

OF 'SHAM' AND OTHER LESSONS FOR AUSTRALIAN REVENUE LAW

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[In describing the issues arising in Raftland Pty Ltd as Trustee of the Raftland Trust v Commissioner of Taxation ('Raftland'), the author examines what he sees as a general reluctance of Australian courts to embrace a more robust approach to designating documented transactions as 'shams', as the Supreme Court of the United States of America has effectively done for some time. He suggests that the reluctance derives from three sources: the parol evidence rule applicable where oral evidence is propounded to vary written evidence and the difficulties inherent in pleading and proving fraud; the enactment of specific legislation to invalidate designated tax avoidance 'schemes'; and the frequent need of the Commissioner to rely on propounded documents to support the asserted tax assessment. Various possible psychological and practical considerations are also mentioned. Nevertheless, the author proposes that greater use of 'sham' analysis should be used in the revenue context in Australia as, he suggests, was ultimately upheld in Raftland. He also refers to the later decision in Commissioner of Taxation v Futuris Corporation Ltd. He suggests that this case illustrates how revenue lawyers need to keep abreast of developments in judicial review and administrative law more generally. Finally, the importance of revenue law to the effective functioning of the Commonwealth is emphasised, and a tribute paid to the lawyers and others who work and teach in this field.]

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I TAX LAW AND THE GENIUS OF THE *CONSTITUTION*

The starting point for a reflection on Australia's revenue law must necessarily be the *Constitution*. In that document, the power to enact laws imposing taxation is expressed in very wide terms.¹ However, from its earliest days the High Court of Australia has insisted that, to be a law with respect to 'taxation', the law must not be arbitrary.² It must be based on an ascertainable criterion and susceptible to judicial scrutiny.³ Whereas in other polities laws with respect to taxation may be substantively and procedurally arbitrary, in Australia the contrary is the case.

My purpose is to draw attention to two recent decisions of the High Court of Australia that have touched upon these dual features of our federal taxation law. Basic decisions as to whether the constitutional criteria have been met belong not to elected politicians nor to officials but to the courts and, ultimately, to the High Court.

Any attempt to render a tax imposed by federal law incontestable in Australia would take the law concerned beyond the legislative power granted to the Parliament by the *Constitution*.⁴ This insight imposes distinctive features on our revenue law, three of which I intend to explore. I will do so by reference to *Raftland Pty Ltd as Trustee of the Raftland Trust v Commissioner of Taxation* ('*Raftland*')⁵ and *Commissioner of Taxation v Futuris Corporation Ltd* ('*Futuris*').⁶ I will close with observations of a general kind addressed to the important contribution that revenue law and revenue lawyers make to law and governance in Australia, and thus to the nation's economic and social success.

The Law School of the University of Melbourne, which sponsors this annual lecture, has long enjoyed particular strengths in the fields of corporations, business law and revenue law. To those subjects Professor Ross Parsons of the University of Sydney — my own alma mater — made a specially important contribution from the 1950s to the 1970s. It was Professor Parsons who introduced me to the challenges of revenue law, which was then contained in statutory provisions that seem tiny and very simple by contrast to the laws of today. Ross Parsons taught Murray Gleeson, Mary Gaudron, William Gummow, Graham Hill, me and many others to search for legal principles in the mass of statutory detail. Great is the debt owed by judges and other lawyers, as well as by accountants and taxation administrators, to the scholars and teachers who accept the obligation of bringing order and discipline to this vital area of the law.

Because, ultimately, federal revenue laws must be susceptible to judicial examination to ensure 'compliance with the constitutional limits upon that

¹ Section 51(ii) of the *Australian Constitution* provides broadly that 'Parliament shall, subject to this *Constitution*, have power to make laws ... with respect to ... taxation; but so as not to discriminate between States or parts of States'.

² *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 247 ALR 605, 622 (Kirby J) ('*Futuris*'). See also *R v Barger* (1908) 6 CLR 41, 94–5 (Isaacs J), 114 (Higgins J).

³ *Deputy Commissioner of Taxation (NSW) v Brown* (1958) 100 CLR 32, 40 (Dixon CJ), 52 (Wilson J).

⁴ *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 639–40 (Gibbs CJ, Wilson, Deane and Dawson JJ) ('*MacCormick*'), citing with approval *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J).

⁵ (2008) 246 ALR 406.

⁶ (2008) 247 ALR 605.

power',⁷ the substance and procedures of federal taxation laws must be capable of coming under the scrutiny of courts. In this respect, the development and exposition of Australia's taxation law comes eventually to a judicial bench that is not necessarily *specialist* in experience but *generalist* in its composition and function.

Traditionally, some members of the High Court, in their legal practices and professional backgrounds, will have had close familiarity with revenue law. But not all. This too is part of the genius of the *Constitution*. Specialists can sometimes become too close to the assumptions and doctrines of the past. They may adhere to legal theories long after they have lost their usefulness. They may cling to the ideas in apparent disharmony with the attempts of the legislature to introduce new concepts. They may be blind to changes in the economic and social context within which the law operates. Such blindness may influence even their reading of comparatively clear statutory provisions, the meaning of which appears plain to the non-specialist.

Justice Gummow pointed this out in his recent essay, 'Form or Substance?'.⁸ It was the error that once beset the High Court of Australia in its exposition of the meaning and operation of ss 90 and 92 of the *Constitution*:⁹

the ever-shifting, ever-unsatisfactory case law construing both s 90 and s 92 of the *Constitution* had been blighted by the refusal of the court to look behind the form provided by the text of s 90 and s 92 to an appreciation of the nineteenth century political and economic theories and debates upon free trade and protectionism which preceded the adoption of the *Constitution*. ... [T]o read s 92 in its historical context¹⁰ is ... [to give] s 92 a reach beyond the elimination of discriminatory burdens of a protectionist kind upon interstate trade and commerce.

Here then, in matters of the highest law in our system, are differing applications of notions of form and substance.

Inspired though I was by Ross Parsons's instruction on revenue law, chance considerations took my legal career on a different path.¹¹ Perhaps my fate was sealed by the Pope's line that the young Murray Gleeson and I so nonchalantly drew in our early law school days: dividing our shared burdens among the topics we studied. If to him we assigned revenue law, to me we assigned jurisprudence and legal theory. Upon this division of the legal subjects may have hung the special focus of our respective legal interests in the decades that were to follow. If, in revenue law, he had the particular knowledge and expertise, perhaps it was for me to feel a need to scrutinise the outcomes more critically, in accordance with deep-lying principles and to question received wisdom. This is what I take the *Constitution* to require.

Thus, whereas in the United States of America the Supreme Court, hearing taxation and other appeals, is not a court of general appellate jurisdiction, the highest court in Australia (as earlier in Canada) *is* such a court. The High Court

⁷ *MacCormick* (1984) 158 CLR 622, 639 (Gibbs CJ, Wilson, Deane and Dawson JJ).

⁸ Justice W M C Gummow, 'Form or Substance?' (2008) 30 *Australian Bar Review* 229.

⁹ *Ibid* 240–1.

¹⁰ See now *Befair Pty Ltd v Western Australia* (2008) 234 CLR 418.

¹¹ Michael Kirby, 'Ten Parables for Freshly-Minted Lawyers' (2006) 33 *University of Western Australia Law Review* 23, 25–7.

of Australia decides cases on a whole range of legal problems, including those from state courts. The obligation of revenue lawyers to submit and argue their contentions before an ultimate national appellate court of general jurisdiction is, I suggest, a healthy corrective against over-specialisation, self-satisfaction and professional hubris.¹² This is one of the reasons why, below the High Court, I favour the continuation of the role of the Federal Court of Australia in taxation appeals. I disagree with the idea of creating a specialist court of taxation appeals which would run the risk of divorcing taxation law from the invigorating stimuli of general legal developments — a subject to which I will return.¹³

II SHAM — THE RELUCTANT EMBRACE

Against the background of this introduction to my three themes, I turn to the first. It concerns the potential role that reasoning by reference to an opinion that transactions constitute a ‘sham’ can play in Australian revenue law, as illustrated by the recent decision in *Raftland*. Self-evidently, nothing that I say in these or any other remarks expands the matters for which that decision (or any other) stands, in terms of legal doctrine. The ratio decidendi of *Raftland*, as of any other case, can only be derived from the judicial reasons offered to support the Court’s dispositive orders.¹⁴

The facts of the *Raftland* case were complex. The broad circumstances were that a company, Raftland Pty Ltd, was a member of a group of companies involved in real property development and leasing. In 1995 and in subsequent tax years, it sought to minimise its income tax by channelling profits through an entity with substantial accumulated tax losses. An unrelated loss bearing unit trust was ‘acquired’ through a firm of accountants. The loss bearing trust was designated as the ‘tertiary beneficiary’ of a discretionary trust within the group. Raftland was the trustee of that trust. Ostensibly, the tertiary beneficiary was entitled to receive distributions from the discretionary trust. Group profits for the 1995 tax year were distributed to Raftland. In turn, it passed resolutions to distribute its entire income to the loss bearing trust in two transactions. In fact, the second and much larger transaction was never paid.

The Commissioner of Taxation disallowed Raftland’s objection to an amended assessment he made relying initially upon Part IVA of the *Income Tax Assessment Act 1936* (Cth). Subsequently, the Commissioner relied on s 100A of the Act to sustain his assessment. The primary judge, Kiefel J, dismissed Raftland’s appeal in *Raftland Pty Ltd (as Trustee of the Raftland Trust) v Commissioner of Taxation*.¹⁵ Like the primary judge, the High Court held that the apparent discrepancy between the entitlements appearing on the face of the parties’ documents and the way the funds were in fact applied raised a question as to whether the documents could be accepted at face value. Particular documents and transactions could be questioned and ultimately disregarded if there was other evidence that the parties had purposes different from those apparent in the

¹² See *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109, 146 (Kirby J).

¹³ For a discussion of this subject, see Justice Michael Kirby, ‘Hubris Contained: Why a Separate Australian Tax Court Should Be Rejected’ (2007) 42 *Taxation in Australia* 161.

¹⁴ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 417–18 (Kirby J).

¹⁵ (2006) 227 ALR 598.

documents and if that evidence demonstrated that the documents could not, and did not, constitute the entirety of the parties' agreed arrangements. The orders of the primary judge were thus sustained. The High Court preferred her Honour's analysis to that of the Full Federal Court.¹⁶

Upon the subject of 'sham' analysis, there was a division of opinion in the High Court, reflected in the approaches severally taken in the three judicial opinions written to support the High Court's unanimous orders.

Three judges (Gleeson CJ, Gummow and Crennan JJ) noted that, although the Commissioner of Taxation had 'relied, with good effect before Kiefel J, upon an argument that invoked the concept of "sham", that argument was not aimed at the entire complex of arrangements.'¹⁷ Crucially, the joint reasons depended for their conclusion on there being an 'apparent discrepancy between the entitlements appearing on the face of the documents and the way in which the funds were applied'.¹⁸ According to the joint reasons, this discrepancy 'gave rise to a question whether the documents were to be taken at face value'¹⁹ or as 'not fully disclosing the legal rights and entitlements for which [they provide] on [their] face'.²⁰ As the joint reasons noted, in such a case the parol evidence rule in Australia, which forbids access to evidence outside the parties' written agreements to contradict or vary the legal purport of those instruments, does not apply.²¹ Upon that footing, the joint reasons acknowledged that '[t]he term "sham" may be employed here'.²² Whilst the word, and the reasoning it introduced, had to be deployed with caution (so far as it suggested the presence of fraud), it could be deployed in *Raftland's* case 'to deny the critical step in [*Raftland's* argument]'.²³

In separate concurring reasons, Heydon J concluded that it was not possible in the case to assert that there had been a 'sham'

in the sense of a transaction aimed at deceiving third parties. The trial judge did not make a finding to that effect, and does not seem to have been explicitly invited to do so. In these circumstances it would be difficult in this court to make that finding in this case.²⁴

Instead, the contested provision of the *Raftland* trust deed was not to be seen as 'valid and operative between the parties, but omitting (designedly or otherwise) some particular term which had been verbally agreed upon'.²⁵ This would effectively render it a 'mere piece of machinery' falling short of the 'only real agreement'²⁶ between the parties and thus unenforceable for that reason, without resort to a doctrine of 'sham'.

¹⁶ The Full Federal Court case was *Raftland Pty Ltd as Trustee for the Raftland Trust v Federal Commissioner of Taxation* (2007) 65 ATR 336.

¹⁷ *Raftland* (2008) 246 ALR 406, 412.

¹⁸ *Ibid* 416.

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ *Ibid*, referring to *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133, 143–4 (Isaacs J).

²² *Raftland* (2008) 246 ALR 406, 417 (Gleeson CJ, Gummow and Crennan JJ).

²³ *Ibid*.

²⁴ *Ibid* 446.

²⁵ *Ibid* 447 (Heydon J).

²⁶ *Ibid*.

In my own reasons, I contested Heydon J's approach to the applicability of 'sham' analysis in the case. I did so by reference to my appreciation of the objective features of the complex written transactions between the parties. It was that analysis that governed the outcome of the appeal.²⁷ I also relied on the following: the conclusions upon these matters expressed by the primary judge; her express invocation of the orthodox understanding of the appearance of a legal 'sham';²⁸ her justification for the imposition on Raftland, as a consequence, of additional tax for 'recklessness' in making its return;²⁹ the differences that then emerged between the primary judge and the Full Federal Court, which were resolved in the joint reasons (and by myself) in favour of the approach of the primary judge;³⁰ and the terms in which the Commissioner's arguments had been addressed to the High Court, expressly supporting the 'sham' analysis adopted at first instance.³¹

Now I reach the interesting questions. If there were so many reasons on the evidence for analysing the *Raftland* case in terms of 'sham' — including the analysis at first instance, the differences on appeal, the consequential arguments, the contested issues and reasons of principle — what explanation can exist for the apparent disinclination of some judges to adopt that tool of analysis? At least, what reason can exist for an unwillingness to do so robustly, when the case arrives before appellate courts? And, specifically, what is the reason for the discernible reluctance of Australian judges, particularly in cases of revenue law, to embark upon an application of the notion of 'sham' for legal purposes as expressed in the language that the High Court adopted in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* ('*Equuscorp*')?³²

III THREE REASONS FOR RELUCTANCE TOWARDS 'SHAM'

The questions posed in the previous Part are particularly intriguing because the notion of a 'sham', for the purposes of legal analysis, has existed in Australian law since at least the earliest days of the High Court. In *Jaques v Federal Commissioner of Taxation*, Isaacs J explained it as involving the use of documents that were 'inherently worthless, ... [needing] no enactment to nullify [the transaction]'.³³

I postulate three fundamental reasons why courts, including in Australian revenue cases, have been reluctant to engage with a robust application of 'sham' analysis and, indeed, why they have embraced the narrow principle stated in *Equuscorp* (which was nonetheless sufficient to import the concept of 'sham' into the reasoning in *Raftland*). In *Equuscorp*, another case of complex and

²⁷ See *ibid* 422 (Gleeson CJ, Gummow and Crennan JJ). See also at 428–30 (Kirby J).

²⁸ *Ibid* 430–1, citing *Raftland Pty Ltd (as Trustee of the Raftland Trust) v Commissioner of Taxation* (2006) 227 ALR 598, 618 (Kiefel J).

²⁹ *Raftland* (2008) 246 ALR 406, 431, citing *Raftland Pty Ltd (as Trustee of the Raftland Trust) v Commissioner of Taxation* (2006) 227 ALR 598, 621 (Kiefel J).

³⁰ *Raftland* (2008) 246 ALR 406, 424 (Gleeson CJ, Gummow and Crennan JJ), 443–4 (Kirby J).

³¹ *Ibid* 428 (Kirby J), citing *Raftland* [2008] HCATrans 009 (Mr Alan Robertson, 30 January 2008) 94.

³² (2005) 218 CLR 471, 486–7 (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ). This passage was cited by the primary judge in *Raftland Pty Ltd (as Trustee of the Raftland Trust) v Commissioner of Taxation* (2006) 227 ALR 598, 615–16 (Kiefel J).

³³ (1924) 34 CLR 328, 358.

seemingly artificial documentation, the High Court had said that “[s]ham” is an expression which has a well-understood legal meaning. It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences.³⁴

The first reason for this judicial reluctance towards ‘sham’ is that the law, including in revenue cases, operates on evidence. Commonly in cases in which sham is an issue, the law relies on documentary evidence. In applying the rules of the common law and the provisions of revenue legislation, courts ordinarily act upon the assumption that such documents are intended to, and do, define the relevant relationships of the parties to them, upon which the provisions of revenue law are intended to attach. In the busy lives of officials, lawyers and courts, it is easier to apply legal rules to the facts derived from such documents than to go beyond the documents or to address the supposed ‘true facts’ of the parties’ relationships. There are those who draw back from the suggestion that they should go behind the documents and give effect to contradictory ‘realities’.³⁵ Finding and applying the relevant law to ascertained facts is difficult enough without injecting a larger and more onerous enquiry. Ascertaining facts apparently in conflict with the written texts by which parties have defined their relationships necessarily involves cost and a degree of inefficiency which the law is understandably reluctant to allow. This is the basic reason behind the parol evidence rule, which normally restrains those who seek to go outside or against the written documents that define the relationships by which parties agree to be bound.³⁶

There may be a psychological reluctance on the part of lawyers, especially those trained in the strict disciplines of property law (in which I would include revenue law). They may resist the needless opening up of evidence and analysis directed at complex factual reality, as distinct from the legal instruments in which parties have stated to the world their agreed arrangements for the deployment of their property. In revenue matters especially, such arrangements are frequently detailed, careful and complex. The definition of property interests usually demands nothing less. In a sense, the edifice of legal rules is substantially built upon documentation which the parties propound. Whilst courts, both of common law and equity, will sometimes go behind such documents, doing so is exceptional and generally uncongenial. Often, it runs against the grain of property lawyers who are usually most comfortable working in the concrete world of written instruments where property rights, privileges and obligations are ordinarily to be found. The messy world of a contradicting actuality may be distasteful to neat and tidy legal minds. Such considerations may help to explain the common reluctance of property lawyers to stray far from the written texts

³⁴ (2005) 218 CLR 471, 486 (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ), referring to the oft-quoted definition of ‘sham’ in *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449, 453–5 (Lockhart J) (*‘Sharrment’*).

³⁵ Cf *Chang v Laidley Shire Council* (2007) 234 CLR 1, 27 (Kirby J); *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria* (2007) 234 CLR 96, 122–3 (Kirby J).

³⁶ As noted above in Part II, the joint reasons in *Raftland* suggested that in some instances the legal documents or instruments will not fully disclose the legal rights and entitlements of the relevant parties: *Raftland* (2008) 246 ALR 406, 416 (Gleeson CJ, Gummow and Crennan JJ). Future courts must clarify the issues that arise from this observation, such as what role precisely the parol evidence rule plays, and whether, in applying sham analysis, decision-makers are to analyse contracts clause by clause in the light of subsequent conduct.

with which they feel at home. In this final remark, I indulge in a little psychological speculation; but I may not be far from the mark.

The second reason goes beyond the foregoing generalities which, however, find a measure of reflection in evidentiary and other rules of law. In Australian revenue law, as elsewhere, there has been a vigorous judicial and academic debate³⁷ over the invocation of ‘sham’ analysis to permit revenue authorities to go behind the written instruments by which taxpayers, and those with whom they deal, attempt to express their relationships for revenue law purposes. At the heart of this debate has been a recognition of the fact that self-interested conduct by taxpayers might sometimes encourage arrangements of extreme artificiality in order to reduce tax liability. At the same time, there arises a recognition that courts cannot ‘ignore the reality that ... tax laws [now] affect the shape of nearly every business transaction’,³⁸ such that businesses plan their affairs around the realities of tax liability, competition law and other commonly applicable statutes.³⁹ In effect, a business that failed to do so would be in breach of its obligation to its shareholders. Between the legitimate purpose of the law to strike down completely artificial ‘schemes’ and the commercial imperative to design transactions that place taxpayers in as advantageous a position as the law permits lies the territory of debate over impermissible tax avoidance and acceptable tax minimisation.

As I remarked in *Raftland*, in 1935 the Supreme Court of the United States in *Gregory v Helvering* expressed a doctrine akin to ‘sham’ in order to enhance the ability of the revenue to disregard seriously artificial transactions despite their ostensible legal regularity and effect:

The whole undertaking ... was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else. ... To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.⁴⁰

Ten years later, the same Court in *Commissioner of Internal Revenue v Court Holding Co* reinforced a similar approach in the context of revenue law: ‘[t]o permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.’⁴¹

Revenue law in Australia has generally resisted such reasoning. The literal approach to the interpretation of most statutes, adopted by the High Court in its earlier years, upheld many ‘schemes’ of tax avoidance despite their obvious artificiality.⁴² By 1980, these decisions produced a strong protest in the High

³⁷ See, eg, John Tiley, *Revenue Law* (5th ed, 2005) 107; *Paintin and Nottingham Ltd v Miller Gale and Winter* [1971] NZLR 164, 175–7 (Turner J); *Raftland* (2008) 246 ALR 406, 428 (Kirby J).

³⁸ *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 416 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ) (‘*Spotless*’), quoting *Frank Lyon Co v United States*, 435 US 561, 580 (Blackmun J) (1978).

³⁹ *Spotless* (1996) 186 CLR 404, 415–16 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ), quoting *Commissioner of Internal Revenue v Brown*, 380 US 563, 579–80 (Harlan J) (1965).

⁴⁰ *Raftland* (2008) 246 ALR 406, 433 (Kirby J), quoting *Gregory v Helvering*, 293 US 465, 470 (Sutherland J for the Court) (1935).

⁴¹ 324 US 331, 334 (Black J for the Court) (1945).

⁴² See, eg, *Curran v Federal Commissioner of Taxation* (1974) 131 CLR 409.

Court, written by Murphy J, calling for the abandonment of what he described as 'strict literalism' in the interpretation of statutes, particularly revenue statutes. In *Federal Commissioner of Taxation v Westraders Pty Ltd* ('Westraders'), Murphy J, citing the foregoing United States decisions, appealed for a broader, purposive approach to the interpretation of revenue law in Australia: '[p]rogress towards a free society will not be advanced by attributing to Parliament meanings which no one believes it intended so that income tax becomes optional for the rich while remaining compulsory for most income earners.'⁴³

Whilst the appeal of Murphy J did not produce immediate judicial support within the High Court, nevertheless, as quite often happened, it worked as a catalyst for an ultimate response. At first, this occurred in a series of decisions in the newly created Federal Court of Australia, which had assumed from the High Court the primary responsibility for taxation appeals. Then in turn, in the High Court, two developments happened that supported the revenue's arguments that courts should travel behind the parties' documentation in cases involving highly artificial transactions so as to consider the apparent realities and thereby to test the imputed 'intentions' of the parties purportedly stated in their documents. The first consequence was a general shift in the approach of the High Court away from a purely literal examination of legislation in favour of considering the *context* of the statutory words and the *purposes* that the law was designed to achieve.⁴⁴ The second was a greater willingness of courts to acknowledge 'sham' analysis in particular circumstances so as to derive the real intentions of the parties in transactions having revenue consequences.⁴⁵

As Australian revenue law presently stands, the appeal by Murphy J for the development of a comprehensive doctrine of 'sham' capable of dealing with *all* 'artificial and contrived transactions for tax avoidance purposes'⁴⁶ remains out of favour in the High Court. The continuing reluctance of the Court to adopt such an approach may be seen in its rejection of the common law 'fiscal nullity' notion, adopted by the House of Lords in *W T Ramsay Ltd v Inland Revenue Commissioners*.⁴⁷ In the High Court of Australia, this notion has been rejected in part because of the enactment of particular federal statutory provisions adopted for the specific purpose of inhibiting unacceptable forms of tax avoidance.⁴⁸

The third reason for the reluctance of Australian courts to venture too vigorously into the field of 'sham' analysis was referred to in the joint reasons of *Rafiland*,⁴⁹ with which I relevantly agreed.⁵⁰ This was encapsulated in the

⁴³ (1980) 144 CLR 55, 80.

⁴⁴ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112–13 (McHugh J); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381, 384 (McHugh, Gummow, Kirby and Hayne JJ).

⁴⁵ *Sharrment* (1988) 18 FCR 449, 453–4 (Lockhart J), affirmed by *Equiscorp* (2005) 218 CLR 471, 486 (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ).

⁴⁶ *Westraders* (1980) 144 CLR 55, 79.

⁴⁷ [1982] AC 300. This approach requires that the fiscal consequences of a series of transactions be ascertained by considering the end result of the series of transactions as a whole, rather than by reference to each individual transaction.

⁴⁸ *Federal Commissioner of Taxation v Patcorp Investments Ltd* (1976) 140 CLR 247, 292 (Gibbs J), cited by *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 434–5 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

⁴⁹ (2008) 246 ALR 406, 411–12 (Gleeson CJ, Gummow and Crennan JJ).

⁵⁰ *Ibid* 428.

explanation that in *Raftland*, as in other cases where the ‘sham’ doctrine has been invoked, the Commissioner must be quite careful. The Commissioner must deploy a surgeon’s scalpel rather than a butcher’s axe. The former will permit the Commissioner to persuade the court to disregard *particular* transactions or *aspects* of those transactions, without bringing down the whole analysis upon which reliance is had to uphold the assessment of taxation due. To the extent that any ‘sham’ analysis were to demolish the entire edifice built upon the documentation produced by the parties (and to invite the court to go behind those documents and to analyse the so-called ‘real’ or ‘true’ dealings of the parties), it might produce an outcome inimical to the Commissioner’s fundamental assertion that the named taxpayer was the recipient of the identified ‘income’ so as to give rise to the liability to pay income tax under the statute.

Thus, ‘sham’ in revenue law, like truth in evidence law, can be loved too unwisely and pursued too keenly.⁵¹ Too ardent a desire to tear up the written documents by which the parties have purported to express their relationships (and to search for the ‘reality’ and ‘truth’ behind their dealings) might take the inquisitor to outcomes which neither the taxpayer nor the revenue really want. Perhaps this consideration, most of all, helps to explain the psychological reluctance of revenue lawyers in Australia to abandon their documents in favour of what they would doubtless regard as a chimerical quest for illusory actuality.

IV THE CURRENT DOCTRINE OF ‘SHAM’

The contemporary debates about ‘sham’ in revenue law occur in the context of a wider discourse about the law’s attitude to form and substance. As Gummow J recognised in his recent essay on that subject, the law generally (but not always) assigns a greater weight, or even decisive effect, to substance rather than form.⁵² Nevertheless, even in revenue law this is not always so. Sometimes the law is properly attentive to considerations of form. Recently, in the criminal case of *R v Clarke*, Lord Bingham in the House of Lords said:

Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place.⁵³

In joint dissenting reasons in *Ayles v The Queen*, Gummow J and I applied Lord Bingham’s dictum to the context of criminal procedure where form must be given due weight.⁵⁴ By contrast, the majority in that case invoked considerations of substance. They rejected the arguments as to form despite the admitted deficiencies in the procedures that had been followed by the prosecution.⁵⁵ Once again, divergences of opinion over such matters emerged.⁵⁶ They have also

⁵¹ Cf *Pearse v Pearse* (1846) 1 De G & Sm 12, 28–9; 63 ER 950, 957 (Sir James Knight Bruce V-C).

⁵² Gummow, above n 8, 229.

⁵³ [2008] 2 All ER 665, 677.

⁵⁴ (2008) 232 CLR 410, 414–15.

⁵⁵ Ibid 414 (Gleeson CJ), 425–6 (Heydon J), 434–5 (Kiefel J).

⁵⁶ Cf *Weiss v The Queen* (2005) 224 CLR 300, 311–12 (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

frequently been apparent in revenue cases where the proponents of 'sham' have appealed to *substance* and the opponents have insisted on the application of the revenue law to the *forms* evident in the parties' documentation. This was the ground upon which battle was joined in *Raftland*.

Within the dialogue about form and substance, it was historically the solicitude of courts of equity to uphold charitable purposes in wills and trusts that promoted an approach that addressed the manifest intention of the relevant actors, despite their failure to perfect that intention by taking the proper legal or formal steps.⁵⁷ In such cases, it was equity's search for the 'intention' of the actors that introduced a vehicle to overcome the apparent impediment of documentary or other formal defects.⁵⁸

This line of reasoning found its way into Australian revenue law in *Scott v Federal Commissioner of Taxation [No 2]*, where Windeyer J remarked:

The difficult and debatable philosophic questions of the meaning and relationship of reality, substance and form are for the purposes of our law generally resolved by asking did the parties who entered into the ostensible transaction mean it to be in truth their transaction, or did they mean it to be, and in fact use it as, merely a disguise, a facade, a sham, a false front — all these words have been metaphorically used — concealing their real transaction ...⁵⁹

Subsequently, in *Gurfinkel v Bentley Pty Ltd*, Windeyer J observed:

Of course if it can be shewn by parol evidence that both parties to a document adopted the form they did as a disguise, then their true intent and not the form will prevail. Thus agreements that were in form sales have sometimes been held to be mortgages when the form of a sale had been adopted as a disguise ...⁶⁰

Once this approach to the controversy about 'sham' in the revenue context is appreciated, it has to be accepted that the operation of the law in this respect is inescapably opaque. This is because, as Gummow J concluded in his treatment of the topic, 'policy choices are made. But frequently what is not found is the articulation of the reasons supporting one such choice rather than another.'⁶¹ Some of the policy choices that are at work in this area of the law I have already identified.⁶² Once they are understood, it should occasion little surprise that the way they play out in the particular case will often be hotly contested.

The foregoing considerations bear out the practical comment made by Dowsett J in the Full Federal Court in his concurring reasons in *Raftland Pty Ltd as Trustee for the Raftland Trust v Federal Commissioner of Taxation*:

whether or not the parties intended that legal or equitable rights and obligations be created by the various transactions into which they entered [needs to be considered] ... [T]he question to be addressed is whether the parties intended that the various transactions take effect, or whether they were really trying to cam-

⁵⁷ Gummow, above n 8, 232.

⁵⁸ *A-G (NSW) v Perpetual Trustee Co (Ltd)* (1940) 63 CLR 209, 226–7 (Dixon and Evatt JJ).

⁵⁹ (1966) 40 ALJR 265, 279.

⁶⁰ (1966) 116 CLR 98, 114.

⁶¹ Gummow, above n 8, 241.

⁶² See above Part III.

oufage the true nature of the dealings between them. In such a case the court must decide where reality stops and camouflage starts.⁶³

Dowsett J was correct to identify the problem as he did. It is obviously a problem of characterisation that depends upon the assessment by the decision-maker of the entirety of the evidence. About that assessment, informed minds will sometimes differ. Nevertheless, as Richardson J (a judge with much knowledge in this area) remarked in the Court of Appeal of New Zealand, it is often the case that

[t]he true nature of a transaction can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out: not on an assessment of the broad substance of the transaction measured by the results intended and achieved or of the overall economic consequences.⁶⁴

‘Schemes’ of varying degrees of complexity and artificiality will sometimes be so obvious as to invite a conclusion that the documents have set out to disguise the true nature of the dealings and to present to the world an appearance of their *intended* relationships that differs from the actuality. It was just such arrangements that caused the legislature to enact both general⁶⁵ and specific⁶⁶ provisions in taxation legislation, aimed to target varying degrees of artificiality and to permit, or even oblige, courts to initiate a search for the ‘real’ or ‘true’ effect of the dealings.

Where anti-avoidance legislation exists, it is perhaps understandable for courts to feel a measure of reluctance towards developing broad common law notions such as ‘sham’ and, instead, to apply the express provisions of the statute to the proved documents. However, in terms of legal principle, the common law does not normally stand paralysed simply because legislative provisions have been adopted. The existence of Part IVA of the *Income Tax Assessment Act 1936* (Cth), or of s 100A of that Act (which was in issue in *Raftland*), does not mean that the tool of analysis potentially afforded by ‘sham’ doctrine is unavailable to decision-makers. It simply means that any resulting common law doctrine must continue to evolve in the orbit of the statutory provisions that have been enacted.⁶⁷

A feature of the cases in which the documentation relied on by the taxpayer is said to constitute a ‘sham’ is that the documents are commonly extremely complex, sometimes for the very purpose of hiding what is suggested to be the ‘real transaction’. That, in part, was the conclusion of Kiefel J at first instance in *Raftland*’s case.⁶⁸ It was a conclusion reached in many earlier cases. A good example is *Matrix-Securities Ltd v Inland Revenue Commissioners*, where Lord Templeman referred to what he called ‘[t]he trick of circular, self-cancelling payments with matching receipts and payments’.⁶⁹ *Equuscorp* also appeared to

⁶³ (2007) 65 ATR 336, 342.

⁶⁴ *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694, 706.

⁶⁵ *Income Tax Assessment Act 1936* (Cth) s 260.

⁶⁶ See, eg, *Income Tax Assessment Act 1936* (Cth) s 100A.

⁶⁷ *Roads and Traffic Authority v Royal* (2008) 245 ALR 653, 677 (Kirby J), cited in *Raftland* (2008) 246 ALR 406, 444 (Kirby J).

⁶⁸ *Raftland Pty Ltd (as Trustee of the Raftland Trust) v Commissioner of Taxation* (2006) 227 ALR 598, 617.

⁶⁹ [1994] 1 All ER 769, 780.

be such a case. In *Equuscorp*, however, the boot was on the other foot. The taxpayers having improvidently entered into a complex 'scheme', the High Court held that they should be fixed with its obligations. If they set out to take the legal benefits, they should be prepared to assume the legal burdens.⁷⁰

It is obviously important for decision-makers to observe the requirements of procedural fairness in cases where 'sham' analysis is to be invoked. This is because, as the joint reasons noted in *Raftland*, allegations of the existence of a 'sham' transaction will sometimes involve a suggestion of fraud. The law has always insisted that allegations of fraud must be pleaded, proved and argued for clearly and directly, not left to implication. If the revenue is to allege that particular transactions of a taxpayer constitute a 'sham', so that the documentation does not disclose the taxpayer's 'real' or 'true' intentions, it is essential that such a contention be made clear. Only that course will ensure that the allegation can be put in issue and addressed by relevant evidence and argument.⁷¹ Also relevant in this regard is the locus of the burden of proof in the case, given that a suggestion of 'sham' is easily made but, where essential, needs to be clearly proved or disproved by the party that in law bears the legal obligation to do so.

The mere fact that a transaction appears to be artificial, circular, designed to achieve a reduction of tax liability or commercially unviable is not sufficient to warrant a conclusion that it represents a 'sham', authorising a court to disregard it for subsequent legal analysis.⁷² By the same token, if parol evidence is admitted to cast doubt on the reality and actuality of the arrangements expressed in the written documents, a court is not obliged to accept those documents on their face unquestioningly. It is not required blindly to abide by a party's assertions about the status and character of its transactions.

Under *Equuscorp*, the test in Australia addresses the intentions of the parties.⁷³ In *Raftland*, I put it this way:⁷⁴

In essence, the parties must have intended to create rights and obligations different from those described in their documents. Such documents must have been intended to mislead third parties in respect of such rights and obligations.⁷⁵

Where a court is considering a suggestion of sham that has a reasonably arguable evidential foundation, the court will not be confined to examining the pro-pounded documentation alone. It may examine (and draw inferences from) other evidence, including the parties' explanations (if any) as to their dealings, and evidence describing their subsequent conduct.⁷⁶

⁷⁰ *Equuscorp* (2005) 218 CLR 471, 483 (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ).

⁷¹ *Raftland* (2008) 246 ALR 406, 428 (Kirby J).

⁷² *Ibid* 436, 442 (Kirby J).

⁷³ See *ibid* 439–40 (Kirby J).

⁷⁴ *Ibid* 442. In the joint reasons, it was stated that whilst fraud requires '[t]he presence of an objective of deliberate deception', for the purposes of *Raftland* '[sham] may be used in a sense which is less pejorative': at 417 (Gleeson CJ, Gummow and Crennan JJ). This does raise questions about whether the joint reasons have modified the law in this area and, if so, in what way. The answers to these questions will need to be explored in future cases in which the doctrine of 'sham' is invoked.

⁷⁵ *Hitch v Stone* [2001] STC 214, 226 (Arden LJ) (Sir Martin Nourse and Kay LJ agreeing: at 236) ('*Stone*').

⁷⁶ *Ibid* 231–2, 236; *Sharrment* (1988) 18 FCR 449, 461 (Lockhart J).

To justify a conclusion that documents constitute a sham, the requisite intention to mislead must be a common intention of the parties.⁷⁷ An exception may exist where the acts and documents reflect a transaction divisible into separate parts, such that a transaction is a sham as to part only of the transaction.⁷⁸

Neither the complexity nor the artificiality of a transaction,⁷⁹ nor any circularity evident in it,⁸⁰ nor the apparent lack of commercial or economic sense⁸¹ will of themselves, alone or in combination, necessarily warrant a conclusion that a transaction constitutes a sham.⁸² Nor does a departure by the parties from the terms of their original agreement necessarily indicate that they never intended that agreement to be effective and binding according to its tenor.⁸³ Nevertheless a sham can develop over time if there is a departure from the original agreement and the parties knowingly do nothing to alter the provisions of their documents as a consequence.⁸⁴

In the limited circumstances so described, the justification for invoking ‘sham’ analysis remains:⁸⁵

where justified, it may rescue the decision-maker from being led by the nose into the artificial task of defining the legal rights and obligations of the parties by reference to their proved documents and related conduct alone, where extrinsic evidence demonstrates that they constitute a sham and were not intended to be effective or have their ‘apparent, or any, legal consequences’.⁸⁶

For a court to call a transaction a sham is not just an assertion of the essential realism of the judicial process, and proof that judicial decision-making is not to be trifled with. It also represents a principled liberation of the court from constraints imposed by taking documents and conduct solely at face value. In this sense, it is yet another instance of the tendency of contemporary Australian law to favour substance over form. As such it is to be welcomed in decision-making in revenue cases.

The consequence of adopting this approach in *Raftland* was that the conclusions of Kiefel J at trial were restored. The High Court held that her Honour’s conclusions about the intentions of the parties, concerning the propounded documents, should not have been disturbed by the Full Court. Those conclusions reflected ‘sensible and rational inferences drawn from [the] evidence.’⁸⁷ I considered that the High Court should endorse reasoning by reference to the analytical tool of ‘sham’ in cases of this kind:

[The High Court] should not be diffident to invoke the tool of reasoning that sham provides ... [n]or should it be hesitant in utilising the word ‘sham’ when

⁷⁷ *Snook v London & West Riding Investments Ltd* [1967] 1 All ER 518, 529 (Russell LJ); *Stone* [2001] STC 214, 226 (Arden LJ) (Sir Martin Nourse and Kay LJ agreeing: at 236).

⁷⁸ New Zealand Inland Revenue, “‘Sham’ — Meaning of the Term” (1997) 9(11) *Tax Information Bulletin* 7, 7–9.

⁷⁹ *Sharrment* (1988) 18 FCR 449, 454–5 (Lockhart J); *Oakey Abattoir Pty Ltd v Federal Commissioner of Taxation* (1984) 55 ALR 291.

⁸⁰ *Sharrment* (1988) 18 FCR 449, 458 (Lockhart J).

⁸¹ *Case X10* (2005) 22 NZTC 12 155, 12 171–5 (Willy DCJ).

⁸² Cf *Accent Management Ltd v Commissioner of Inland Revenue* (2007) 23 NZTC 21 323, 21 336 (William Young P).

⁸³ *Stone* [2001] STC 214, 226 (Arden LJ) (Sir Martin Nourse and Kay LJ agreeing: at 236).

⁸⁴ See *Marac Finance Ltd v Virtue* [1981] 1 NZLR 586, 588 (Richardson J).

⁸⁵ *Raftland* (2008) 246 ALR 406, 443 (Kirby J).

⁸⁶ *Equuscorp* (2005) 218 CLR 471, 486 (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ).

⁸⁷ *Raftland* (2008) 246 ALR 406, 443 (Kirby J).

explaining its reasons. So long as the legal preconditions are established, the decision-maker should call a spade a spade — and a sham a sham.⁸⁸

V KEEPING ABREAST OF THE LAW OF JUDICIAL REVIEW

A generous performer will always offer an audience an encore: something additional to the advertised programme that leaves those attending convinced that they have received their money's worth. As it happens, I have two encores for revenue lawyers beyond the sonata on sham, derived from a theme of *Raftland*.

The first is a reminder of the importance for revenue lawyers of remaining abreast of developments in federal administrative law generally. I have been tracking these developments closely since 1976 when, with Brennan J and others, I served as a foundation member of the Administrative Review Council. It was that body that supervised the introduction of the new federal administrative law in Australia. This included the enactment of the *Administrative Appeals Tribunal Act 1975* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth). These developments of administrative law are amongst the most notable advances in Australian law that have occurred in my professional lifetime.⁸⁹

It is all too easy for lawyers who live and work in a specialised field of law (such as revenue law) to overlook, or even be unaware of, developments in the law elsewhere that may affect the remedies now available, and thus constitute developments relevant to their clients' needs.

This was one of the points that I called to attention in *Futuris*.⁹⁰ That case was decided three months after *Raftland*. There are many points of importance in *Futuris*. For present purposes, there are two that need especially to be noted because, in my opinion, they affect the correct approach to the remedy of judicial review when that relief is invoked in contemporary challenges before federal courts in revenue cases.

Virtually since the earliest days of the Commonwealth, judicial review has been claimed in revenue cases. Because for three parts of the last century the High Court itself was the main or only court available to give judicial relief against administrative decisions concerned with federal income tax, that Court developed a large body of case law explaining where the remedies of judicial review, under the *Constitution* and by statute,⁹¹ would be available. The chief cases are all too familiar to revenue lawyers.⁹² Generally speaking, they have sent those lawyers, when claiming or resisting such relief, searching for indica-

⁸⁸ Ibid 444.

⁸⁹ See *Futuris* (2008) 247 ALR 605, 635 (Kirby J), agreeing in part with *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 641 (Lord Diplock).

⁹⁰ (2008) 247 ALR 605, 635.

⁹¹ See now *Judiciary Act 1903* (Cth) s 39B.

⁹² See, eg, *Federal Commissioner of Taxation v Australian Boot Factory Ltd* (1926) 38 CLR 391, 397 (Isaacs J); *Federal Commissioner of Taxation v S Hoffnung & Co Ltd* (1928) 42 CLR 39, 54–5 (Isaacs J); *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243; *F J Bloemen Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 360, 377–8 (Mason and Wilson JJ); *Deputy Federal Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 199–201 (Brennan J).

tions that the administrator has acted in breach of the rules of procedural fairness ('natural justice'); acted in bad faith; or made an assessment that is flawed because (contrary to the statute) it was merely temporary or provisional in character.

A point that I made in *Futuris*⁹³ was that, outside revenue cases, the categories of 'jurisdictional error'⁹⁴ have expanded significantly in Australia in recent years, partly under the influence of earlier judicial decisions in England.⁹⁵ According to Professor Mark Aronson, there are now six categories of 'jurisdictional error' recognised by Australian courts.⁹⁶ There should perhaps be still more categories. However that may be, the present point is that it is a serious mistake for revenue lawyers seeking the remedies of judicial review to treat the early High Court taxation decisions on the topic as expressing exhaustively the grounds for judicial review that will now be given effect. Revenue law is not divorced from developments occurring in the law of judicial review more generally. In *Futuris*, I observed:⁹⁷

For decades, taxation decisions arising in judicial review proceedings have typically concerned the suggested tentative or provisional character of such decisions or their lack of good faith. This does not justify treating those two categories as covering the entire field of disqualifying legal (or 'jurisdictional') error ... As the two nominated categories of invalidity have arisen in taxation cases for at least 80 years,⁹⁸ there is a risk that specialists in taxation law will overlook, or ignore, the considerable subsequent advances in administrative law, in particular within judicial review. Specialist disciplines, including in law, can occasionally be myopic and inward-looking.

A second lesson from *Futuris* also derives from developments in judicial review of administrative action more generally. It is that such remedies, whether derived from the *Constitution* or by analogy from like provisions in federal legislation, are all discretionary in character. Where particular statutory remedies that permit a more ample examination of the administrative decision (including on the merits) are provided, it is consistent with long-standing principles for the

⁹³ (2008) 247 ALR 605, 635–40. As there pointed out, the ambit and nature of the remedies of judicial review are also relevant to the operation of the purported privative provisions in ss 175 and 177(1) of the *Income Tax Assessment Act 1936* (Cth): at 638–9.

⁹⁴ 'Jurisdictional error' was an expression first used in the recorded arguments of counsel in *R v Kirby; Ex parte Transport Workers' Union of Australia* (1954) 91 CLR 159, 168 (E G Coppel QC, with him J H Dobson). The expression was first used in judicial reasons in *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415, 423 (Murphy J). See also *Futuris* (2008) 247 ALR 605, 607–8 (Gummow, Hayne, Heydon and Crennan JJ), 635 (Kirby J).

⁹⁵ The two additional categories of 'bad faith' and 'breach of natural justice' are attributed to Lord Reid's reasons in *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 171; cf Mark Aronson, 'Jurisdictional Error without the Tears' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 330, 335–6.

⁹⁶ Aronson, above n 95, 335–6, citing *Craig v South Australia* (1995) 184 CLR 163, 176–80 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

⁹⁷ (2008) 247 ALR 605, 635.

⁹⁸ See, eg, *Federal Commissioner of Taxation v Australian Boot Factory Ltd* (1926) 38 CLR 391, 397 (Isaacs J); *Federal Commissioner of Taxation v S Hoffnung & Co Ltd* (1928) 42 CLR 39, 54–5 (Isaacs J).

court whose remedies are invoked to deny judicial review upon discretionary grounds, obliging the applicant to pursue the specific statutory remedies first.⁹⁹

Especially is this so where the evidence demonstrates that — perhaps to avoid the descent of a statutory time limit — the applicant has actually applied for the statutory remedies, as indeed the taxpayer had done in *Futuris*. In such circumstances, to refuse judicial review in the exercise of the court's discretion, and to oblige the applicant first to pursue the application under the statute, fully conforms both to long-standing legal rules and to economic and prudent judicial practice.¹⁰⁰

VI THE NATIONAL IMPORTANCE OF REVENUE LAW

My second encore is of a completely different character. It involves a few parting words of praise and appreciation for revenue law and revenue lawyers and for the importance of their work in the Australian Commonwealth.

At the beginning of the 20th century, two new nations were commonly identified as offering the greatest promise for the prosperity and wellbeing of their peoples: they were Australia and Argentina.¹⁰¹ At that time, the gross domestic product per capita of those living in each country was fairly close.¹⁰² The prospects for each nation appeared equally promising. However, in the course of the ensuing century, Argentina, despite the great natural resources of the country, fell far behind.¹⁰³ It did so largely because of the imperfections of its governance. The Australian people, generally speaking, have continued to prosper under their 1901 *Constitution*.

Amongst the reasons commonly advanced for these contrasting outcomes have been the inefficiencies and imperfections of the Argentine law and practice on taxation. For much of the last century, the wealthy in Argentina reflected the nightmare that haunted Murphy J in his dissent in *Westraders*, that 'income tax becomes optional for the rich while remaining compulsory for most income earners.'¹⁰⁴

⁹⁹ *Futuris* (2008) 247 ALR 605, 641–2 (Kirby J). This point was previously made in *Re Carmody; Ex parte Glennan* (2000) 173 ALR 145, 156 (Kirby J) and in *Re Heerey; Ex parte Heinrich* (2001) 185 ALR 106, 109 (Kirby J). It was subsequently approved by a full bench of the High Court in *Glennan v Commissioner of Taxation* (2003) 198 ALR 250, 254–5 (Gummow, Hayne and Callinan JJ).

¹⁰⁰ See, eg, *Ex parte Corbishley; Re Locke* (1967) 67 SR (NSW) 396, 402–3 (Holmes JA); *Ultra Tune (Aust) Pty Ltd v Swann* (1983) 8 IR 122, 122 (Hutley JA); *Boral Gas (NSW) Pty Ltd v Magill* (1993) 32 NSWLR 501, 510–14 (Kirby P). For a list of other English and Australian cases on this point, see *Futuris* (2008) 247 ALR 605, 641 (Kirby J) and accompanying footnotes.

¹⁰¹ See generally Lee J Alston and Andrés A Gallo, 'The Erosion of Rule of Law in Argentina, 1930–1947: An Explanation of Argentina's Economic Slide from the Top 10' (2003) 2–4 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=463300>.

¹⁰² In 1900, Australia was ranked third in the world in terms of gross domestic product per capita; Argentina was ranked 13th: see Andres Gallo, 'Argentina–Australia: Growth and Divergence in the Twentieth Century' (Paper presented at the 14th International Economic History Congress, Helsinki, 21–25 August 2006) 9.

¹⁰³ In 2002, Australia was ranked eighth in the world in terms of gross domestic product per capita; Argentina was ranked 27th: *ibid*.

¹⁰⁴ (1980) 144 CLR 55, 80. See Kenneth L Sokoloff and Eric M Zolt, 'Inequality and Taxation: Evidence from the Americas on How Inequality May Influence Tax Institutions' (2006) 59 *Tax Law Review* 167, 201–2, 241.

The example of Argentina's past misfortunes remains before us as a warning. In Australia, we must continue to uphold by law a legal regime of national taxation that obliges administrators to conform to their legal obligations, to act fairly and to avoid procedures or outcomes that are so disproportionate as to be irrational or manifestly outside their statutory authority. At the same time, we must uphold the purposes of our revenue statutes and reject any notion that the paying of lawful taxes is optional. We must do so whether by the use of 'sham' analysis applied to artificial transactions or by invoking laws rendering defined 'schemes' ineffective at law.

I pay tribute to the teachers, legal practitioners, accountants, administrators and judicial officers who labour in the intricate and complex field of Australia's revenue laws. They should never be in doubt about the importance of their discipline for, or of their own contributions to, the prosperity, good governance and welfare of the people of Australia.