Tax Research Seminars Online

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Taxation of the Commercialised Body

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Date : **30 September 2021**
Time : 3.30 – 5.00pm
Via zoom

Schedule for 2021 Tax Research Seminars Online

1. **25 February 2021**, A new-knowledge approach to corporate income tax efficiency – Associate Professor Mark Bowler-Smith (Deakin University), discussant Professor John Freebairn (University of Melbourne)

2. **25 March 2021**, The Law and Policy of VAT Tourist Tax Refund Schemes: A Comparative Analysis – Associate Professor Tingting Wang (University of Melbourne/ Southwest University of Political Science and Law, China) and Professor Miranda Stewart (University of Melbourne), discussant Mr Michael Evans (University of Melbourne)

3. **29 April 2021,** MLSTRSO-Special Edition: *Rebellion, Rascals, and Revenue.* A discussion with Joel Slemrod (University of Michigan) and Mike Keen (Deputy Director of the Fiscal Affairs Department at the International Monetary Fund) on their new book, *Rebellion, Rascals, and Revenue* (Princeton Press, 2021)

4. **27 May 2021,** History of Tax Reform in Australia. – Mr Paul Tilley (University of Melbourne/ ANU TTPI), discussant Mr Greg Smith (Former Head of Treasury Budget and Revenue Groups)

5. **29 July 2021**, Tax law as political gesture: 2017 US Tax Cuts and Job Act through the lens of political anthropology – Ms Viva Hammer (Melbourne Law School, Visiting Fellow), discussant Associate Professor Lael Weis (Melbourne Law School)

6. **18 August 2021,** The effectiveness of voluntary corporate tax disclosures: an Australian case study - Dr Bronwyn McCredie (QUT), discussant Dr Rodney Brown (University of New South Wales)

7. **30 September 2021,** Taxation of the Commercialised Body – Mr Micah Burch (University of Sydney), discussant Professor Julie Cassidy (University of Auckland)

8. **28 October 2021**, The Luxury Car Tax – Dr Kathryn James (Monash University)

9. **25 November 2021,** Excess Profit Tax – Professor Emeritus John Taylor (UNSW)

Taxation of the Commercialised Body

Micah Burch (Sydney Law School)

[Discussion Draft]

Melbourne Law School - Tax Research Seminar (online)
30 September 2021

I. Introduction

Advances in medical technology over the last few decades have challenged the default legal notion that the human body – its biological parts, products, and processes – is not amenable to either property law or commercial exploitation. Our increasing ability to use and manipulate the human body's form and function has led to its inevitable commercialisation and the Australian legal community is just beginning to grapple with some of the attendant fundamental legal (not to mention ethical) questions.

While the current matrix of relevant Commonwealth and state law generally hews closely to the European Convention on Human Rights and Biomedicine's maxim that "the human body and its parts shall not, as such, give rise to financial gain", there is a continuing lively debate in Australia around biomedical science as it relates to the commercialised human body and its regulation, including the property law status of human tissue.

Scientific progress makes it inevitable that opportunities to commercialise the human body will continue to proliferate. In addition to support for (regulated) markets in body parts and gametes, there are also calls to legalise commercial surrogacy by prominent figures such as former Family Court Chief Justice Diana Bryant.[1] Indeed, in (heretofore non-commercial) contexts and for various purposes, recent court cases have revealed a growing recognition of property-like rights in one's bodily materials.

[1] Rick Feneley, 'Chief Justice Diana Bryant confident commercial surrogacy will be legalised in Australia', *The Sydney Morning Herald* (online, 29 April 2015) (Justice Bryant asserts that legalised commercial surrogacy would allow for ethical oversight and transparency to replace black markets).

But because 'primary production' in the human body is prohibited in Australia, there has not to date been a consideration of the Australian tax law issues engendered by the commercialised human body.

The United States tax law system, however, has been contemplating this issue, sporadically, for over 70 years. This paper canvasses the United States tax law guidance and authority and then considers the application of Australian tax law principles to trade in bodily materials.

Such a consideration can be useful in terms of anticipating the tax law challenges for both taxpayers and policymakers presented by imminent (or at least potential) economic activity.[2] As with regulating such boundary-pushing activity more generally, "[b]y the time a breakthrough is here and widespread, it is often hard to have a real conversation about 'where to go' because we are already there."[3] It is also useful as an intellectual and educational exercise as it poses interesting and fundamental questions about ordinary income and its categorization, as well as fun technical applications of the CGT rules. But given that the fiscal ramifications of commercializing the human body are unlikely to be overwhelming, perhaps the most interesting contribution tax law can make in this area is through its expressive function.

In the United States context, where the tax law authority is incongruous, incomplete, and unclear, it was said that "if courts or rule-makers are to contemplate the tax consequences of a commercial trade in human blood and breast milk, then they must resolve baseline legal questions about the nature of the human body."[4] Such contemplation "forces a clear articulation of the interests and policies that the laws of taxation (and reproductive technology) should serve."[5] This is a lot to ask of tax law jurisprudence, even acknowledging the expressive power of tax law.

[2] As an early scholarly note on the tax consequences of transfer of bodily parts suggested, "as more income is generated by these transactions more attention will be focused on resulting tax consequences." Note, 'Tax Consequences of Transfers of Bodily Parts' (1973) 73 *Columbia Law* Review 842.
[3] Sara Talpos, 'The Dystopian Fear of Artificial Wombs" (3 October 2017) *The Atlantic* (quoting Glenn Cohen).
[4] Crawford, 'Our Bodies' (n 4) 697.
[5] Ibid 698.

Tax law's mandate, in fact, is often to do just the opposite: to see the world through tax-coloured glasses and straightforwardly enforce the tax rules. In that regard, Australian tax law can contribute something to the larger debate about the regulation (and property law status) of the commercialised human body – by staying out of the way.

Given the complexity and multifaceted nature of the ethical and legal questions around human body commercialization, and the lack of coherence provided by United States authority, clarity and certainty around the tax law treatment of such activity would allow the larger debate to focus on the main ethical and regulatory matters at hand.

And it turns out that Australian tax law has a doctrine (for which there is not a ready analogue in United States tax law) that could accomplish just that. Whereas the United States attempts to categorise various transactions as either arising from services, property, or the carrying on of an ongoing business "seem irrational,"[6] the broad vibe of the holding in the famous *Whitfords Beach*[7] case provides a means of neatly taxing the commercialised human body without the complexity and baggage seen in the United States context.

The remainder of this essay proceeds as follows: Part II discusses the Australian regulatory scheme and the property law rules pertaining to trade in the human body that provide background to the tax law inquiry - both are concerned with the same essential question regarding commercialization of the human body: the extent to which the tissue can be said to have been processed sufficiently that we are comfortable saying that it is not trading in the human body itself. Part III canvasses the United States authority and guidance regarding various transactions in body tissue. Part IV discusses the application of basic Australian tax law principles to trade in the human body and proposes that the reasoning in *Whitfords Beach* provides an appropriate tax law categorization. Part V concludes.

[6] Lawrence Zelenak, 'The Body in Question: The Income Tax and Human Body Materials' (2017) 80 *Law and Contemporary Problems* 37, 82.
[7] *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 150 CLR 355.

II. Regulation and Property Law

Regulation of the commercialised body

Currently, individuals in Australia are prohibited by Commonwealth and state law[8] from commercial or profit-seeking trade in their bodily materials and reproductive functions. There is a patchwork of legislation regulating various forms of body and body part usage. The regulatory scheme deals separately with reproductive material, surrogacy, and other human tissue, as backgrounded below.[9] But the basic net effect in terms of commercialization is in line with the European Convention on Human Rights and Biomedicine: "the human body and its parts shall not, as such, give rise to financial gain."[10]

With respect to cloning and embryonic research, there is nationally consistent legislation banning human cloning (and similar practices) and regulating embryonic research. The *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) prohibits the payment of "valuable consideration" for a donated oocyte, sperm or embryo.[11] There is, however, an exception for "reasonable expenses" (for example, related to collection, storage, and transportation) and clinics have some scope to determine the reasonable amount.[12]

Other reproductive services are subject to another level of regulation at the state level as well as to national ethical guidelines.[13] The purpose of the *Assisted Reproductive Technology Act 2007* (NSW) is "to prevent the commercialisation of human reproduction."[14]

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[8] For practical reasons reference herein to state law is limited to that of New South Wales.
[9] The *Human Tissues Act 1983* (NSW) deals with non-reproductive material (and further distinguishes between regenerative and non-regenerative tissue), the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) and the *Assisted Reproduction Act 2007* (NSW) deal with gametes, and the *Surrogacy Act 2010* (NSW) deals with surrogacy.
[10] *European Convention on Human Rights and Biomedicine* (Oviedo Convention 1997), Art. 21.
[11] Section 21. See also *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (NSW) s 16; *Research Involving Human Embryos Act 2002* (Cth).
[12] Australian Senate, Legal and Constitutional Affairs References Committee, 'Donor conception practices in Australia' (February 2011), 4.4. <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/donorconception/report/c04>
[13] National Health and Medical Research Council, 'Ethical guidelines on the use of assisted reproductive technology in clinical practice and research' (2017) ('NHMRC ART Guidelines').
[14] Section 3. See also NHMRC ART Guidelines (n 13), 5.4, 8.8.

Surrogacy is also governed at the state level (and subject to the NHMRC ART Guidelines). Commercial surrogacy arrangements are forbidden (in New South Wales) by the *Surrogacy Act 2010* (NSW).[15] A "commercial surrogacy arrangement"

> involves the provision of a fee, reward or other material benefit or advantage to a person for the person or another person:
>
> (a) agreeing to enter into or entering into the surrogacy arrangement, or
>
> (b) giving up a child of the surrogacy arrangement to be raised by intended parent or intended parents, or
>
> (c) consenting to the making of a parentage order in relation to a child of the surrogacy arrangement.[16]

However, "reimbursement of a birth mother's surrogacy costs" are allowed.[17]

Finally, non-reproductive material is also regulated at the state level and subject to a variety of national ethical guidelines.[18] The *Human Tissue Act 1983* (NSW) (*'HTA')* applies to tissue other than "ova, semen or foetal tissue".[19] *HTA* Section 32 provides:

> (1) A person must not enter into, or offer to enter into, a contract or arrangement under which any person agrees, for valuable consideration, whether given or to be given to any such person or to any other person:
>
> (a) to the sale or supply of tissue from any such person's body or from the body of any other person, whether before or after that person's death or the death of that other person, as the case may be …

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[15] *Surrogacy Act 2010* (NSW) s 8. A "surrogacy arrangement" is

> "(a) an arrangement under which a woman agrees to become or to try to become pregnant with a child, and that the parentage of the child born as a result of the pregnancy is to be transferred to another person or persons, or
>
> (b) an arrangement under which a pregnant woman agrees that the parentage of a child born as a result of the pregnancy is to be transferred to another person or persons." Ibid s 5.

[16] *Surrogacy Act 2010* (NSW) s 9(1)

[17] Ibid 9(2).

[18] National Health and Medical Research Council, 'Ethical guidelines on organ and tissue donation and transplantation'. <https://www.nhmrc.gov.au/research-policy/ethics/ethical-guidelines-organ-and-tissue-donation-and-transplantation>.

[19] *Human Tissue Act 1983* (NSW) s 6. The statute makes a further distinction between "regenerative" and "non-regenerative" tissue in terms of the requirements for consent to donations. Ibid s 7 and 8. Essentially, one can consent to the removal of regenerative tissue for purposes of transplantation or other therapeutic, medical, or scientific purposes; the removal of non-regenerative tissue can only be consented to for the latter purpose.

The *HTA* also provides an exception for "reimbursement of any expenses necessarily incurred by a person in relation to the removal of tissue in accordance with this Act."[20]

In all cases, commodification of the human body is the core ethical objection to commercialization. The Australian Law Reform Commission explained that

> Allowing people to exercise their rights to income and capital of human tissue might be regarded as allowing the human body to be commodified. This may alter community attitudes towards bodies and their parts, and as a result alter how communities perceive and treat living humans.[21]

Commodification of the human body, it is argued, has as one inevitable practical outcome exploitation along gender and class lines. On the more theoretical level, it is said to be morally repugnant and to undermine and erode the dignity of human life on which so much modern thought rests.[22]

On the other hand, the market for the human body's products and processes is an enormous one, and one which is enriching many market participants – with the glaring exception of those whose bodies are being exploited.[23] Fairness and distributive justice, as well as modern liberal concerns for autonomy and liberty, lend support to the argument for legalizing commercialization.[24] As a practical matter, demand for organs and bodily products

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[20] *Human Tissue Act 1983* (NSW) s 32(3). The United States has similar rules. The *National Organ Transplant Act 1984,* P.L. 98-507 ('*NOTA'*), s 301(a) (42 United States Code s 247e(a)),forbids the buying or selling of human organs for "valuable consideration" (s 301), though this prohibition does not apply to paired organ donation. "Valuable consideration" does not include reasonable processing costs or "expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ." *NOTA* s 301(c)(2), 42 United States Code s 247e(c)(2).

[21] Australian Law Reform Commission, *Essentially Yours. The Protection of Human Genetic Information in Australia* (2004).

[22] Reproductive biomedical technology also involves ethical and legal concerns with respect to resulting children.

[23] The 'secondary' commercial market in human bodily products, assisted reproductive services and technology, and the like is huge and growing. Human reproductive material is the basis of huge fertility industry and the size of the global market for assisted reproductive technology is well into the tens of billions of dollars. Blood and its derivatives are the basis of a large health and medical industry and there is increasing trade in products derivative of all sorts of human tissue for a wide variety of purposes (eg, for diagnostic tools, reconstructive and plastic surgery, replacement body parts, biomedical research, bone screws and putty, collagen, etc.). Additional regulation applies to "biologicals" (certain things made from human cells and tissues used for medical purposes) and "medicines" (including many blood-related products) by the Therapeutic Goods Administration.

[24] See Alexandra George, 'Marketing Humanity: Should We Allow the Sale of Human Body Parts?' (2005) 7 *University of Technology Sydney Law Review* 11.

well outstrips the supply provided by altruism and leads inevitably to black markets and overseas jurisdiction-shopping that often manifests the concerns identified above.

Despite Australia's blanket prohibition on commercialization, the mosaic of laws mentioned above recognises that the wide range of stuff that one can do with one's body does not all raise legal and ethical concerns to the same extent.[25] As a matter of policy and public opinion, there is generally a more permissive view toward trade in replenishable reproductive and non-reproductive bodily materials (like sperm and blood) than there is toward selling one's organs (for example); commercialization of eggs and surrogacy is more complicated and occupies an uncertain space in the middle.[26]

Indeed, not all commercial activity in the human body is everywhere illegal. Most notably (and to varying degrees), India and parts of the United States and Asia allow commercial trade in reproductive material (gametes), blood and other replenishable body products (like milk and hair), as well as commercial surrogacy. Only Iran permits the sale of organs for transplant, but even commercializing (certain) organ donation (such as kidneys) has its proponents.[27]

The extent to which commercialization of the human body should or will be allowed in Australia is unclear (and this paper proposes that tax law can and should essentially remain agnostic on those issues), but the matter is a live and dynamic one. Public policy will evolve with societal attitudes and technological development. Meanwhile, biomedicine is producing more and more situations that stretch the application of the property law rules applicable to the human body.[28]

[25] See Imogen Goold, 'Sounds Suspiciously like Property Treatment: Does Human Tissue Fit within the Common Law Concept of Property?' (2005) 7 *University of Technology Sydney Law Review* 62 (positing that the acts regulating the use of human tissue are limited in what they cover in terms of both substances and purposes).
[26] For example, a relatively recent poll (December 2016) found that over 60% of respondents disapprove of banning commercial surrogacy. Kelton Tremellen and Sam Everingham, 'For love or money? Australian attitudes to financially compensated (commercial) surrogacy' (2016) 56(6) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 558.
[27] [Posner, George, etc.]
[28] See footnote 23 and discussion of property law below.

This paper does not purport to directly enter into the biomedical legal and ethical debate around commercializing the human body (and the above is surely a gross oversimplification of that debate). It does, however, observe the growing acceptance of at least some forms of commerciality in providing bodily tissues, gametes, and surrogacy services as well as the growing recognition of property rights in bodily materials (particularly reproductive material).

Property law and the human body

A threshold, though not necessarily dispositive, issue regarding the tax characterization of trade in body tissues is the extent to which property rights in such tissues are legally recognised. Reproductive technology, and particularly the provenance of sperm collected after a donor's death, has brought this issue to the legal forefront in recent years in Australia.

Western law's background default position was well established in Roman law: *dominus membrorum suorum nemo videtur* ("no one should be seen as owner of his own limbs"). That which can be called property under the law is an object, with a relationship to, but separate from, the personhood of the subject/owner of the property. "One cannot possess something which is not separate and distinct from oneself."[29]

A weird old Australian High Court case about a corpse combined with modern medical science, however, is presenting more and more opportunities to acknowledge property rights in human tissue.[30] Like the living body, the Western legal tradition did not recognise corpses as property.[31] But in 1908, the High Court now-famously ruled that

[29] *R v Bentham* [2005] UKHL 18 (one cannot be guilty of 'possessing' a firearm if it is just an imitation one made with one's hand and fingers); *Moore v Regents of the University of California* (1990) 51 Cal. 3d 120. Lisa Milot, 'What Are We – Laborers, Factories, or Spare Parts? The Tax Treatment of Transfers of Human Body Materials' (2010) 67 *Washington & Lee Law Review* 1053, 1092 ("To the extent the human body materials in a transaction are part of an integrated living human, they are not property").
[30] See generally Goold, (n 25).
[31] Of particular interest in the Australian context is that a lack of property rights in corpses can deny aboriginal communities a means of reclaiming the remains of ancestors in some circumstances.

> when a person has by lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least against any person not entitled to have it delivered to him for the purpose of burial[32]

Courts have applied the central holding to an ever-growing array of situations involving tissue.

Some early UK cases cited *Doodeward* to find that blood samples and body parts are able to be stolen under criminal statutes.[33] But the situation in Australia remained unclear at the turn of the millennium. In 2002, the ALRC reported that

> The courts have not produced any clear ruling on the particular property rights that may be held over tissue samples, beyond a right to possess - the violation of which constitutes theft only in very specific circumstances. It is not clear how far other property rights could be said to exist in relation to tissue samples.[34]

Recent holdings address other common situations. In 2000, tissue of a deceased was held to be property for purposes of a court order that allowed taking of the tissue in order to conduct a paternity test.[35] Ten years later a handful of rulings found that a widow can inherit their deceased husband's sperm via succession to property.[36] Gametes, because they involve the creation of another human life, are of particular importance and have special status.[37]

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[32] *Doodeward v Spence* [1908] HCA 45, 50. In this entertaining, if macabre, case, a medical doctor preserved the corpse of a two-headed stillborn because of its strangeness. When the doctor died, a guy called Doodeward bought the corpse at auction and then exhibited it as curiosity, eventually getting arrested.

[33] See, eg, *R v Rothery* [1976] Crim LR 691; *R v Kelly* [1999] QB 621; Roger Magnusson, 'The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions' (1992) 18 *Melbourne University Law Journal* 601, 617. More recently, individuals have been found to have property rights over sperm samples for purposes of suing over their negligent storage. *Yearworth & ors v North Bristol NHS Trust* [2009] EWCA Civ 37. On the other hand, there is United States precedent that an individual did not have property rights in his bodily materials that were, unbeknownst to him, used to develop a commercially successful line of cells because body parts were *sui generis*, and "research participants unlike researchers don not contribute skill, knowledge, nor transform material into invention." *Moore*, (n 29) _.

[34] Australian Legal Reform Commission, 'Protection of Human Genetic Information' (2002) DP 66*,* [17.20].

[35] *Roche v Douglas* [2000] WASC 146.

[36] See, eg, *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118; *Re Edwards* [2011] NSWSC 478.

[37] Brenda Reddix-Smalls, 'Assessing the Market for Human Reproductive Tissue Alienability: Why Can We Sell Our Eggs but Not Our Livers' (2008) 10(3) *Vanderbilt Journal on Entertainment and Technology Law* 643 (discussing why there is a strongly regulated market for sale of human organs and less so for sale of human gametes); Crawford, 'Our Bodies' (n 4) 714. See, eg, *Hecht v Kane* (1990) 20 Cal. Rptr. 2d 275 (finding that

These cases have recognised various property-like rights for various purposes, but most of them do not directly address the original body-haver, and none of them involve commercial transactions. It is only once bodily materials have been sufficiently processed and transformed (via work and skill) that they can be commercialised.

The *Human Tissue Act 1983 (NSW)* incorporates *Doodeward's* core concept by excepting from the prohibition on trading in human tissue that which "has been subjected to processing or treatment[.]"[38] Thus, the common law inquiry into the extent of property law rights in human tissue and the regulatory regime's exception above essentially collapse into the same issue: that which has been excised sufficiently from the human body to enter the stream of commerce is subject to property rights; and that which is subject to property law recognition is able to be commercialised.[39]

This inquiry is not necessarily dispositive of income tax ramifications from trade in bodily material, but the relevance of property law to the generation of ordinary income (or the application of the capital gains tax provisions) is obvious, and further discussed below.

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deceased have a property-like interest over preserved sperm because they should have some say over whether they have a posthumous child).

[38] *Human Tissue Act 1983* (NSW) s 32(2) provides that subsection (1) does not apply "if the tissue has been subjected to processing or treatment and the sale or supply is made for the purpose of enabling the tissue to be used for therapeutic purposes, medical purposes or scientific purposes." This exception accords with the vibe of *Doodeward* (that property rights attach to human bodily products once they are sufficiently processed, as discussed herein) and is the basis for the large (and regulated) secondary market in human bodily products and processes.

[39] See Lisa Milot, 'What Are We – Laborers, Factories, or Spare Parts? The Tax Treatment of Transfers of Human Body Materials' (2010) 67 *Washington & Lee Law Review* 1053, 1094 ("Once a distinction is drawn between excised human body materials that have entered the stream of commerce … and those that are transferred in a gratuitous transaction … only those in the former category should be considered property"). There are a number of theories in the scholarly literature to explain the mechanism by which doing something to tissue makes it property. One is to be found in Roman law's recognition of acquired property rights. James Edelman, 'Property Right to Our Bodies and Their Products' (2015) 39(2) *University of Western Australia Law Review* 47 (discussing ownership by *accessio* (merging two things), *specificatio* (creation of new thing), and *occupatio* (first possessor)). A more modern approach is contextual: property status depends upon the circumstances under which a person deals with their body – how and why they entered the market, whether the material is replenishable or regenerable, whether it is abundant, how invasive it is to obtain, the long term effect of its removal, and the like. Crawford, 'Our Bodies' (n 4) 703. See also Milot (suggesting that if bodily material is traded for compensation, then it is property; except for payments for whole body use, which is the provision of services). Property law in this area is in a feedback loop with ethics and societal attitudes: properly recognition is given to that which we are comfortable allowing to be commercialised. Blood and sperm are replenishable, for example.

III. United States Authority and Guidance

Blood

The first bodily product directly addressed by tax authorities was blood (in the context of the availability of charitable deductions for blood donations). United States case law and Internal Revenue Service guidance also addresses the tax ramifications of sales of blood (and blood plasma). Together, this guidance shows the difficult analytical and policy factors that go into categorizing transactions in human blood (and, by extension, other materials).

> "[T]here is no intuitive answer to the question of whether the transfer of one's own blood, for example, should be thought of as the performance of a service or as a property transaction. The degree of personal participation—in both the self-creation and the extraction of one's blood—suggests the performance of a service; however, the undeniable thingness of the resulting pint of blood, and its ready alienability and transferability, point in the direction of property."[40]

Blood donation, both charitable and compensated, is a common practice. Whole blood donations are generally made for little or no compensation, but plasma can be quite valuable. Blood and its constituent matter can be sold for gain and when donated charitably the question arises whether it can support a deduction (provided that the other requirements for a charitable deduction are met). Thus, the first considered tax law issue considered in this regard is the availability under United States tax law of a deduction for a charitable contribution of blood (a 'donation' in the tax law sense of the word). Although internal communications suggest that the Internal Revenue Service considered donations of blood to be property the value of which could be deducted under applicable law,[41] the first published consideration of the issue, during World War II, indicated that the Internal Revenue Service no longer felt that way as of 1942.[42] This view was made formal in Revenue Ruling 162, which advised that "furnishing blood for a transfusion or to a blood bank is analogous to the rendering of a personal *service* by a donor rather than a

[40] Zelenak (n 6) 52.
[41] United States Internal Revenue Service, General Counsel Memorandum 36418 (15 September 1975) ('GCM 35418').
[42] United States Internal Revenue Service, General Counsel Memorandum 23310 (6 July 1942).

contribution of 'property'"[43]. The practical effect of such a categorization was that the fair market value of the blood could not be deducted, the value of services being non-deductible. As such, the result is perhaps at least in part policy-driven. At the same time, blood was not so commodified at the time as a commercial product as it would late become.[44]

The next consideration came two decades later, by which time the Internal Revenue Service had changed its view, acknowledging the change in the marketplace and that "today blood is a commodity with a commercial market and value apart from its donor".[45] The memorandum was actually about the donation of milk,[46] and its status as property that can be donated:

> "apart from the taxpayer, mother's *milk is property* within the general definition of the term. The dictionary defines property as something that is or may be owned or possessed such as wealth, goods or a piece of real estate. Each week the taxpayer donated and the donee received . . . mother's milk. The milk was tangible and transferable; in fact, it was a marketable commodity. … the taxpayer could have sold her extra milk . . ."[47] (emphasis added)

The previous Revenue Ruling has never been modified or updated to reflect this view, and no new guidance or cases regarding charitable deductions for blood donation have appeared. However, subsequent tax law in the context of sales of blood has bolstered the recognition of bodily tissue as commodities.

In the first litigated case dealing with the tax ramifications of the sale of blood, the taxpayer in *Garber* had blood plasma that contained a rare antibody that commanded a high price

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[43] Revenue Ruling 162, 1953-2 C.B. 127 (1953) (emphasis added).

[44] Nonetheless, in a 1986 case, a deduction for a charitable donation of blood was denied (despite the holding in *Green*, discussed herein) without characterizing the activity as either services provision or the giving of property: in either case a deduction was unavailable either because services are not deductible or because even if property, blood is not the type of property (that which gives rise to long-term capital gain) for which the relevant statute allows a donation. *Lary v US,* 787 F.2d 1538 (11th Cir. 1986).

[45] GCM 35418 (n 41).

[46] The memorandum considered the donation of milk as non-deductible because it was not the right type of property under the applicable statute. Ibid.

[47] Ibid ("[M]ilk is a commodity, whether from a human being or a cow"). Like blood, milk is regenerative and not used to create a new life; however, one might distinguish between the two on the basis that milk is not necessary to the health of the person who produces it in the same way that blood is (and is thus more readily severable from the body).

(that was determined by a bidding war).[48] The taxpayer received a $25,000 bonus, $1,600 per bleed, and a $200 weekly salary and was indicted for tax evasion for failing to declare this income. The conviction was overturned on appeal, and the court did not need to resolve the categorization issue, finding the receipts income in any event. In dicta, however, the court noted that blood donation "resembles work" and at the same time "blood plasma, like a chicken and egg, a sheep's wool, or like any salable part of the human body, is tangible property which in this case commanded money."[49]

Shortly thereafter, another taxpayer was deemed to be engaged in the business of selling blood plasma.[50] As in *Garber*, the taxpayer in *Green* had a rare blood type that commanded a high price and which the taxpayer sold regularly over many years. In addition, the taxpayer monitored his specialty diet and augmented it with medicines and was required to travel to a lab multiple times per month. The litigants agreed that the receipts were income, but the deductibility of related expenditure was dependent on the type of income. The court determined that the income was from the business of selling a product not unlike the "usual sale of a product by a manufacturer to a distributor or of raw materials by a producer to a processor."[51] The court compared blood to "hen's eggs, bee's honey, cow's milk, or sheep's wool" and determined:

> "Although we recognise the traditional sanctity of the human body, we can find no reason to legally distinguish the sale of these raw products of nature from the sale of petitioner's blood plasma. Even human hair, if of sufficient length and quality, may be sold for the production of hairpieces."[52]

The result was that the taxpayer was allowed deductions for expenditure on transportation and specialty foods and medicines relating to sales of the taxpayer's blood plasma, but was disallowed deductions for personal expenditure on health insurance. A practical result of

[48] *United States v Garber*, 607 F.2d 92 (5th Cir. 1979).
[49] Ibid 97. Private Letter Ruling 8814010 (1987) came to the same conclusion that the sale of rare blood plasma gives rise to income, citing *Green* and *Lary*, discussed herein, but did not indicate to what type of income the sales gave rise.
[50] *Green v Comm'r* 74 TC 1229 (Tax Ct. 1980).
[51] Ibid 1234.
[52] Ibid.

this categorization is that the transportation expenses might not have been deductible had the sale of blood plasma been considered the provision of services.[53]

While the holding did not require the court to explicitly determine whether the taxpayer's business was one of selling property or services, the above indicates that the court viewed blood as property, at least for United States tax law purposes.

Eggs

With the characterization of trade in blood all over the place, the issue of how to tax the commercialised body was not addressed by United States courts again until 2015, when the Tax Court determined that the taxpayer in *Perez* received taxable services income when she was paid to get hormone treatment and have any viable mature eggs aspirated.[54] The taxpayer signed contracts with the arranging assisted reproduction agency and the intended parents paying her $20,000 for going through the prescribed procedures (as well as reimbursement of related expense).[55] Perez was to be paid for going through the egg retrieval procedures whether or not any eggs were extracted.[56] In that way, the parties were able to avoid the characterization of the contract as one for the (illegal) sale of body parts (which of course is not to say that the parties' characterization need be respected).[57] Such a characterization also allowed the court to refrain from deciding what type of assets eggs are.[58]

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[53] *Lunney v Federal Commissioner of Taxation* (1958) 100 CLR 478.
[54] *Perez v Comm'r*, 144 TC 51 (Tax Ct. 2015).
[55] The demand for eggs is evidenced by the large international IVF industry; eggs can go for up to $100,000 in parts of Asia and the United States. Sperm is much more readily available and commands much less for donors. For an overview of the market for gametes, see Rene Almeling, *Sex Cells: The Medical Market for Eggs and Sperm* (University of California Press, 2011).
[56] Payment under the contract was based on "good faith and full compliance with the donor egg procedure, not in exchange for or purchase of eggs". *Perez* (n 54) 54. Nor is there a business of selling eggs here because, unlike *Green*, payment is not based on the amount or success of material provided.
[57] Neither party argued for such a characterization nor did the court consider it. Transcript of Proceedings at 29, Perez v. Comm'r, 144 T.C. 51 (2015) (No. 9103-12), 97. However, the opinion did acknowledge the effect of the contracts to be that the removed eggs were to "become the property of the intended parents." *Perez* (n 54) 54. See also Zelenak (n 6) 49. The taxpayer argued that in essence the payment was for damages for pain and suffering – an argument that was not accepted because the taxpayer had consented to it.
[58] Having decided that the taxpayer have services income, the court did not decide whether the eggs are capital assets. Ibid 56-57.

Surrogacy

Commercial surrogacy is prohibited everywhere in Australia (except the Northern Territory, where there is no law addressing the issue) and it is even illegal in some states to go overseas for a surrogacy arrangement.[59] Nonetheless, there is a demand for surrogacy and up to a quarter of international surrogacies are for Australian intended parents. While most countries, including all those un Europe, ban surrogacy as an illegal medical procedure, it is legal in some jurisdictions (such as many American states[60] and in some countries in Asia).

In the typical surrogacy arrangement, a woman contracts to be artificially inseminated,[61] carry the baby to term, and relinquish parental rights to the intended parents. As with contracts dealing with bodily tissue, payments under surrogacy arrangements are usually characterised as reimbursements for medical and living expenses. The selling of babies is generally frowned upon.

There has not yet been any published authority on the tax treatment of commercial surrogacy, though it has been discussed in the scholarly literature. It has been long been assumed by United States commentators that any payments received by the surrogate are taxable income.[62] In an economic sense, surrogacy is rather simple. Furthermore, "intact

[59] Australian law nonetheless countenances commercial surrogacy that occurs overseas. See, eg, *Ellison v Karnchanit* [2012] FamCA 602 (Australian couple granted parental rights to twins born to surrogate in Thailand).

[60] At the national level in the United States, there are no laws on surrogacy, and its 50 states constitute a patchwork quilt of policies and laws, ranging from bans (eg Michigan) to legalization with regulation (eg Florida) to "anything goes" (California).

[61] Artificial insemination of the surrogate either uses the surrogate's own egg (a 'traditional', though less common surrogacy) or someone else's donated egg (a 'gestational' surrogacy, preferred because the surrogate has no genetic relationship with the child and so the family issues are neater). See generally Bridget J Crawford, 'Taxation, Pregnancy, and Privacy' (2010) 16 *William & Mary Journal of Women and the Law* 327.

[62] James Edward Maule, 'Federal Tax Consequences of Surrogate Motherhood' (1980) 60 *Taxes: The Tax Magazine* 656, 657 ("Unquestionably, the fee paid to the surrogate mother by the childless couple is gross income to the surrogate mother … Whether that fee constitutes compensation or rental income is arguable'). As discussed above, it is not really all that arguable. Other than rhetorically, a womb is not rentable. At any rate, not taxing surrogacy would result in such work being tax-preferred, and there is no policy or doctrinal justification for that. Bridget J Crawford, 'Taxing Surrogacy' in Kim Brooks, Åsa Gunnarsson, Lisa Philipps, and Maria Wersig (eds), *Challenging Gender Inequalities in Tax Policy Making: Comparative Perspectives* (Hart Publishing, 2011) 95-108, 101. But see Crawford, 'Taxation, Pregnancy, and Privacy' (n 61) 345 (regarding possibility that one engages in surrogate gestation as a "hobby").

living bodies are subjects, and thus transactions with respect to them are only taxable as services."[63]

The importance of categories

Animating the categorization efforts discussed above is the notion that

> human body transactions expose several of the key structural tensions in the federal income tax. Most significantly, in a number of ways the income tax treats income from property very differently from, and usually more favourably than, income from services.[64]

Specifically, under both American and Australian tax law, income from property can be taxed at lower rates (via concessional treatment of capital gains) than income from services; income from property can be more easily deferred and alienated; and the value of property is amenable to deduction for charitable donations (whereas the charitable donation of services is not deductible).

To the first point, the degree to which it actually matters (aside from technical valuation and timing rules) in the context of the human body is outweighed by the expressive value of a definitive tax categorization (such as "eggs are property" or "blood is trading stock" or "kidneys are capital assets"). The main distinction between income from services and property is that the latter is potentially subject to lower capital gains rates. However, such concessional treatment is only available to the extent that the holding periods of various body tissues satisfy the statutory requirements. As is discussed below, such holding periods are unlikely to be met for any body tissues considered property.

That such distinctions are "bizarre"[65] only bolsters the case for avoiding making them if not necessary to do so. The *Whitfords Beach* case is itself an example of transcending

[63] Milot (n 29) 1092. The Australian tax situation is likely more complicated because of the potential application of CGT.
[64] Zelenak (n 6) 39.
[65] "[T]here is no remotely plausible policy reason why the tax consequences of body materials transactions should differ greatly depending on whether the label of services or property is attached to particular

established categories of income and provides a doctrinal basis for avoiding making difficult and unnecessary categorizations (as discussed below).[66]

IV. Application of Australian Tax Law Principles

What follows is a discussion of the categorization of income from trade in the human body under Australian tax law principles.[67] The initial impetus for this inquiry was an attempt to come up with an exam question for an undergraduate introductory tax law course that presented a novel and challenging application of the common law interpretation of "ordinary income". Such analyses must start with the incantation that ordinary income is

> not a term of art, and what forms of receipts are comprehended within it, and what principles are to be applied to ascertain how much of those receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind, expect in so far as the statute states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as income.[68]

These concepts and usages are not constant and static but evolve and change over time.[69] There is no definitive definition of "ordinary income" but rather some generally recognised categories, principles and indicia that allow the concept to reflect changing societal

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transactions, and because (to take a striking example from a judicial opinion) it is bizarre that federal income tax consequences should turn on the lifespans of red blood cells." Ibid 82.

[66] See Ibid ("If tax distinctions—between income from services and income from property, between sales of capital and non-capital assets, and between long-term and short-term gain seem irrational in the unfamiliar context of human body transactions, that might lead one to examine more critically the justifications for those distinctions in other, more familiar, areas. Perhaps the broader lesson to be drawn from the consideration of the tax treatment of transactions in human body materials is that it would be better to have a tax system which did not draw so many distinctions between different types of income.").

[67] This analysis assumes the legality of such transactions for the purposes of discussion. At any rate, assessability based on ordinary concepts in not affected by the legality of activity giving rise to a receipt, though there are statutory rules preventing cost recovery for expenditure relating to illegal activities. *ITAA 1997* s 26-54, 110-38(1). Furthermore, an unenforceable right would not seem to meet the definition a "CGT asset" as it is expressly not a "legal or equitable right that is not property." *ITAA 1997* s 108-5(1)(b). Until recently (1 July 2019), expenditure by those seeking to obtain body tissue or surrogacy services was eligible for the medical expense tax offset under former section 159P *ITAA 1936*, which covered, for example, the cost of purchasing sperm overseas (ATO ID 2001/169, withdrawn) and of infertility treatments (IT 2359).

[68] *Scott v Comm'r* (1935) 35 SR (NSW) 215, 219.

[69] *Federal Commissioner of Taxation v Blake* (1984) ATC 4661, 4663.

conditions.[70] *Whitfords Beach* itself (discussed below) is an example of the evolution of the concept of ordinary income, as it recognised a new (sub-)category of income.

An older, embedded, principle is that genuine gifts, those that arise from personal qualities and feelings of affection rather than from a recognised source of income (such as capital or labour), are not ordinary income.[71] However, because those who provide body tissues are generally referred to as a "donor" (whether or compensated),[72] there is some linguistic confusion. Indeed, many paid egg donors are motivated by altruism, and object to taxation on that basis.[73] But a taxpayer's subjective intent, while perhaps a factor in the determination of whether a receipt is ordinary income, does not matter as such.[74]

Nor does the private and domestic nature of health and reproduction mean that receipts from related transactions are not ordinary income. While it has been recognised that there are some things that, based on their nature, should be beyond the reach of taxation (a person's identity, talents, disabilities, or imputed income),[75] unlike with respect to the denial of deductions that are private and domestic in nature,[76] there is no exception to the recognition of ordinary income from receipts arising from such transactions. Gifts and

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[70] Domenic Carbone, 'An Extraordinary Concept of Ordinary Income? The Significance of *Federal Commissioner of Taxation v Montgomery* on What is Income According to Ordinary Concepts' (2010) 20 *Revenue Law Journal* 20 (discussing whether income must fit within a recognised category or merely exhibit enough relevant indicia in order to be considered ordinary income); Margaret McKerchar and Cynthia Coleman, 'The Ever-Elusive Definition of Income: A Historical Perspective from Australia' in John Tiley (ed), *Studies in the History of Tax Law vol 2* (Hart Publishing 2007) 357-374, at 361-62 (discussing, inter alia, the 'fruit and tree' analogy from *Eisner v Macomber* 252 US 189 (1919)).

[71] *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47; *Scott v Federal Commissioner of Taxation* (1966) 117 CLR 514.

[72] This colloquial term is used herein with the understanding that readers will understand that it does not mean "donor" in the legal sense (unless otherwise indicated).

[73] See Bridget J Crawford, 'Tax Talk and Reproductive Technology" (2019) 99 *Boston University Law Review* 1757 ('Tax Talk'), 1791.

[74] *Federal Commissioner of Taxation v Stone* (2005) 215 ALR 61.

[75] Tsilly Dagan, 'The Currency of Taxation' (2016) 84 *Fordham Law Review* 2537, 2538. The exception for income from hobbies, pursued mainly for the purpose of leisure and recreation exists because genuine hobby activity is domestic, even if it involves money (though the amount of money surely has an effect on whether or not it is truly a hobby). *Thomas v Federal Commissioner of Taxation* (1972) 3 ATR 165. In terms of farming and primary production activity, that which is more than private and domestic (a hobby), is that which exceeds what is required for the taxpayer's domestic consumption and enjoyment. See, eg, *Ferguson v Federal Commissioner of Taxation* (1979) 9 ATR 873 for some uneasy agricultural metaphors given the present discussion. But genuine recreation is not of the commercial realm, and thus is outside the concept of ordinary income.

[76] *Income Tax Assessment Act 1997* (Cth) s 8-1(2)(b).

prizes and windfalls are not income because they are divorced from any particular cognizable income-producing source. Service and goods providers who do all sorts of intimate, private and domestic things for money nonetheless derive that income from their provision of services and goods (rather than from altruism).

Thus, while the general concept of ordinary income readily accommodates trade in the human body, the traditional categories (the capital-revenue distinction; income from property vs services vs business) used to identify ordinary income do not sit so comfortably with such practices.

A fundamental aspect of capital, like the category of property more generally, is that it is ownable. "'[C]apital' is used in contrast with 'revenue'; it has no reference to a man's body, mind, or capacity."[77] Incongruously, it is only once bodily tissue has been sufficiently separated from the body that it can be recognised as property; but in order to determine what type of property, an examination of the putative property's role while it was still a constituent part of an undivided body is required. For this purpose, reference may be had to the regulatory regime's categorization scheme, which distinguishes between reproductive and non-reproductive material, and, in the case of the latter, between regenerative and non-regenerative tissue.[78]

At a basic level, regenerative tissue seems more like a 'revenue' asset, and non-regenerative more like capital; and to stretch a familiar analogy, reproductive materials seem like the fruit of the tree and a kidney seems more like a capital asset.[79] Were such categories relevant, sperm, simple to collect, reproductive, and regenerative, might be identified as the most similar to a revenue asset.[80] But the capital/revenue distinction is predicated on the taxpayer holding property, which it is argued cannot occur until the body is sufficiently transformed so as to allow it to enter into commerce.

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[77] *FCT v Hatchett* [1971] HCA 47: (expenditure to equip the taxpayer's mind in order to earn more is not capital in the relevant sense).
[78] See Part II.
[79] See Dorothy A Brown, 'Taxing the Body' in Michele Goodwin (ed), *The Global Body Market: Altruism's Limits* (Cambridge University Press 2013) 148-159.
[80] Probably for this reason, there is no United States tax law guidance on point. However, most of the Australian property law cases regarding bodily tissue involve sperm.

At the margins where trade in bodily material lies, the distinction between property and services is also difficult (and practically unnecessary) to make.[81] Likewise, despite the holding in *Green*, categorizing even regular and long-term compensated donations of body tissue as business activity is an uneasy fit.[82] In fact, with regard to the commercialised body, it is the business category that would subject the taxpayer to differential treatment (including, for example, the trading stock rules and loss quarantining rules in Division 35 of the *ITAA 1997*); furthermore, labelling trade in the human body as an ongoing "business" is an even more loaded instance of law's expressive function than recognizing property rights. Property rights are recognised for a variety of purposes, but an ongoing business's *raison d'être* is to be commercial.

The most neutral and natural category in which to place the commercialised human body is that announced by *Whitfords Beach*, which involved an isolated one-off income-generating venture. In that case, a company purchased some land in Western Australia in 1954 so that the members of the company could enjoy their fishing holiday houses there. Many years later, the members changed their mind about using the property for vacation purposes and sold their shares to a development company in 1967 (and realised a capital gain). The development company then developed the land and sold it off in lots over the subsequent years. Even though the taxpayer company had not acquired the land originally for the purpose of profiting upon resale, when the new members began development it transformed the nature of the sale of the land from one that was capital to an 'isolated venture' that generated ordinary income.[83]

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[81] See, eg, Zelenak (n 6) 57-58; Crawford, 'Our Bodies' (n 4) 748. *ITAA 1936* unhelpfully in this context defines "income from property" as all income that is not from personal exertion. *ITAA 1936* s 6(1).

[82] Note that the Australian definition of "trading stock" does not explicitly require the stock to be "property": "anything produced, manufactured or acquired that is held for purposes of … sale or exchange in the ordinary course of a business." *ITAA 1997* s 70-10. It is not clear that the "purpose" of holding blood is for sale or exchange, even for the taxpayer who regularly sells it. See Zelenak (n 6) 55. However, it could be said that once the blood intended for sale/donation is extracted, it becomes trading stock, to be carried at either its cost or its market value, at the election of the taxpayer. *ITAA 1997* s 70-30. In the case of the latter, section 104-220 *ITAA 1997* would apply a deemed sale rule to the former capital asset.

[83] The statutory back up in this area is *ITAA 1997* s 15-15 'Profit-making undertaking or plan', which is limited to those transactions that do not give rise to ordinary income, and does not apply to transactions involving property acquired on or after 20 September 1985.

The factual scenario of the case is obviously unrelated to that of the commercialised body; so an expansive reading of the holding is required in order to support the assertion herein: that the 'isolated venture' doctrine is the appropriate one to justify the taxation of the commercialised human body.

It is the category that most epitomises the essence of the concept of ordinary income without further characterization of the nature of the activity while at the same time recognizing that trade in human body and its materials is *sui generis*. Further, the circumstances in which the holding arose emphasises the theme of *transformation* that is at the heart of the inquiry around property rights in human tissue and the extent to which they can be commercialised.

The High Court identified that the alleged profit making undertaking or scheme "forms the whole of the taxpayer's operations" rather than being part of a larger operation,[84] but nonetheless found that such activity can give rise to profit akin to business profits.[85] The Court emphasised that it was the *change* that occurred upon the sale of the shares in the land-owning company that "transformed" a "domestic" holding of land to a "commercial venture with a view to a profit."[86] The general theme of this holding is compatible with the property law background that transformation (by value-enhancing work) is required in order to change something that was not in the stream of commerce into something that is.

Though it is couched in terms of "business" profits, the essence of the *Whitfords Beach* isolated venture doctrine is the uniqueness of one-off profit-making activity and the need for it to have its own category that does not rely on the traditional categories of income. The reasoning for the holding would support categorizing income as ordinary whether or not the transaction dealt with property, and the "business" label here merely signifies "commerciality", lest a new category would not be required. Thus, the holding has broad applicability and has been relied upon in a variety of contexts.[87]

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[84] *Whitfords Beach* (n 7) 366.
[85] Ibid 367-68.
[86] Ibid 370.
[87] Graeme S Cooper et al, *Income Taxation: Commentary and Materials* (Thompson Reuters, 9th ed, 2020) [5.230].

Reliance on the isolated venture doctrine to deal with the commercialised body has the benefit of avoiding some of the more problematic characterization problems in tax law while at the same time acknowledging both the uniqueness of the commercialised body and the legitimacy of the related transactions and the taxpayers who engage in them.

In this unusual area of economic activity, much is asked of tax law. Like other areas of law, tax law can be a feedback loop that both expresses a society's values and codifies its norms[88] while at the same time contributing to the content of those values and norms.[89] Legal acknowledgment can legitimise practices and transactions[90] and "make [them] part of the public conversation about rights and responsibilities"[91]

The above is perhaps an argument for some legitimizing benefits of taxation in this area, but not necessarily an argument for any specific characterization regarding the type of income, given that such a characterization would mainly serve expressive purposes. It is enough for the tax system to acknowledge and legitimise the transfer of human bodily materials as producing ordinary income; application of the *Whitfords Beach* doctrine heralds the *sui generis* nature of the commercialised body and avoids issues that involve policy matters that are unsuited for tax categorization.[92]

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[88] See, eg, Kitty Richard, 'An Expressive Theory of Tax' (2017) 27 *Cornell Journal of Law & Public Policy* 301; Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144 *University of Pennsylvania Law Review* 2021.
[89] Tsilly Dagan, 'The Currency of Taxation' (2016) 84 *Fordham Law Review* 2537. See, eg, Bridget J Crawford, 'Gender, Private Life, and Taxation: Lessons from United States Income, Estate and Gift Tax Laws' (2013) PhD thesis on file with author (study concludes that United States tax law encourages and rewards traditional family arrangements).
[90] Crawford, 'Tax Talk' (n 73) ("to tax a transaction such as compensated egg transfers is to recognise that activity's importance"); Bridget J Crawford, 'Taxing Surrogacy' in Kim Brooks, Åsa Gunnarsson, Lisa Philipps, and Maria Wersig (eds), *Challenging Gender Inequalities in Tax Policy Making: Comparative Perspectives* (Hart Publishing, 2011) 95-108, 107 ("Tax law and the enforcement of tax laws relating to surrogacy is part of the progress towards justice for women"). Perhaps this in part explains the reluctance to characterise trade in body parts as such. See generally, Patricia Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991). That being said, the application of tax law to illegal activity cannot be said to legitimise such activity. At the very least, the same concerns that underlie the argument for prohibition support the argument against tax-favouring commercial trade in the human body.
[91] Crawford, 'Taxing Surrogacy' (n 90) 106.
[92] See Crawford, 'Our Bodies' (n 4) 761 ("Taxing the transfer of human bodies or bodily materials, including gametes, serves only to expose the transactions for what they are in a financial sense. Undistracted, one can then undertake a more neutral look at the long-term social and ethical implications of a market in the very stuff of which humans are made").

The assertion above that categorization matters mostly for expressive purposes depends, at least in part, on the application of the CGT rules (particularly the holding period provisions) to body parts and materials.[93]

The definition of "capital asset" as "any kind of property" or "a legal or equitable right that is not property" would likely capture any rights one has in one's own body.[94] The main issue then is one of timing – when those rights came to be. In general, you acquire a CGT asset when you "become its owner."[95] For self-created assets, you acquires the asset when the "work that resulted in the creation started."[96]

If rights (property or otherwise) are for tax purposes inherent in bodily materials when they came into existence, then presumably the characterization and holding period would be measured as of that time. Thus, if rights in body parts and tissue arise along with their existence, then body tissue that is a capital asset would probably also be a "personal use asset" the gain or loss on which is likely to be disregarded.[97]

Furthermore, the holding period calculation would become an exercise in anatomy and biology: a person is born with all of the eggs they are going to have, though only one egg matures through menstruation at a time; on the hand, sperm and milk and blood (at least on a cell-by-cell level) is constantly being created and replaced over short periods of time. [98]

However, if body parts and tissues are recognised for tax purposes only once they have been sufficiently transformed, then the CGT outcome not only becomes much more simple and straightforward, but it also avoids (in most cases) potential concessional treatment

[93] It is likely the deeply nerdy aspect of the tax law question of holding periods for body parts that accounts for a not insignificant amount of the academic interest in this topic. See, eg, Zelenak (n 6) 125-154.
[94] *ITAA 1997* s 108-5(1).
[95] *ITAA 1997* s 109-5(1).
[96] *ITAA 1997* s 109-10, Item 1.
[97] The CGT rules disregard losses from personal use assets (*ITAA 1997* s 108-20) and gains on personal use assets whose first element of cost base is $10,000 or less (*ITAA 1997* s 118-10(3)).
[98] *Lary* (n 44) discussed in dicta that if red blood cells were property, they only last for around 4 months, and so could not take advantage of concessions available for capital assets held for at least a year. Of course, organic material can be frozen, thereby potentially extending the holding period of a capital asset. Hair grows about 6 inches per year.

available to assets held for longer than a year. This view would accord with both the *Doodeward* and the *Whitfords Beach* lines of cases and their emphasis on the relevance of transformative work.[99] It is also supported by commentators who have considered the issue.[100]

V. Conclusion

There are a number of complex legal and ethical questions surrounding the commercialised human body. Income tax categorization of receipts from trade in the human body need not be one of them. A broad interpretation of the 'isolated venture' doctrine in *Whitfords Beach* is the analytically apt one to apply to activity as unique as trade in the human body's parts and products. It allows tax law to be appropriately expressive of this quality while avoiding unnecessary complications regarding categorizing income. Finally, the *Whitfords Beach* ratio is aligned with the transformative theme embodied similarly in Australian property law and regulatory statutes applicable to the commercialised human body.

[99] The calculation of gain in *Whitfords Beach* involved a deemed reacquisition of the property (with the taxpayer's intent then measured at the time of reacquisition). For a discussion of *Whitfords Beach* and non-business taxpayers, see Julie Cassidy, 'The Taxation of Isolated Sales Under Section 25(1) *ITAA*: TR 92/3 v Joint Submission' (1994) 4:1 *Revenue Law Journal* 1, 9.

[100] See, eg, Milot (n 29) 1101 ("[P]rior to excision and commercialization, [human body materials] are simply not assets and thus cannot properly be considered to be held within the meaning of the tax statute. Moreover, it unnecessarily complicates the analysis to consider them as such, by requiring that each extracted cell be classified by age, with a precision that is not always possible. Finally, assigning a holding period that begins only with commercialization after excision to all human body materials means that all such materials are treated equally under tax law rather than arbitrarily favouring some materials (for example, eggs) over others (like sperm)").