relationship with its people is paramount. There are two major views of the role of governments in modern democratic societies. One view is that governments exist in order to serve their people, where their goals are to protect property, freedoms and conduct other protective functions.³⁵ Where the people do not agree with an existing government’s policies (including taxation), then it is through the peoples’ voting power, that an existing government can be removed and replaced with another who may have more favourable policies. This approach views governments as servants of the people, and the people as its masters,³⁶ and as such, a government’s set of policies that are implemented during their term in office are legitimised.

³⁰ See generally Donatella H Meadows, Dennis L Meadows and Jorgen Randers, *Beyond the Limits: Confronting Global Collapse, Envisioning a Sustainable Future* (Chelsea Green Publishing, 1992).

³¹ Edith Brown Weiss, ‘In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity’ (Transnational Publishers and the United Nations University, 1990) 8.

³² Stern (n 3) 28.

³³ United Nations, *Sustainable Development Goals – 17 Goals to Transform Our World* <<http://www.un.org/sustainabledevelopment/>>.

³⁴ *Commonwealth of Australia Constitution Act 1901* (Cth).

³⁵ See generally Walter E Williams, *More Liberty Means Less Government* (Hoover Institute Press, 1999) where the author notes that it is debatable that in providing other functions, western governments actually impede upon property rights and freedoms.

³⁶ This view of governments was established in 1690 by John Locke. See John Locke, *Two Treatises of Governments* (Awnsham Churchill, 1690). Locke’s ideas are canvassed by many, for example see Richard A

The opposite approach views a government as master and the people as its servants. Here a government may take on a paternalistic approach, given that one of its objectives as master is to protect its citizens. It can be argued that under this view, because a government know what is best for society as a whole, their actions in formulating policies and implementing strategies to regulate undesirable human behaviours are legitimised. There are some however who argue that such intrusions disrupt social harmony, and that they can ‘divide individuals into classes for no legitimate reason.’³⁷ For example, it has been argued that tobacco policies aimed at reducing cigarette consumption, single out those persons who smoke cigarettes, stigmatising them in society based on their consumption choices.³⁸

2.2.2 Free Will

In this Article it is argued that any anti-paternalistic attitudes can be countered in those circumstances where the engagement in human activities (including the consumption of certain commodities) need addressing because they impact negatively on ‘the human condition and human flourishing’³⁹ overall. In Australia, legal paternalistic measures are already in place that have an objective to protect the general health and wellbeing of the population. It is arguable that these interventions are justified in those circumstances where individual choice and autonomy are perceived to harm the community as a whole. Take for example the hard legislative approaches that require drivers of motor vehicles to wear seatbelts, or to not use their mobile phone when driving, or even the 0.05% alcohol level drink driving laws.

Another example is the approach of the tobacco laws in Australia, where excise taxes have been imposed on tobacco products since 1901 in order to influence their consumption, and to address negative health consequences for individuals as well as the associated burdens on the Australian health system. Notably, in 2014 Australia became the only country in the world to index tobacco excise taxes to wage inflation so as to:

ensure that tobacco products do not become relatively more affordable over time. In 2015, many common brands of cigarettes (pack of 20) already cost more than 20 Australian dollars (US\$ 15.50), which are among the highest prices in the world.⁴⁰

Epstein, *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* (Perseus Books Group, 1998) 25–8, 251–64.

³⁷ Robert W McGee, *The Philosophy of Taxation and Public Finance* (Springer, 2004) 85.

³⁸ The legislative amendments to the *Tobacco Act 1987* (Vic) were imposed in Victoria, Australia in 2017 which mandate no smoking in outdoor areas when food is available for consumption.

³⁹ Mirko Bagaric and Sharon Erbacher, 'Fat and the Law: Who Should Take the Blame?' (2005) 12(3) *Journal of Law and Medicine* 323, 333.

⁴⁰ World Health Organisation, *Report on the Global Tobacco Epidemic, Raising Taxes on Tobacco* (2015) 39.

In this context, a paternalistic approach to limiting consumption of tobacco products has been in place, and has been accepted in its implementation in Australia over a number of decades.

By adopting a similar hard paternalistic approach to overweight issues and obesity as another example, a sugar or fat tax on commodities such as sweetened sugary beverages and highly processed foods may also be justified because it is in the interests of the health of both the individual and the impacts on a population as a whole. This position is supported by Bagaric and Erbacher who note in the context of the obesity problem:

[t]he law is a particularly suitable vehicle for dealing with the obesity problem because legal regulation is the most coercive and effective behaviour-modifying tool in society. It has the capacity to significantly shape and guide not only our judgments and mind-set but even more importantly our behaviour and activities.⁴¹

These examples illustrate that it would be remiss if laws were not implemented to deal with such important issues for both individuals and for broader society.

2.2.3 *Soft Regulatory Approaches*

Rather than relying on taxation to alter human behaviours, it is also recognised that other regulatory approaches may also be implemented. However, it can be argued that such approaches are not always as effective or as efficient. For example, with respect to addressing human induced climate change, environmental measures have traditionally been enforced through ‘command and control’ regulations which aim to ‘prohibit behaviour damaging to the environment.’⁴² Such approaches can, for example, seek to reduce greenhouse gas emissions and promote industry change through the introduction of regulatory controls whereby a regulatory body ‘enforce[s] statutory standards [set] for industrial emissions.’⁴³ It has been argued that these approaches:

...can be successful in dealing with point-source pollution such as discharges to air and water from industrial premises [as well as reducing certain] ... “mobile” sources of air pollution, a good example in the introduction of tougher emission standards for automobiles in the United States.⁴⁴

However, it is has also been argued that such an approach cannot respond adequately where pollution comes from a range of:

<http://apps.who.int/iris/bitstream/10665/178574/1/9789240694606_eng.pdf?ua=1&ua=1>.

⁴¹ Bagaric and Erbacher (n 39).

⁴² Fanny Missfeldt and Jochen Hauff ‘The Role of Economic Instruments’ in AD Owen and N Hanley (eds), *The Economics of Climate Change* (Routledge, 2004) 115.

⁴³ Wayne Gumley, ‘Legal and Economic Responses to Global Warming – An Australian Perspective’ (1997) 14 *Environmental and Planning Law Journal* 341, 343.

⁴⁴ *Ibid.*

...varied and diffuse sources with an incremental or cumulative effect. [This is especially so where the necessary resources are not available to administer and monitor the] vast number of minor and widespread violations. Global warming presents this problem on a vast scale.⁴⁵

As another example, other regulatory measures and other softer paternalistic approaches to deal with overweight and obesity have also been implemented in many jurisdictions. In Australia, these have included, the educative approach under the ‘LiveLighter’ campaign, which has run since 2012 in the Australian Capital Territory, Victoria and Western Australia. This public educative campaign promotes healthy eating and physical activity, using resources that provide healthy recipes, meal and activity planners.⁴⁶ Similarly, since 2013, the ‘Let’s Take on Childhood Obesity’ campaign in Ireland has provided information regarding meal planning, and other healthy tips, to parents in so as to assist them with their approaches to childhood overweight and obesity.⁴⁷ Mexico too in 2013 introduced a mass media campaign via TV, radio etc, the objective being to reduce consumption of high calorie foods.⁴⁸

It is however postulated in this Article that on their own, such regulatory measures don’t always have the required effect. Taking the overweight and obesity issues as an example, such softer paternalistic measures have not been able to effectively curb the growing obesity epidemic. The incidence of obesity and overweight issues have continued to grow both in Australia and other developed countries over the last few decades.⁴⁹ An additional harder paternalistic approach may be what is required.

2.3 Pillar 3: Economics

2.3.1 *Economics, Taxes and the Individual*

Economic strategies and policy approaches have been implemented as an accepted method to addressing problematic human behaviours and consumptions in many jurisdictions and in many circumstances. Using the example of consumption of sweetened sugary beverages and highly processed foods, which have been associated as one of the possible causes of overweight issues and obesity, taxes on such commodities have been supported by many as one way to address the negative consequences for individuals. Economic strategies to reduce the consumption of obesity inducing food and drink products (i.e. those that are considered to be

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Organization for Economic Co-operation and Development, *Obesity Update* (OECD 2017) (2017) < <http://www.oecd.org/health/health-systems/Obesity-Update-2017.pdf>>. OECD, *Obesity Update* 2017, 12.

⁴⁸ Ibid.

⁴⁹ See generally Organization for Economic Co-operation and Development, *Obesity Update* (OECD 2017) (2017) < <http://www.oecd.org/health/health-systems/Obesity-Update-2017.pdf>>.

less healthy options) have been recommended by the World Health Organization (WHO), who have noted:

[a]s appropriate to national context, [policymakers can] consider economic tools that are justified by evidence, and may include taxes and subsidies, that create incentives for behaviours associated with improved health outcomes, improve the affordability and encourage consumption of healthier food products and discourage the consumption of less healthy options.⁵⁰

Further, WHO, in their 2016 Ending Childhood Obesity Commission Report, also recommended taxation on sugar sweetened beverages (SSBs) where they set out that:

[t]he adoption of fiscal measures for obesity prevention has received a great deal of attention ... and is being implemented in a number of countries. ... Overall, the rationale for taxation measures to influence purchasing behaviours is strong and supported by the available evidence.⁵¹

Indeed, many countries have implemented sugar and fat taxes to deal with the negative impacts that overweight issues and obesity have for individuals.⁵² Japan for example introduced a ‘quasi obesity tax’ on the person in 2008. At the time, according to a 2008 report by the New York Times, it was noted:

to reach its goal of shrinking the overweight population by 10 per cent over the next four years and 25 per cent over the next seven years, the [Japanese] government will impose financial penalties on companies and local governments that fail to meet specific targets. The country’s Ministry of Health argues that the campaign will keep the spread of diseases like diabetes and strokes in check.⁵³

The UK also introduced a sugar tax on sweetened sugary beverages in 2018 in order to deal with rising and concerning overweight and obesity issues for its people.⁵⁴

However, it is important to also note that depending on whether the demand for particular commodities is elastic or inelastic, different outcomes on their consumption will result following the imposition of a tax. In those circumstances where demand for a particular commodity is highly inelastic, a price change (associated with the implementation of a tax) will have little effect on its demand, and therefore little effect on the quantity consumed.⁵⁵ Continuing to use sweetened sugary beverages or highly processed foods as examples, these

⁵⁰ World Health Organization (WHO), *Global Action Plan for the Control and Prevention of Noncommunicable Disease 2013–2020*, Objective 3, Recommendation 39, 32 <http://apps.who.int/iris/bitstream/10665/94384/1/9789241506236_eng.pdf?ua=1>.

⁵¹ World Health Organization (WHO), *Report of the Commission on Ending Childhood Obesity* (2016) Recommendation 1.2, 18 <http://apps.who.int/iris/bitstream/10665/204176/1/9789241510066_eng.pdf>.

⁵² See Alberto Alemanno and Ignacio Carreno, ‘Fat Taxes in the European Union between Fiscal Austerity and the Fight Against Obesity’ (2011) 2(4) *European Journal of Risk Regulation* <<http://ssrn.com/abstract=1945804>>. The authors provide an analysis of the ‘genesis, rationale and legal implications’ of a number of ‘fat tax’ schemes across the European Union.

⁵³ Norimitsu Onishi, ‘Japan, Seeking Trim Waists, Measures Millions’, *The New York Times* (online), 13 June 2008 <<http://www.nytimes.com/2008/06/13/world/asia/13fat.html>>.

⁵⁴ HM Treasury, *Soft Drinks Industry Levy comes into effect*, (5 April 2018) GOV.UK <<https://www.gov.uk/government/news/soft-drinks-industry-levy-comes-into-effect>>.

⁵⁵ See generally James S Eustice, ‘Tax Complexity and the Tax Practitioner’ (1989) 45 *Tax Law Review* 7, 9.

commodities may be described as being highly palatable, where their consumption could be related to addiction or a genetic disposition.⁵⁶ If this is the case, then their demand curves will be highly inelastic, and so any price increases due to the imposition of a tax on them will not have any significant effect on reducing their consumption. There are arguments that also hold that price elasticity can vary amongst various groups of the population. For example, despite studies showing that eating and beverage behaviour may be more responsive to price increases than nutritional education, there is also data that indicates that individuals who are overweight or obese are less responsive to price changes than those individuals who are not.⁵⁷

Continuing with this example, an alternative argument is that demand for sweetened sugary beverages or highly processed foods may actually be relatively elastic. Why people consume such products, even where it has been shown to be detrimental to their own health can be due to other factors such as technological changes, urbanisation, aggressive marketing, lack of education, and even medical advances.⁵⁸ All these factors taken together can support the imposition of a tax on such commodities, which will have some effect on reducing peoples' consumptions. A tax on such undesirable commodities could also shift their consumption preferences to healthier foods and beverages.⁵⁹ Where this shift occurs, it is posited the imposition of taxation can positively affect human behaviours and address associated individual negative consequences.

⁵⁶ See Stephanie-May Ruchat and Michelle Mottola, 'Preventing Long-Term Risk of Obesity for Two Generations: Prenatal Physical Activity Is Part of the Puzzle' (2012) *Journal of Pregnancy* 133, 133.

⁵⁷ See generally Gideon Yaniv, Odelia Rosin and Yossef Tobol, 'Junk Food, Home Cooking and Physical Activity and Obesity: The Effect of the Fat Tax and the Thin Subsidy' (2009) 93(5-6) *Journal of Public Economics* 823-830.

⁵⁸ See L Sjöström et al, "Bariatric Surgery and Long-term Cardiovascular Events" (2012) 307(1) *Journal of American Medical Association* 56, 63 who note bariatric surgery (used to treat obese patients) leads to a reduction in mortality. In particular, their study found that for those subjects who underwent the surgery, they had reduced cardiovascular deaths and first-time (fatal and nonfatal) cardiovascular events. Also see MF Fraga et al, "Epigenetic Differences Arise during the Lifetime of Monozygotic Twins" (2005) 102(30) *Proceedings of the National Academy of Sciences* 10604, for a discussion on how technological advances have contributed to the rising obesity epidemic. Also refer to B Swinburn, G Egger and F Raza, "Dissecting Obesogenic Environments: The Development and Application of a Framework for Identifying and Prioritizing Environmental Interventions for Obesity" (1999) 29(Pt 1), *Preventative Medicine* 563, 563. The authors comment that human beings are increasingly finding themselves in 'environment[s] that promote gaining weight and one that is not conducive to weight loss within the home or workplace'. Also refer to S Lvovich, "Advertising and Obesity: The Research Evidence" (2012) 4(2) *World Advertising Research Center* <<https://www.warc.com/fulltext/ijamc/77377.htm>>. The authors here contend that advertising is a factor that adds to the obesogenic environment in technologically advanced economies.

⁵⁹ See Jennifer Falbe, Hannah R Thompson, Christina M Becker, Nadia Rojas, Charles E McCulloch, and Kristine A Madsen, 'Impact of the Berkeley excise tax on sugar-sweetened beverage consumption' (2016) 106(10) *American Journal of Public Health*, 1865–1871. The authors highlight the positive outcomes of a SSB (sweetened sugary beverages) tax as imposed in California in 2014. The note that within 4 months of the introduction of the SSB tax, the city of Berkeley, California observed a 21% reduction in the consumption of SSBs and a 68% increase in the consumption of water.

2.3.2 Economics, Taxes and Broader Society

Under an optimal functioning market, consumers will have perfect information upon which to make their choices, with respect to costs and benefits of the transaction. For example, by reference to the above example concerning sweetened sugary beverages and highly processed foods, people who consume such products pay a certain price to do so, however that price paid will not necessarily reflect the negative externalities associated with their consumption. These negative externalities are a result of market failures where there has been sub-optimal production and consumption. For example, not all consumers will be aware of the total risks involved in the consumption such commodities to themselves and for broader society.

Consumers are driven to purchase and consume these commodities, in part based on the marketing campaigns of highly aggressive manufacturers, intent on selling their product, regardless of any associated real or perceived risks, in order to maximise profits. WHO has stated that ‘the heavy marketing of energy dense foods and fast food outlets is a probable cause of obesity’.⁶⁰ These marketing approaches can distort consumer behaviours, especially where they are not provided with full information about the risks involved in the consumption of such products. Even where they are aware of such risks, in some part, consumers will sacrifice any future consequences associated with the consumption of certain products in favour of short-term gratification. For example, poor diet, weight gain, obesity and obesity related diseases are all longer-term individual consequences of short-term consumption of sweetened sugary beverages and highly processed foods. In addition, longer term health care costs associated with their consumption are not reflected in the price of these commodities and are borne by society as a whole through increasing Medicare costs in Australia, for example.⁶¹ This means that their consumption is not affected by these negative external costs. It is theorised therefore that by imposing a tax on such undesirable commodities, their associated market failures can

⁶⁰ World Health Organization, *Diet, Nutrition and the Prevention of Chronic Diseases: WHO Technical Report Series 916* (2003) <http://apps.who.int/iris/bitstream/handle/10665/42665/WHO_TRS_916.pdf;jsessionid=A2A80E617BE6FFF964D387B2D2A972CA?sequence=1>.

⁶¹ See Australian Tax Office, *Medicare Levy Surcharge* (27 October 2020) <<https://www.ato.gov.au/Individuals/Medicare-and-private-health-insurance/Medicare-levy-surcharge/>>. The Australian Medicare program is partly funded by taxpayers who currently pay a Medicare levy of 2 % of their taxable income. It provides Australian residents access to health care. For those taxpayers who do not have adequate private health insurance as well, there is a Medicare levy surcharge which is additional to the Medicare levy. This surcharge is an additional 1–1.5 % of taxable income levy which can be imposed.

be addressed to a degree by incorporating the negative externalities into their price. This is best illustrated under the Pigouvian taxation theory approach.

2.3.2.1 Pigouvian Tax Theory and Negative Externalities

Pigou posited that taxes can be imposed on those goods or commodities in cases where their true social cost is not represented in their prices.⁶² Pigouvian taxes can be used to manage negative externalities by balancing the marginal social costs and marginal social benefits by using the tax system to address particular human activity. Economic theory, which focuses on supply and demand, can be utilised when there are negative externalities present (for example: consumption of sweetened sugary beverages and highly processed foods = higher costs on the health system / lower GDP).

Figure 1 demonstrate how the implementation of a Pigouvian tax can be employed to address a commodity's associated negative externalities. Here, supply of a commodity with a tax imposed actually shifts the supply curve upwards, because producers of the commodity with the negative externality associated with it will incorporate the tax amount into their price. Figure 1 also indicates that there is a smaller producer surplus. Producers will lose from reduced quantities demanded by consumers. Figure 1 also illustrates a reduction in the consumer surplus. However, some of the lost economic surpluses will be converted into tax revenues (as indicated by the black rectangle) collected by policymakers.

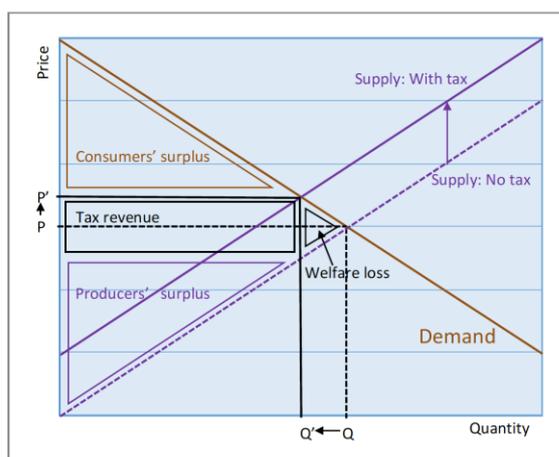


Figure 1: Consumer and Producer Surplus – with Taxes. (Authors' own derivation)

⁶² See Arthur C Pigou, *The Economics of Welfare* (Macmillan and Co., 1932) Library of Economics and Liberty [Online] <<http://www.econlib.org/library/NPDBooks/Pigou/pgEW.html>>. The Pigouvian theory of taxation, posits that where there is the imposition of a Pigouvian tax on a commodity that has negative externalities associated with its consumption, consumer and producer surpluses can be diminished, and some of these losses can be converted into tax revenues for the government.

By reference to Figure 1, it is apparent that not all negative externalities can be eliminated. However, costs associated with negative externalities can be kept to a minimum.

As illustrated, such an approach can also provide tax revenues for policymakers, which can be then redirected to other policy initiatives that will be able to address the negative externalities directly. By using the example of addressing the causes of human induced climate change, under a Pigouvian taxation approach, some of the tax revenues collected from a ‘carbon tax’ on coal production for example, can be directed to encourage new technologies aimed at supporting alternative cleaner energy initiatives. As noted by van Zyl ‘[e]nvironmental taxes have a dual purpose: they can penalise the environmental “bads” through additional taxes and nurture the environmental “goods” through tax incentives (a stick and carrot approach)’.⁶³ Owens further posited that ‘the taxing system can be a powerful policy instrument for spurring innovation.’⁶⁴ By referring to the Canadian example, Owens highlighted that environmental taxes in Canada permit policymakers to offer a ‘broad-based R&D tax credit of up to 35% for expenditures towards experimental development, basic and applied research, and related supporting activities.’⁶⁵ However, Owen also noted that this approach may not be enough, in those circumstances where there is no cost to polluting. This requires therefore a cost to be imposed on pollution itself. Where the market cannot achieve this itself, it is imperative that government intervention is undertaken. Importantly:

[t]axes are generally considered the most effective environmental policy tool available to governments, alongside tradable permit systems, which have very similar properties. By placing a price on the pollutant, both approaches really can encourage firm-level action to reduce pollution and thereby stimulate innovation.⁶⁶

While the Pigouvian theory of taxation aims to explain human behaviours following the imposition of a tax on a commodity which has negative externalities associated with it, there are others who have put forward criticisms of this theory. For example, Ronald Coase was highly critical of the Pigouvian tax approach, viewing Pigou as a radical government interventionist.⁶⁷ Coase argued *inter alia* that the concept of externalities was very complex,

⁶³ Fanie van Zyl, ‘Do you really try to minimise your carbon footprint?’ (Speech delivered at the University of South Africa, 2 August 2017).

⁶⁴ Jeffrey Owens, *Taxes for Innovation* (2018) OECD Observer, <http://oecdobserver.org/news/fullstory.php/aid/3271/Taxes_for_innovation.html>.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ronald Coase, ‘The Problem of Social Cost’ (1960) 3 *The Journal of Law & Economics* 1, 1-44.

where he was much more averse to government interventions.⁶⁸ Notably, Arthur Pigou in 1954 also conceded some shortcomings accompanying his theorised Pigouvian tax approach. He noted ‘[i]t must be confessed, however, that we seldom know enough to decide in what fields and to what extent the State, on account of [the gaps between private and public costs] could interfere with individual choice.’⁶⁹ In other words, the pure economic approach assumes that we have knowledge of what the market will actually do. In reality such knowledge is unknown. For example, it can be argued where consumers are inattentive to costs for certain commodities, they will not make optimal decisions, and this will affect the desired outcomes of the Pigouvian tax.⁷⁰ Despite these acknowledged shortcomings, it is argued that the Pigouvian theory of taxation does provide some support to policymakers in the design of a tax which is to deal with concerning individual impacts and broader externalities associated with the consumption of a commodity or in the engagement of a human activity.

Conclusion

In this Article, support is given to the argument that a tax system is to be judged by ‘its effect on the public of influencing their economic behaviour.’⁷¹ On this basis, it is posited that an expansion of the ‘purpose’ of taxation is to be supported where it is made to incorporate objectives of socially engineering human behaviours in those circumstances where government intervention is warranted. That is: to protect individuals and broader society from certain harms. Support for this extended purpose of taxation is based on three Pillars: Ethics, Law and Economics, which have been drawn together in this Article. By drawing together these three Pillars the question and answer to ‘How can taxation, as a social engineering tool, be supported and accepted by taxpayers?’ is explored.

Under the first Pillar: Ethics, it is noted that in most countries such as Australia, policymakers have an overall obligation to ‘maximise ... overall social welfare’,⁷² especially in those circumstances where consumption of certain commodities, have not only negative consequences for the individual, but also where there are associated harms to broader society. In addition, it is argued that intergenerational equity obligations which dictate that the current

⁶⁸ Herbert Hovenkamp, ‘The Coase Theorem and Arthur Cecil Pigou’ (2008) 51 *Arizona Law Review* 633.

⁶⁹ Arthur Pigou, ‘Some Aspects of the Welfare State’ (1954) 2(7) *Diogenes* 1-11, 6.

⁷⁰ Hunt Allcott, Sendhil Mullainathan and Dmitry Taubinsky, ‘Externalities, Internalities, and the Targeting of Energy Policy’ (Working Article No 17977, National Bureau of Economic Research, March 2012) 2.

⁷¹ Lerner (n 2).

⁷² Stern (n 3) 28.

generation owes a duty to future generations to ensure that they leave a sustainable society intact, also support the acceptability of using taxes as part of the framework of commerce.

Under Pillar 2: Law, it is recognised that the relationship that policymakers have with its people is extremely important, especially in the formulating of paternalistic policies and in the implementation of strategies and policies that are designed to protect and maximise their welfare. In this Article, it is postulated that it would be remiss if laws are not implemented to deal with extremely concerning issues facing humans of the world today.

The acceptability of utilising taxation as a social engineering tool by reference to Pillar 3: Economics, was also examined in this Article. Basic supply and demand economic theory are referred to in order to illustrate how shifts in consumption and human behaviour can occur following the implementation of taxes on certain commodities depending on the relative elasticities of demand and supply. The Pigouvian theory of taxation illustrates how negative externalities associated with individual activities or consumptions can be dealt with in a positive way. These negative externalities are a result of market failures where there has been sub-optimal production and consumption. It is illustrated that after the imposition of a tax on a commodity that has negative externalities associated with its consumption, consumer and producer surpluses can be diminished, where some of these losses can be converted into tax revenues for the policymakers. These tax revenues can then be directed to other policy maker initiatives that will be able to address the negative externalities directly.

Overall, it is concluded that the three Pillar approach: Ethics, Law and Economics provides a supported underpinning basis to extend the purpose of taxation to encompass objectives to socially engineer human behaviours. In doing so, the attainment of a fair and community-subscribed tax system may be possible.