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TAX UNCERTAINTY

G.T. Pagone*

**"Whoever hopes a faultless tax to see,
Hopes what ne'er was, or is, or e'er shall be"[1]**

The Dean's letter of invitation described the general theme of this lecture series as "taxation law in context" with the lectures examining "the development of taxation law in its broader legal and historical settings". "Uncertainty" seemed the obvious subject.

At some point in a law course, every law student is taught about the importance of certainty in the law. At some point in a lawyer's career, every lawyer in every area of legal practice comes to appreciate the necessity of certainty in the law. Certainty is the foundation of the lawyer's craft and is, perhaps, the only contribution that makes us useful to clients and society. It is the lawyer's ability to predict the application of the law that helps us organise relations between people in their personal affairs, business relations and dealings with government. Without a reliable degree of certainty, contracts would be worthless and ongoing ordinary relations and dealings would be at risk of whim and fancies. Certainty in the law is fundamental to the rule of law which "should be clear, easily accessible, comprehensible, prospective rather than retrospective, and relatively stable".[2] It is with that frame of mind that I turn to taxation.

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* Judge of the Supreme Court of Victoria; Professorial Fellow, University of Melbourne.

1 Quoted in P J Lanigan, 'Technical Problems Relating to the Objectives and Consequences of Taxation', *Papers, First National Convention, The Taxation Institute of Australia*, (TIA, 1969) 39.

2 Melissa Castan and Sarah Joseph*, Federal Constitutional Law*, *a Contemporary View* (2nd ed, 2006) 5; J Raz, "The Rule of Law and its Virtue" (1977) 93 *Law Quarterly Review* 195, 198-202; A V Dicey, *Introduction to the Study of the Law of the Constitution* (1st ed, 1885; 10th ed, MacMillan, 1960); Butterworths, *Halsbury's Laws of Australia*, vol 4 (at 18 August 2009) 80 Civil and Political Rights, 'Use of International Covenant on Civil and Political Rights' [80-25].

There is a curious entry, some may say a curiously candid entry, under the heading "Taxation" in *The Oxford Companion to Law*.[3] The first two and the last two sentences describe taxation as follows:

> Traditionally the principal way in which the ruling classes in organised communities have oppressed, fleeced, and expropriated some of the subjects. It has been known from very early times, and from the earliest times the tax-gatherer has been an object of public fear, hatred, and execration …
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> […]
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> Not the least evil features of the modern tax system are the army of unproductive civil servants concerned with the assessing and collecting of taxes, the enormous volume and constantly changing detail of the chaotic and largely incomprehensible body of verbiage called the law of taxation, the incomprehensible and frequently incorrect assessments, and the utterly irrational nature of the whole topic. In the law of taxation justice has no place at all.[4]

Some may think this an extreme view. Perhaps it is, but it gives us a context in which to evaluate the role of certainty in tax law. Tax falls upon us in the ordinary course of our activities as a compulsory taking[5] from us of something that we, by definition, have earned or owned. How and when that may happen should be clear, predictable and free from whim, caprice or chance. In the time available this evening, I thought it might be interesting to reflect upon some causes of uncertainty in tax law and whether uncertainty is desirable or deliberate. In doing so I should make it clear that I hold no hope for certainty in tax law in the future. Ten years ago last month the Ralph committee recommended reform to the anti avoidance provisions to be based around a clear articulation of the underlying policy of a restructured tax law.[6] A few years before that we lived through the partial and incomplete rewriting of the 1936 Act as the result of what was optimistically called

3 D M Walker, *The Oxford Companion to Law* (1980) 1208.
4 Ibid.
5 *Matthews v Chicory Marketing Board (Victoria)* (1938) 60 CLR 263, 276 (Latham CJ).
6 Review of Business Taxation, *A Tax System Redesigned: more certain, equitable and durable* (July

the Tax Law Improvement Project. Forty years ago, at the First National Convention at the Tax Institute of Australia in May 1969 a Mr R.F. Hughes wrote:

> Some not very scientific, and probably far from complete, research has disclosed that, in the last eight years in Australia, at least two hundred separate articles in professional or business journals and papers presented at professional conventions or congresses have been concerned with taxation reform in one way or another. One wonders whether, therefore, anything further may usefully be said on this topic, or, if said, whether we will ever see reform.[7]

At the same conference the then second Commissioner of Taxation, Mr P.J. Lanigan, began his paper by recalling the four basic canons laid down by Adam Smith in 1776.[8] The second canon was:

> The tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor and to every other person.[9]

And yet stubborn uncertainty stubbornly remains. The more things change, as the French adage goes, the more things remain the same.[10] I doubt that we can do much more than gain some small insight into why that may be so.

Uncertainty may in part be an inevitable feature of language. Words are frequently capable of many meanings, some of which were not, or at least may not have been, intended when used in a particular context. One such example may be seen in *Bourne v Norwich Crematorium Limited*[11] in the context of a UK statute where the tax fell by reference to whether a building or structure was for the manufacture of goods

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1999) 243.

7 R F Hughes, 'Taxation Reform', *Papers, First National Convention, The Taxation Institute of Australia*, (TIA, 1969) 143.

8 Lanigan, above n 1, 27.

9 Ibid.

10 Or as Yogi Berra might have said: "It's déjà vu all over again." Yogi Berra, *The Yogi Book* (L.T.D. Enterprises, 1998) 30.

or materials or the subjection of goods or materials to any process. A narrow question raised in that case was whether goods and materials subject to a process included the cremated remains of human bodies. Justice Stamp said of this:

> In my judgment it would be a distortion of the English language to describe the living or the dead as goods or materials. The argument of course goes on inevitably to this; that just as "goods and materials" is wide enough to embrace, and does embrace, all things animate and inanimate, and so includes the dead human body, so the other words to which a meaning must be given, namely "subjection" and "process", are words of the widest import. Parliament cannot, so the argument as I understand it runs, have intended to exclude from the definition a process whereby refuse or waste material is destroyed or consumed by fire and, putting it crudely, for it can only be put crudely, the consumption by fire of the human body is a process. I protest against subjecting the English language, and more particularly a simple English phrase, to this kind of process of philosophy and semasiology. English words derive colour from those which surround them. *Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which one has assigned to them as separate words so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language.* That one must construe a word or phrase in a section of an Act of Parliament with all the assistance one can from decided cases and, if you will, from the dictionary, is not in doubt; but having obtained all that assistance, one must not at the end of the day distort that which has to be construed and give it a meaning which in its context one would not think it can possibly bear. What has to be decided here is whether what is done by the taxpayer company, namely the consumption or destruction by fire of the dead body of the human being, is within the phrase "the subjection of goods or materials to any process". I can only said that, having given the matter the best attention that I can, I conclude that the consumption by fire of the mortal remains of homo sapiens is not the subjection of goods or materials to a process within the definition of industrial buildings or structure contained in section 271(1)(c) of the Income Tax Act 1952. (emphasis added)[12]

To the inherent ambiguity in language one may also add determined obfuscation,[13] nurtured, perhaps by self interest or institutional objective.

Another cause of uncertainty may be a mismatch between the underlying objectives

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11 [1967] 1 WLR 691.

12 Ibid 695-6.

13 *Pyneboard Pty Ltd v Trade Practices Commission and Bannerman* (1982) 57 FLR 368, 375 (Northrop,

expressed in statute and the potentially distorting tools used by lawyers to determine the meaning of the words used and their application. This mismatch may be seen in many contexts of tax law. The reason for the mismatch is essentially that the tools used by the law to discern or apply meaning may not reflect the non lawyer's intention or meaning when the words were used or adopted. Take for example the distinction between capital and income upon which our system of taxation so heavily depends. Whether a receipt or an outgoing has the character of income or capital will usually be obvious enough and the legal answer may well accord with the economic or accounting outcome which the statutory words were intended to express. However that will not always be so and one reason for that is because the lawyer's tools to determine the characterisation is different from that of an accountant or an economist.

In this context the courts have frequently said that what is income and what are allowable as deductions are matters of legal analysis rather than for determination by accountants or economists,[14] notwithstanding that the legal measure adopted in the statute might be thought to have been the expression of the accounting or economic concept by reference to which profit and loss was traditionally determined by ordinary concepts. An example of the difference in approach may be seen in the decision in *Federal Commissioner of Taxation v McNeil*[15] concerning the taxability as "income" of a receipt by a shareholder of $514 from the sale on her behalf of rights to sell shares in St George Bank Limited. Mrs McNeil had previously held 5,450 shares in the bank from which, over the years, she derived dividends upon which she paid tax in the ordinary way. In January 2001 the bank announced its intention to buy back about 5% of its issued share capital at a fixed price of $16.50 per share.

Deane and Fisher JJ).

14 *The Commissioner of Taxes (South Australia) v The Executor Trustee and Agency Co of South*

Mrs McNeil thus came to have 272 rights to require the bank to buy her shares. These rights were separately listed for trading on the Stock Exchange which, at the time in question, had a value of $1.89 each. Mrs McNeil took no steps to exercise her rights, with the consequence, under the transaction documents, that they were transferred to a merchant bank which sold them to the bank for $2.12 each for a total of $576.64. Part of that receipt was treated as a capital gain, but the bulk, $514, was treated by the Commissioner as ordinary income under general principles.

The occasion by which Mrs McNeil came to have the rights was, from the company's point of view, a partial return of capital to its shareholders. Mrs McNeil, as a shareholder, and from an accounting and economic point of view, could be seen to be receiving a part of the capital value of her shareholding upon the sale of the sell-back rights. The High Court, by a 4-1 majority, held otherwise, focussing upon Mrs McNeil's individual receipt of the money and upon a finding that her shareholding in legal terms remained unchanged as a matter of legal analysis. The law treated the receipt as income though in economic terms her capital wealth as a shareholder in the Bank before and after the transaction had not changed (except, of course, that it was reduced by reason of the tax she had to pay).

The majority judgment in *McNeil* began its consideration of the issues by recalling that the character of the sell-back rights had to be determined from the point of view of the taxpayer (the recipient) and not from the point of view of the bank (the payer). Their Honours next reasoned that "a gain derived from property has the character of income", including a gain to an owner who receives the gain passively.[16] An important inquiry relevant to the ultimate issue was, therefore, whether the gain was

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Australia Ltd ('Carden's Case') (1938) 63 CLR 108, 152 (Dixon J).

15 (2007) 229 CLR 656.

derived from property which the taxpayer continued to hold in contrast to a receipt in exchange for a disposal of part of the capital. This led their Honours to consider whether the rights enjoyed by Mrs McNeil arose from and were "severed from, and were a product of, her shareholding in [the bank] which she retained": in short, was the capital severed or did it remain intact; was the receipt in exchange for what was severed or did it proceed from capital which remained whole?[17] Critical to their Honours' conclusion that the receipt was a product of (and not in exchange for a part of) the capital, was their Honours' analysis that Mrs McNeil's shareholding in the bank, as a matter of legal analysis, "remained untouched".[18] Callinan J reached the contrary conclusion placing significance on the impact upon Mrs McNeil as a shareholder when considering, as his Honour said, the "transaction as a whole".[19]

The most significant point in the conclusion of the joint judgment was that Mrs McNeil's shareholding in the bank "remained untouched".[20] An accountant or an economist may have analysed the transaction quite differently and may have seen the transaction from Mrs McNeil's point of view as an affair wholly on capital account (as did Callinan J). On such an analysis, Mrs McNeil, as a shareholder, had a number of shares, and came to receive part of their value in cash in consequence of her capacity as a shareholder. The number of shares she held before and after her receipt of cash remained the same, but part of the economic value of her investment in those shares was returned to her (and did so in her capacity as a shareholder) without her doing anything and for no other reason than because she was a shareholder. From her point of view, the accounting and economic consequence of the receipt upon the sale of the rights was that her shareholding was in economic

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16 Ibid 663 (Gummow ACJ, Hayne, Heydon and Crennan JJ).
17 Ibid [21].
18 Ibid [22].
19 Ibid [55].
20 Ibid [22].

terms, and in accounting terms, reduced in value by the amount she received in cash and, on that analysis, a portion of *the value* of her shareholding was "severed" from the worth of the whole of her shareholding and paid to her in cash. That appears to have been the view adopted by Callinan J when his Honour concluded that if one were "to look only to what [Mrs McNeil] had in her hands", she received money "which effectively gave shareholders access to a component of [capital] that they would not otherwise have had".[21]

Similar differences between the lawyers' tools and the meaning of economists and accountants may be seen on the deduction side of the distinction between capital and income. Capital losses and outgoings are not usually deductible against income receipts and the character of a loss or outgoing as either being on revenue account or on capital account can have profound consequences for fiscal outcomes. The legislative amendments and line of litigation involving convertible notes and instruments with a component of deductible outgoings illustrate this.[22]

The cases involving finance companies raising tier one capital through instruments with an obligation to pay an interest component also illustrate the tensions between the lawyer's analysis of tax law and the economic view of transactions. The raising of capital, whether by a financier or any other taxpayer, carries with it a cost: investors buying shares expect a return on their investment and lenders who have lent money similarly require an economic return on the funds advanced. From the point of view of the taxpayer raising funds, there is a cost whichever way the funds are raised, but the amount of the cost will differ by reason of the impact of tax

21 Ibid [56]. See also D H Bloom Q.C., 'Taxpayer's Heaven: The Citylink Decision; The Opposite of Heaven: The decision in McNeil', *Papers, First National Convention, The Taxation Institute of Australia*, (TIA, 2007); Justice Richard Edmonds, 'Recent Tax Litigation: A View from the Bench' (2008) 37 *Australian Tax Review* 79.

22 See, eg, *Macquarie Finance Ltd v Commissioner of Taxation* (2004) 210 ALR 508.

depending upon whether the funds are obtained as loans or as contributions to equity. Similarly, from the point of view of the provider of funds (whether as investor or as lender) there will be an expectation of preserving capital as well as an economic return upon the capital, but there will be a difference in expected risk and return depending upon whether the funds are provided as investor or as lender. The parties regulate their dealings to share or minimise risks and returns by the type, form and detail of the transactions they enter into. Transactions differ in the nature of the risk exposure undertaken by the provider of the funds and the degree to which a company is willing to share the rewards of its risks and endeavours with those who have provided the funds that make that possible. How much risk each will take and how much of the reward each may enjoy are part of the economics of the bargain finally made. Embedded (indeed, inevitably embedded) in those dealings, and which govern the shape of the transactions and the outcomes agreed to, is the fiscal treatment of different transactions.

These differences may be of interest to accountants and economists but they are critical to the tax adviser because of the fiscal consequences which flow from the different legal character ascribed to each kind of transaction. The investor risks capital into a corporate venture and generally has no legal right to require repayment of the capital as such. In return for the investment risk the investor will generally be entitled to share in the fruits of the venture through dividends (that is, through a distribution and division of profits amongst the shareholders). The lender, on the other hand, assumes a different risk to that of an investor and will generally be entitled only to a financier's return on capital without reference to the profitability of the use to which the funds have been employed, and will generally have a legal entitlement to require repayment of the moneys lent. The cost to the person obtaining the funds (whether by share issue or as a borrowing) will be treated as either an affair of capital or as an affair of revenue with an important consequence for the cost of the capital obtained and for the public revenue. If the cost be on capital account it will generally not be deductible and, therefore, it will, to that extent, be more expensive than if the outgoing were deductible.

There are many observations in the decided cases which explain why in law the form of a transaction is important and why it may be difficult to rely upon broader notions of substance to determine the fiscal outcomes.[23] On the other hand a mere interpretation of a transaction by reference to its form may say nothing about its nature. In *Lomax v Dixon*[24] Lord Greene MR observed:

> In many cases, however, mere interpretation of the contract leads nowhere. If A. lends B. 100*l* on the terms that B. will pay him 110*l* at the expiration of two years, interpretation of the contract tells us that B.'s obligation is to make this payment. It tells us nothing more.[25]

The 110*l* difference in the payment could be accretion to capital or it could be in the nature of interest return upon the capital. In cases like *Macquarie Finance Ltd v Federal Commissioner of Taxation*[26] and *St George Bank Ltd v Federal Commissioner of Taxation*[27] there were considerable fiscal and commercial consequences flowing from a determination of whether the payment of an obligation described as interest was to be seen as on capital account: that is, as a return upon the capital provided rather than as a cost incurred in the derivation of income. One economic consequence of allowing deductibility of the "interest" component of the payment under a perpetual Tier 1 instrument is that the economic cost to the taxpayer of its capital is reduced by the tax effect of the deduction. Another economic consequence of allowing a deduction is to shift from the shareholders to

23 See, eg, *Australia and New Zealand Savings Bank Ltd v Federal Commissioner of Taxation* (1993) 114 ALR 673, 696 (Hill J); *Reuter v Federal Commissioner of Taxation* (1993) 111 ALR 716.

24 [1943] 1 KB 671.

25 Ibid 675.

26 (2004) 210 ALR 508.

the public revenue the economic burden of that amount of the cost of capital raising that is effectively part of the economic return to the shareholder/lender for the risking of funds. In other words, an economic consequence of allowing deductions for such payments is that the "interest" component has the economic effect of becoming like a tax deductible dividend by the company making the payment. In *Macquarie Finance* Hill J, at first instance, and the Full Court on appeal,[28] sought to determine the substance of the transaction by the legal rights created rather than by reference to an economic or accounting analysis. In other words the outcome of the case was not governed by the broader economic or accounting realities of the transactions, but by the lawyer's tools of analysing and classifying the legal rights between the parties. Even so, recourse to lawyers' tools of analysis will not always guarantee the same reasoning process as a comparison of the reasoning of the full courts in *Macquarie Finance*, on the one hand, and *St George Bank,* on the other, will show.

Some uncertainty also arises from the ordinary development and rearticulation of principles fundamental to tax. The decision of the High Court in *Federal Commissioner of Taxation v Stone*[29] held that the hallmark of a revenue receipt by an athlete was that she had "turned her talent [as an athlete] to account for money".[30] The decision was applied by the Federal Court at first instance to allow deductions,[31] and, like *McNeil*, applied the dicta in *Federal Commissioner of Taxation v Montgomery*[32] that:

> [I]ncome is often (but not always) a product of exploitation of capital; income is often (but not always) recurrent or periodical; receipts from carrying on a business are mostly (but not always) income.[33]

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27 (2009) 256 ALR 391.

28 *Macquarie Finance Ltd v Commissioner of* Taxation (2005) 146 FCR 77.

29 (2005) 222 CLR 289.

30 Ibid 291.

31 *Spriggs v FCT* (2007) 68 ATR 740; *Riddell v FCT* (2007) 68 ATR 757; although subsequently overturned on appeal see *Federal Commissioner of Taxation v Spriggs* (2008) 170 FCR 135.

32 (1999) 198 CLR 639.

33 Ibid 663 [68] (Gaudron, Gummow, Kirby and Hayne JJ).

The concept that an income receipt may flow from the exploitation of capital is not novel and lies at the heart of many of the decided cases. What *Stone* highlighted, however, was the importance of the link between a receipt and the exploitation of the capital. It was the exploitation of the capital that made the receipts assessable as income. The articulation of that basal principle in *McNeil*, however, produced a different light upon its application.

The critical concept in both *Stone* and *Montgomery* may have been thought to be the emphasis placed by the court upon the finding of “use”, “exploitation” or “bringing to account” of the capital. In *Montgomery*, for example, the court explained its application of the dicta from *Eisner v Macomber* by saying that “the firm used or exploited its capital”[34] to obtain the inducement amounts. So understood, what mattered was not just that the capital had not been severed, but, rather, that the resultant receipt was a product of activity which stamped the receipt with some profit making purpose. In that regard the decision is illustrative of the dicta in *Federal Commissioner of Taxation v Myer Emporium Ltd*.[35] What *McNeil* may add to that analysis, however, is that the circumstance of the capital having remained intact may be sufficient to provide the finding that the receipt had the character of income without the need to find that the circumstances of the receipt had the characteristics of income earning activity. In *Montgomery* and *Stone* it was the <u>exploitation</u> of the (intact) capital that stamped a profit making purpose upon the receipt, but in Mrs McNeil’s case, she had been entirely passive (a circumstance pointed out in the joint judgment as being insufficient to deny a receipt the character of income). Taxpayers, and their professional advisers, may now need to consider many other receipts hitherto not thought to be brought to tax as income when lodging returns. Amounts received, for example, in restraint of trade upon the sale of a business, which many may have thought taxable only as a capital gain (and perhaps only in the

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34 Ibid 678 (Gaudron, Gummow, Kirby and Hayne JJ).
35 (1986) 163 CLR 199, 209 (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ).

extended operation of those provisions), may need to be reconsidered in light of *McNeil*.

Recourse to metaphors also carries its share of uncertainty. One metaphor which has featured prominently at the heart of tax law is the metaphor of trees and fruits in explanation of the difference between capital and income. The metaphor was used by Pitney J in *Eisner v Macomber,*[36] it was accepted in *Federal Commissioner of Taxation v Montgomery,*[37] and it was endorsed in *McNeil.*[38] In *Berkey v Third Ave Railway Co*[39] Cardozo J warned that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it".[40] The metaphor may be helpful when the fiscal issue in dispute depends upon whether the receipt is made in return for part of the severed whole (in which case the receipt can more readily be seen as given in exchange for part of the corpus) but is less helpful when the fiscal issue in dispute depends upon the impact which the circumstances of the receipt has upon its character. In the latter case, the fact that the receipt is not given in exchange for a severed portion of the whole may be taken as a given, and the focus of enquiry shifts to the nature of the receiving rather than to the nature of its source.

It will not always be clear to taxpayers, or to their advisers who must lodge returns and advise upon transactions, when, or how, a receipt may be said to be severed from an item of capital as its fruit rather than its body. The payment to a shareholder of part of a company's profits should and will, in the ordinary course, be treated as income. Such a payment will ordinarily be a taxable dividend to the recipient and little further enquiry need be undertaken to dispose of any question about

36 252 US 189 at 206-207 (1920).

37 (1999) 198 CLR 639, 660-663 (Gaudron, Gummow, Kirby and Hayne JJ).

38 (2007) 229 CLR 656, 663 [21] (Gummow ACJ, Hayne, Heydon and Crennan JJ).

39 155 NE 58 (1926).

40 Ibid 61. See also Justice Richard Edmonds, 'Recent Tax Litigation: A View from the Bench' (2008) 37 *Australian Tax Review* 79.

assessability. The same answer need not necessarily be reached, as a matter of fiscal policy, where the receipt does not proceed from a pool of taxable profits. Indeed, to treat a payment of a company's corpus as taxable, as ordinary income, in the hands of a shareholder may present several fiscal anomalies. Such a payment, for example, would not receive the benefit of company tax imputation (since no company tax was paid or payable upon the corpus) and may produce unexpected capital gains tax outcomes if the shares are eventually sold (since the receipt will not be treated as a reduction in the cost base).

Another cause of uncertainty in tax law arises not from the discipline of the law producing an answer different from other disciplines, but because within the law there are strongly held divergent views about the law itself. Countless examples of this may be given but it will be sufficient to remember only the decision in *Hepples v Federal Commissioner of Taxation*[41] to see how this cause of uncertainty may give rise to severe problems in the application of taxing statutes with no countervailing public benefit. The facts and the question involved in the case are easy to convey in general terms but the legal analysis that produced the ultimate outcome is far more complicated. The question, in general terms, was whether the payment of $40,000 to a former employee in consideration of a restraint upon termination of employment was a deemed disposal for capital gains tax purposes. The resolution of that issue reached the High Court by way of a case stated from the Administrative Appeals Tribunal. The Tribunal member (that is, the decision maker) sought to know whether he should determine that the amount was taxable as a deemed disposal under one or other of two sub-sections, namely sub-sections 160M(6) or (7). If either was engaged, the receipt would be brought to tax as assessable income through another provision, namely s 160ZO. That section, however, was not itself the basis of the

[41] (1992) 173 CLR 492.

liability: either s 160M(6) or 160M(7) had first to be engaged for s 160ZO to operate.

Four out of the seven members in the High Court decided that the payment was not taxable as a disposal under the first of the provisions (s 160M(6)). A different four members held that the amount was not taxable as a disposal under the other provision (s 160M(7)). Viewed in that way there was no majority that either of the two sub-sections were engaged because there was no majority view that there was a deemed disposal. Viewed simplistically, the primary decision maker would have concluded that the amount was not taxable because neither of the two provisions upon which taxability depended were engaged. Unfortunately for the taxpayer, however, there was a majority which concluded that it was taxable. That was because three out of the seven judges had concluded that it was taxable as a disposal under s 160M(6) and therefore brought to tax through s 160ZO, and a different three judges out of the seven who had concluded that it was taxable as a disposal under s 160M(7) and therefore brought to tax through s 160ZO. In all, four out of seven of their Honours had concluded that, one way or another, the receipt was taxable through s 160ZO. The order made by the Court on appeal declared the majority opinion as to the issue of law notwithstanding the lack of a majority about the foundation upon which that conclusion was supported.[42] The outcome, jurisprudentially, can be explained, justified and understood (at least by lawyers), although, if the decision reflected the reasoning process of the one individual member of the AAT who had the unfortunate task of deciding the case at first instance (as in a sense it could) it would reveal a deeply troubled and profoundly unstable mind.

The lawyer’s rules of statutory construction are, of course, intended in part to remove uncertainties by making the approach to interpretation predictable. Some of these rules were said to be particular to tax, and, in their own way have ironically played their part in producing uncertainty, especially in the field of tax avoidance. In *Anderson v Commissioner of Taxes (Vic)*[43] Latham CJ adopted with approval[44] a principle stated in *Inland Revenue Commissioners v The Duke of Westminster*[45] that if a "person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spheres of the law the case might otherwise appear to be".[46] A literal construction and application of taxing provisions may no longer be in vogue[47] and has given way to a re-affirmation that the task of statutory interpretation must be to discern and apply the intention of Parliament.[48] Whether there is logically much difference between these two approaches may be open to doubt; after all, there is no reason to assume that the purpose of Parliament in enacting fiscal legislation was to impose any more than would be imposed by a literal application of the provision. In *Scott v Cawsey*[49] Isaacs J had said:

> When it is said that penal Acts or fiscal Acts should receive a strict construction, I apprehend it amounts to nothing more than this. Where Parliament has, in the public interest, thought fit in the one case to restrain private action to a limited extent and penalise a contravention of its directions, and in the other to exact from individuals certain

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42 Ibid 550-553 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

43 (1937) 57 CLR 233.

44 Ibid 239 (Latham J).

45 [1936] AC 1.

46 Ibid 24-25 (Lord Russell of Killowen).

47 See Sir Anthony Mason, 'Taxation Policy on the Courts' (1990) 2 (4) *CCH Journal of Australian Taxation* 40; Justice Graeme D Hill, 'A Judicial Perspective on the Tax Law Reform' (1998) 72 *Australian Law Journal* 685; R C Allerdice, 'The swinging pendulum: judicial trends in the interpretation of revenue statutes' (1996) 19 *University of New South Wales Law Journal* 162; M Burton, The Rhetoric of Tax Interpretation – Where Talking the Talk is Not Walking the Walk' (2006) *Journal of Australasian Tax Teachers' Association* 27.

48 See *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *MLC Ltd v Federal Commissioner of Taxation* (2003) 126 FCR 37, [31]-[32] (Hill J).

49 [1907] 5 CLR 132.

> contributions to the general revenue, a court should be specially careful, in the view of the consequences on both sides, to ascertain and enforce the actual commands of the Legislature, not weakening them in favour of private persons to the detriment of the public welfare, nor enlarging them as against the individuals towards whom they are directed.[50]

As this passage shows, the overriding requirement of interpreting legislation by giving effect to the intention of the legislature is consistent with the assumption that the legislature sought fit to impose fiscal obligations strictly in accordance with the limited extent to which it is imposed by the words. In *BP Refinery (Westernport) Pty Ltd v Hastings Shire*[51] the Privy Council observed that it was a strong thing to read into an Act of Parliament words which were not there and that it was "a particularly strong thing to do so when it amounts to modifying", as against the fiscal subject, words which have a plain, natural and ordinary meaning in "[the subject's] favour".[52] In *Western Australian Trustee Executor and Agency Co Ltd v Commissioner of State Taxation (WA)*[53] Gibbs J observed that a liability to taxation should not be inferred from ambiguous words if the terms of a taxing Act did "not reveal a clear intention to do so".[54]

In any event, the lawyers' tools of statutory construction may be a reason for some of the uncertainty in our tax laws. It may be that the drafting of some of the provisions has sought to overcome the effect of rules of construction and that, perhaps, some uncertainty may have been intended as a design feature in our system of taxation. I do stop to ask whether this is a good thing but observe that rewards and penalties linked to unpredictable outcomes is an important part of ordinary economic

50 Ibid 154-5 (Isaacs J).
51 (1977) 16 ALR 363.
52 Ibid 365.
53 (1980) 147 CLR 119.
54 Ibid 126.

behaviour in ordinary life.[55] There are many instances in tax law of structured uncertainty. There are, for instance, numerous provisions where the liability of a taxpayer is made to depend upon the exercise of a discretion by the Commissioner. The Parliament may constitutionally enact a law with respect to taxation by reference to which the amount of tax payable is made to depend upon the formation by the Commissioner of an opinion about whether the application of some provision is unreasonable, even when the basis of that opinion is in part dependant upon the Commissioner having a discretion to take into account such "matters, if any, as he thinks fit".[56] Delegated legislation may be declared invalid if, upon its proper construction, it is found to be uncertain,[57] but the duty of a court in relation to Acts of Parliament is to find and apply meaning in the words no matter how difficult they may be to interpret.[58]

There are many reasons for discretions to be given in tax legislation notwithstanding the desirability for clarity, certainty and predictability.[59] One of them may be to have a tax outcome depend upon commercial, business or economic considerations that non discretionary rules might not allow. It is not hard to see the echo of economic criteria as the determinants in transfer pricing discretions or in the debt/equity rules. At times, alas all too frequently, the complexity of drafting is such that "what seem[ed] obvious at first sight quickly recedes into obscurity".[60] The consolidation

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55 Philip D Straffin, 'The Prisoner's Dilemma' in Eric Rasmusen (ed) *Readings in Games and Information* (2001); John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behaviour* (2004).

56 *Giris Pty Ltd v Commissioner of Taxation* (1969) 119 CLR 365.

57 *King Gee Clothing Company Pty Ltd v Commonwealth* (1945) 71 CLR 184, 194 (Dixon J); *Kruse v Johnson* [1898] 2 QB 91, 108 (Mathew J); *Cann's Pty Ltd v Commonwealth* (1946) 71 CLR 210; *TAB Limited v Racing Victoria Ltd* [2009] VSC 338 (Unreported, Davies J, 13 August 2009).

58 *Brisbane City Council v Attorney-General* (1908) 5 CLR 695, 720 (O'Connor J); D.C. Pearce and S. Argument, *Delegated Legislation in Australia* (3rd ed, 2005) [22.3]; D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) [2.22].

59 Prof G.S.A. Wheatcroft, "Taxation by Administrative Discretion", *Papers, First National Convention, Taxation Institute of Australia* (TIA, 1969) 1-11; see also K.C. Davis, *Discretionary Justice* (1979, Illinois), Ch 1.

60 *Inland Revenue Commissioners v Bew Estates Ltd* [1956] 1 Ch D 407, 413 (Roxburgh J).

provisions may be one such example, to which one may rapidly add the CFC, FIF and other provisions before the number of additions becomes a flood.

Another reason for discretions is as a response to what may be thought to be the "social evil" of tax avoidance.[61] The shape of modern legislation against tax avoidance in Australia may be a reaction against the way we had previously viewed such activities.[62] The provisions directed to preventing tax avoidance are steeped in uncertainty, although the uncertainty embedded in these provisions is conceptually problematic. It is problematic because the anti-avoidance provisions are not intended to apply as primary taxing provisions. They are intended to apply, rather, only when the ordinary provisions have failed to achieve the purpose which, somehow, they were intended to achieve but failed to achieve. A moments reflection will reveal an obvious tension between the application of such provisions and a purposive construction of fiscal legislation: how can taxing provisions fail to achieve their proper and intended purpose if they have been construed and applied according to their purpose?

In other jurisdictions, typically those which do not have a specific anti-avoidance provision, a purposive construction of legislation has been used as the basis for courts attempting to prevent tax avoidance. In the United States decision of *Helvering v Gregory*[63] Judge Learned Hand refused to apply a literal reading of a statute which he considered to be contrary to the statutory intention. His Honour said:

> … Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay

61 Lanigan, above n 1, 29, 32-33, 38; Professor Ross Parsons, 'Commentary', *Papers, First National Convention, The Taxation Institute of Australia*, (TIA, 1969) 47.

62 See Arie Freiberg "White-collar Crime Must be Seen as 'real' Crime", Letters, *The Age,* 23 September 1982.

63 69 F. 2d 809 (2nd Cir, 1934), aff'd 293 U.S. 465 (1935).

> the Treasury; there is not even a patriotic duty to increase one's taxes … Nevertheless, it does not follow that Congress meant to cover such a transaction, not even though the facts answer the dictionary definitions of each term used in the statutory definition … [T]he meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.[64]

A purposive, or non literal, construction to taxing statutes may, however, be made more difficult as the statute increases in specificity. In the same passage in *Gregory* Judge Learned Hand observed that "[A]s the articulation of a statute increases, the room for interpretation must contract".[65]

The courts have also relied upon principles of statutory interpretation in the United Kingdom in developing the doctrine of fiscal nullity to counter tax avoidance. The doctrine articulated first in *W.T. Ramsay v Inland Revenue Commissioners*[66] was said by Lord Wilberforce as within the function of the courts to apply strictly and correctly the legislation enacted by Parliament. In that context, his Lordship said:

> To force the courts to adopt, in relation to closely interpreted situations, a step by step, dissecting, approach which the parties themselves may have negated, would be a denial rather than an affirmation of the true judicial process.[67]

The question at issue in *Ramsay* was whether there had been a disposal giving rise to a loss under a taxing statute. The issue of construction was whether the particular transaction came within the intended terms of the statute where the disposal was effected by a series of steps, each of which the parties necessarily intended to be effective according to their terms, but the partial legal effect of which had been intentionally cancelled by some other parts of the transaction. The principle adopted

64 69 F. 2d 809 (2nd Cir, 1934) 810-11; see also Marvin A Chirelstein, 'Learned Hand's Contribution to the Law of Tax Avoidance' (1968) 77 *Yale Law Journal* 440.

65 69 F. 2d 809 (2nd Cir, 1934) 810; aff'd 293 U.S. 465 (1935).

66 [1982] AC 300.

67 Ibid 326C-D.

in that case was subsequently formulated by Lord Brightman in *Furniss v Dawson*[68] in these terms:

> First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies by the Dawsons to Wood Bastow. It did not in *Ramsay*. Secondly, there must be steps inserted which have no commercial (business) <u>purpose</u> apart from the avoidance of a liability to tax … not "no business <u>effect</u>". If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The Court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.[69]

The importance, and limitations, of the statutory construction at play as the foundation and extent of the principle enunciated has been remarked upon in subsequent cases[70] and by commentators.[71] Nonetheless, whatever its limitations, the foundation for the development of these judicial attempts to prevent tax avoidance has been a purposive construction of tax legislation.

The anti-avoidance provision in Australia, however, must be applied even when a fully purposive construction of the tax legislation has enabled a taxpayer to obtain a tax benefit. In such cases, it is not just that the "literal" words have failed to apply but, rather, that the words in the statute, when properly construed by reference to the purpose of the legislative intention, have failed to secure a fiscal objective which is somehow still supposed to be evident. Part IVA is not expressed as a provision to allow the Commissioner or the courts to impose such tax as either might think fit, or as either might be minded to impose in the exercise of some uncontrolled discretion or notion of fiscal equity. A casual observer might be forgiven, therefore, for being

68 [1984] AC 474.

69 Ibid 527.

70 See especially *IRC v McGuckian* [1997] 1 WLR 991, 999-1000 (Lord Stein) and 1005 (Lord Cooke), *MacNiven (HM Inspector of Taxes) v Westmoreland Investments Ltd* [2003] 1 AC 311 per Lord Hoffman.

71 See Lord Walker, 'Ramsay 25 Years On: Some Reflections on Tax Avoidance' (2004) 120 *Law Quarterly Review* 412, 416.

surprised that the application of Part IVA may seem neither certain nor predictable, and that it can operate after a purposive interpretation of the legislation has permitted a tax benefit to be obtained. The course of judicial consideration of the provisions has demonstrated a marked difference of judicial application of them. In *Commissioner of Taxation (Cth) v Spotless Services*[72] the joint judgment of the High Court adopted a passage from the reasons of the judgment of Cooper J as the foundation for the opposite conclusion which had been reached by his Honour.[73] In *Macquarie Finance Ltd v Commissioner of Taxation*[74] Hill J, at first instance, concluded that Part IVA applied to a transaction but said that he did so "with some reluctance" and doubted that the legislature would have regarded the relevant scheme as one involving the application of Part IVA when enacted in 1981.[75] On appeal, Gyles J had no doubt that Part IVA applied[76] whilst French and Hely JJ were of the opposite view. Similar divergence of views can be seen in many of the other cases in which Part IVA has been considered by different judges. In *Hart v Commissioner of Taxation,*[77] at first instance, Gyles J concluded that Part IVA applied to the transaction in question but, on appeal, the full Federal Court unanimously concluded that it did not.[78] On further appeal to the High Court, all five judges concluded that it did.[79] Differences in interpretation of the provisions before the decision in *Hart's* case might explain different outcomes in *Hart* and the cases before it, but that cannot explain the different conclusions reached by the judges who have considered *Macquarie Finance* and other cases after *Hart* had been decided.

It is a reasonable concern of the casual observer that the differences in application of Part IVA reflect a profound uncertainty about whether or how the anti-avoidance provisions apply to the countless number of transactions which are entered into on a

72 (1996) 186 CLR 404.
73 Ibid 422-3.
74 (2004) 210 ALR 508.
75 Ibid [120].
76 *Macquarie Finance Ltd v Commissioner of* Taxation (2005) 146 FCR 77, [257].
77 [2001] FCA 1547.
78 (2002) 121 FCR 206.
79 (2004) 217 CLR 216.

daily basis and to the many cases which various members of the Tax Office, at varying levels of seniority, have to consider. None of the cases which have exhibited such different conclusions had depended for their different views upon different subjective views or discretionary considerations. In each case the judges applied objective facts and criteria to the facts as found. The uncertainty, in short, is embedded in its application and acts as a sword of Damocles over the heads of taxpayers each time a taxable event occurs or a taxable transaction is entered into. We have adopted, as the provision of last resort, a provision which may operate at least in part from fear of the unknown (with the full impact of the chilling effect upon commerce and economic activities which that may bring).

The main feature of Part IVA to which the uncertainty may be attributed is undoubtedly the conclusion which s 177D requires to be reached for the provisions to apply. The section requires a conclusion to be drawn that the dominant purpose of a person who entered into or carried out the scheme was to obtain a tax benefit. Assuming, therefore, the existence of a tax benefit as a pre-condition, the enquiry is focused upon the purpose of a person. That purpose is to be ascertained not by reference to any actual intention but, rather, by an objective evaluation of the matters which s 177D(b) permits to be taken into account.[80] To that extent the analysis is essentially that articulated by the Privy Council in *Newton v Federal Commissioner of Taxation*[81] and accords with the general statements about "blatant, artificial or contrived" in the explanatory memorandum when the provision was first introduced into Parliament. The difficult issue which remains, however, is that of evaluating the factors permitted by s 177D(b) to be taken into account and determining whether, when those limited factors are taken into account, and excluding the subjective purpose or motive of the taxpayer, the conclusion should be drawn that the dominant purpose of a person was to obtain the tax benefit. The joint judgment of Gummow and Hayne JJ in *Hart* sought to provide guidance in undertaking that task when their

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80 *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216, 243 [65] (Gummow and Hayne JJ).
81 (1958) 98 CLR 1, 8-9 (Lord Denning).

Honours said:

> In the present matters, the respondents would obtain a tax benefit if, in the terms of s 177C(1)(b), had the scheme not been entered into or carried out, the deductions “might reasonably be expected not to have been allowable”. When that is read with s 177D(b) it becomes apparent that the inquiry directed by Pt IVA requires comparison between the scheme in question and an alternative postulate. To draw a conclusion about purpose from the eight matters identified in s 177D(b) will require consideration of what other possibilities existed. To say, as Hill J did, that “the manner in which the scheme was formulated and thus entered into or carried out is certainly explicable only by the taxation consequences” assumes that there were other ways in which the borrowing of moneys for two purposes (one private and the other income producing) might have been effected. And it further assumes that those other ways of borrowing would have had less advantageous taxation consequences.[82]

In this way their Honours sought to inform the fundamental issue upon which the application of the provision depended by drawing attention to the need to compare what was done with something else in order to determine whether the way in which the transaction was entered into was explicable only by taxation consequences.[83] The problem is that however helpful and correct that analysis may be, the evaluation and judgment required for the application of the statutory provision still appears to be so broad that it permits widely differing conclusions between apparently reasonable people. As such it leaves much to be desired as an anti-avoidance provision of last resort after a purposive construction of the primary taxing provisions have not brought an item to tax.

Barely ten years ago the *Review of Business Taxation* chaired by J.T. Ralph, AO recommended streamlining the general anti-avoidance rules as a means of reinforcing the integrity and equity in the taxation system. The Ralph Report recommended clarification of the anti-avoidance rules to ensure that it “be exercised in a manner consistent with, and supportive of, the tax policy principles embodied in

82 *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216, [66] (Gummow and Hayne JJ).
83 See also, Ibid [68] and [69].

other provisions in the tax law".[84] One wonders what has happened to those recommendations and why to date they have not been adopted. Part of the recommendations called for an involvement by the Board of Taxation in reviewing the application of the policy framework and processes guiding the implementation of the anti-avoidance provisions. The task envisaged in the Ralph Report was that the Board of Taxation would consult with taxpayers on appropriate responses to tax avoidance and monitor the policy guidelines adopted by the tax department in applying the provisions.

There is much to be said for a greater impact by taxpayers in the implementation of tax at this level of administration. The point is not that the Commissioner should not apply the law but, rather, that an institutional view about what constitutes tax avoidance should be informed broadly where there is legitimate room for difference. The Ralph Report suggested a relatively modest role for the Board of Taxation in that task but, where there is genuine difference of view about the true legal content of tax avoidance, I would have thought it a strong case for a much greater role to be given to business and other groups with an interest in how the tax avoidance provisions should operate in the Australian economy. Those charged with the administration of the tax law have, as they should have, an understandable bias towards raising revenue. Their primary task is to apply the law, not to see it weakened or ignored. It is natural and proper for those charged with the administration of tax laws to favour the raising of revenue as a public good and to ensure equity amongst taxpayers. But, where there is room for doubt about what constitutes tax avoidance, the task to be undertaken is not merely that of administration: it is first to form a view about how the uncertainties are to be understood and applied. In that task it is desirable for the decision to be informed by all interests which may bear upon a reasonable, responsible and defensible understanding and application of the law within the limited tolerances of the ambit of uncertainty. It is a mistake to assume that all

[84] Review of Business Taxation, above n 5, 241.

taxpayers, whether business, corporate or individuals, will favour a weak anti-avoidance rule. Taxpayers have much to gain from a level playing field and have a real interest to ensure that business competition does not favour, or personal wealth is not secured, by unacceptable exploitation of tax law. The Commissioner has adopted an impressive array of measures to ensure taxpayer representation in his decision making or decision forming internal bodies and processes such as the public rulings panel and the general anti avoidance rule panel. Such measures are to be encouraged and confirm a genuine commitment to informed decision making; but it is still decision making by the administration and is no substitute for an independent decision maker.

One solution that attempted to provide certainty was the enactment of a comprehensive private and public rulings regime. Amongst the weaknesses in this regime are, first, that the strength of rulings depends upon the precision of the facts upon which they are based, secondly that obtaining rulings depends upon decisions of the Commissioner whose statutory tasks and administrative duties may weigh against rulings favourable to taxpayers in case of genuine doubt, and thirdly that they are difficult to apply to the anti-avoidance provisions where much may depend upon how a scheme is carried out after any ruling is obtained.[85] In part, therefore, a solution designed to provide certainty brings with it its own baggage of uncertainty.

An alternative solution to reduce uncertainty might be the creation of a specialist tribunal charged primarily with the development of consistent, clear and predictable rules concerning tax law. Whether there should be a separate Australian tax court was an issue upon which Justice Kirby delivered a paper just over two years ago in Sydney. The paper bore the title “Hubirs Contained: Why a Separate Australian Tax

85 *Bellinz v Federal Commissioner of Taxation* (1998) 84 FCR 154, 170 (Hill, Sundberg and Goldberg JJ).

Court Should be Rejected".[86] "Hubirs" is not, I do not think, a friendly word; at least not as used by his Honour. It is defined as "arrogant pride or presumption" and, in relation to Greek tragedy at any rate, as "excessive pride towards or defiance of the Gods, leading to nemesis".[87] With that definition, and in the light of the title adopted by his Honour, I enter upon this debate with grave trepidations and fear of nemesis. Perhaps I should seek some protection by saying that I am not generally in favour of specialist courts. Most of the arguments identified by his Honour against specialist courts are ones which I generally embrace. However, I think it a little unfair to assume that the argument in favour of a specialist tax tribunal, whether a court or otherwise, to deal with taxation is evidence of "hubris". One can readily accept that the law should be developed by the general courts of law informed by the general application of the law and not by the potentially distorted prism which may come from specialisation in a narrow field of practice. For this purpose I will assume, although I think it wrong in fact, that taxation practitioners do not have as good a grasp of the general law as some other practitioners (indeed, for my part, I am hard pressed to think of any other class of legal practitioner other than tax lawyers likely to have a greater need to grasp as broad a range of laws upon which tax law will apply). The point, rather, is that a specialist tax tribunal at first instance might usefully develop principles and practices informed by an understanding of fiscal consequences. Consistency and uniformity may then be achieved with greater certainty and predictability, but always, of course, subject to the review on appeal by the courts of law which are charged with the task of declaring and applying the law. The Boards of Review used to fulfil some such role without evident "hubris". The expertise and experience its members brought to tax decisions was considerable but, over time, was largely diluted by an overriding imperative for administrative decisions of the AAT to be made by a broader group of decision members than the accountants, economists, former tax officials and the occasional lawyer who had typically been appointed to the Boards of Review. It seems to me that tax law and practice would

86 The Hon Justice Michael Kirby AC CMG, *Hubris Contained: Why a Separate Tax Court Should be Rejected* (2007) High Court of Australia <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_3aug07.pdf> at 18 August 2009.

87 R.E. Allen (ed), *The Concise Oxford Dictionary*, (Clarendon Press, 8th ed, 1990) 574.

gain much from decision makers bringing their expertise and experience of economic, accounting and business realities when deciding tax cases within the boundaries permitted by the law. The community would also have greater confidence in that level of decision making especially in relation to the application of discretionary considerations, including the uncertainties inherent in the anti-avoidance provisions.

Some uncertainty may be inevitable, but some is not. Certainty and uncertainty each comes at a cost to the community and our focus should be on what we gain and what we lose when we enact laws with deliberate uncertainties. We should look hard at who gains, and how much may be lost, from the uncertainty of the application of taxing laws, and seriously question in whose interest uncertainty can be maintained. William Pitt is quoted as saying that "[w]here law ends tyranny begins",[88] and many others have said variations on that theme. Discretions in law, including tax law, may be necessary, but they should be structured, confined, reviewable[89] and above all predictable. Laws tend towards tyranny when they are not predictable. The Explanatory Memorandum accompanying the Bill which introduced Part IVA said:

> That [the] test for application of the new provision is intended to have the effect that arrangements of a normal business or family kind, including those of a tax planning nature, will be beyond the scope of Part IVA.[90]

However the lack of predictability of the provisions impacts upon, and potentially distorts, "ordinary business or family dealing". In the end, we may decide that it suits us as a community for business transactions and other dealings to be undertaken with an overarching uncertainty about fiscal outcomes. We should be reluctant to accept that, however, without intending that to be so.

88 See K.C. Davis, above n 58.
89 Ibid Ch III, IV, V.
90 Explanatory Momorandum, Income Tax Laws Amendment Bill (No 2) 1981 (CTH) 3.

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