PATRON'S ADDRESS

Australasian Tax Teachers Association Conference, 17 January 2019

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It is a great privilege for me to have the opportunity of addressing the Australasian Association of Tax Teachers at its 2019 annual conference. The theme of your conference this year has something of a familiar, and constant, ring about it: *"Tax, innovation and education: Tax in a changing world"*. It seems to me that tax has been in a changing world for as long as I can remember, and that the need for tax, and for tax education, to come to terms with innovation has been a lament of many tax practitioners for a long time. Saying that does not lessen the novelty and complexity of the issues which are particular to these times, nor does it lessen the importance for tax education to come to terms with the changes in the world today and to educate those who develop and apply tax law as it is evolving now.

The changing world had given rise to new questions for our revenue base, and in its application and enforcement. Tax teachers have an important role in understanding the issues raised in our times and in framing the questions which are to be asked and the answers which are to be given. The issues, questions and answers will be with us for many years to come and the audience you need to address will cover every aspect of tax practice and administration for many years. The makers of policy may look to you for impartial guidance; your students will be those who will come to apply, advise and guide taxpayers in understanding their duties and obligations; those who will apply the law (including tax officials, taxpayers, tax practitioners and judges) may all look to

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you for an impartial understanding of the issues, questions and answers they must deal with in the ever changing world of today.

I will not trespass in my remarks upon the details of the many interesting topics you will be considering at this conference, but will confine myself to some general reflections (if I may) based upon my recent role as a judge having impartially to apply principles to facts where the answers were neither obvious nor easy. Those appearing before a court have duties to assist the judge in the administration of the law but they do so as interested parties seeking to secure an outcome. Tax litigation is, perhaps sadly, conducted within the adversarial model of litigation with the Commissioner adopting the position of an interested party seeking to win a case rather than, as it could otherwise be, of an impartial regulator making submissions on the law and its application other than as an interested party. There are instances of regulators participating in litigation for the more limited purpose of ensuring the impartial application of public policy reflected in the law for which the regulator is particularly responsible. The traditional role of a prosecutor is, for example, as a "minister of justice" whose primary duty is to assist the court fairly and honestly[1] and not to secure the highest possible penalty[2]. The Commissioner must of course act as a model litigant in tax appeals, but the role of the Commissioner in that framework is not limited to acting as a "minister of justice" and is frequently an active partisan seeking to secure outcomes with vigour.

There is no criticism intended by a description of the Commissioner adopting a robust adversarial position in litigation, but it has an effect upon the dynamics of tax administration, including tax litigation, and suggests that there may be an important role for tax teachers in providing an impartial and independent

[1] *R v Lucas* [1973] VR 693, 705

[2] *King v The Queen* (1986) 161 CLR 423

understanding of the rules which a court is first called upon to understand and is next called upon to apply. It is a fact that many judges who are called upon to decide tax cases do not have had much prior training and exposure to the provisions they are to interpret and to apply. Indeed, it is thought by many to be a positive aspect of our legal system that the law, including tax law, is not left to be applied to tax specialists[3] but is rather to be applied by generalist judges who bring a wide and general knowledge of the law to the particular tax issues raised in a given case. In *Federal Commissioner of Taxation v Ryan*[4] Kirby J said:

> It is hubris on the part of specialised lawyers to consider that "their Act" is special and distinct from general movements in statutory construction which have been such a marked feature of our legal system in recent decades. The [*Income Tax Assessment Act* 1936 (Cth)] is not different in this respect. It should be construed, like any other federal statute, to give effect to the ascertained purpose of the Parliament.[5]

Even judges with a broad, and deep, knowledge and experience of tax, however, will be called upon from time to time to come to terms with provisions they have not seen before, and may come to task with no familiarity or intuitive understanding of them. Even when there is familiarity or intuitive understanding it will often not be enough to resolve questions between contending parties who are each making plausible and forceful cases for their own, but incompatible, outcomes.

It is not uncommon in tax, and in other fields of specialist law, for decision makers to seek guidance in the works by academics. The tax teacher is thus able to supply what the parties cannot be expected to supply: an unbiased, learned, and dispassionate view about how novel challenges are addressed by

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[3] See: The Hon Justice Kirby, "Hubris contained: Why a separate Australian Tax Court should be rejected", Challis Taxation Discussion Group, Union Club, Sydney, 3 August 2007.

[4] (2000) 201 CLR 109 at 479

[5] See also: *Federal Commissioner of Taxation v Scully* (2000) 201 CLR 148 at 172 [43]; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 596 [218]; *Aktiebolaget Hässle v Alphapharm Pty Ltd* (2002) 212 CLR

novel tax provisions. The judge in a tax case hearing counsel for the Commissioner as an advocate understands the submissions as that of an interested party and not as those of the minister for justice whose task is limited to assisting the judge in applying the law without an interest in the outcome. The judge lacks the resources of the litigants to find facts, to research all of the law, or to obtain reliable expert knowledge. The judge relies overwhelmingly on what the litigants present and is vulnerable to the defects, biases and nuances of what the parties have selected to put in terms of the law and how it is to be applied to the facts. However confidently a reasoned judgment may be expressed, its production is often achieved with anxious vulnerability. The teacher comes to the task frequently faced by judges without the partisan interest in an outcome and may thereby give much useful and reliable insight into what the law means and how it is to be applied.

There are a few practical aspects of the impartial role of the tax teacher that I would like specifically to mention. The first is to emphasise the important role you can play in leading the conversation about ethics in tax practice and tax administration.[6] There is much said about inappropriate tax behavior by taxpayers that is highly partisan, uninformed and lacks reliable foundation and principled reasoning. It is not uncommon to hear generalised accusations of inappropriate behaviour by taxpayers or by the Commissioner which cannot be tested. Taxpayers are sometimes oddly accused of inappropriately taking into account the tax consequences of their transactions when that is precisely what tax legislation requires and must be expected to occur. The Commissioner is similarly criticised at times about so-called heavy handed or unreasonable conduct towards taxpayers, or groups of taxpayers, in such generalised terms that the complaint cannot adequately be evaluated or assessed in public debate.

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411 at 476 [137]; R v Lavender (2005) 222 CLR 67 at 97 [94].

[6] See Michael Bersten, "Independence and Accountability of the Commissioner of Taxation" (2002) 12 *Revenue Law Journal* 5

Such accusations are often seen in newspapers and public forum in which meaningful responses are neither appropriate nor possible.[7] Public debate about individual misconduct is unable to make reliable findings in which all parties are given a fair hearing by an impartial and disinterested decision maker and measured intervention by academics through reasoned research and principled analysis could do much to find proper paths for future conduct.

Accusations of taxpayers and their advisers being tax cheats, and of the Commissioner being a bad tax administrator, undermine the confidence which the public needs to have in the public administration of a sound, reliable and fair system of taxation. The correct exaction of taxes according to law is an important and fundamental feature of our Constitution, with no person being required by the executive to pay more than parliament has authorised. The proper payment of that amount is, by parity of reasoning, an obligation of citizenship in an ordered and civil society. Confidence in the administration and application of tax laws is essential: a sound system of taxation needs a strong and serene sense of trust and confidence. Taxpayers and the public need to feel confident that those who administer tax laws are doing so properly, reasonably and fairly. There should be no room for the tax profession and tax administrators to trade public insults and insinuations with each other. Tax administrators should feel confident with tax professionals robustly acting within the confines of their duties to the law. There needs similarly to be in place robust and reliable systems of accountability and oversight of tax administrators that are both independent and effective and which enable the public, including taxpayers, to feel confident that administrators are applying the law fairly. There is an important role for tax teachers to lead discussion about the conduct, and its oversight, of those involved in tax practice and tax

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[7] See Tom McIroy and Edmund Tadros "ATO calls out "reckless" legal privilege claims" in *Australian Financial Review Weekend*, 5 Jan. 2019, p 2

administration. Taxpayers and tax administrators will each be perceived to be partisan in such a debate where what is so essential is that there be confidence that the laws are being applied fairly by the revenue and being applied properly by taxpayers and their advisors.

The next particular aspect I would like to mention is an aspect of the curriculum which may not yet have received sufficient attention. The teaching of tax to student or post graduate practitioners of tax alike focus overwhelmingly upon rules and principles without perhaps sufficient attention to the process by which decisions are actually made and how they may be effectively influenced. Heuristics and unconscious biases play some part in decision making which advocacy, and teaching, should more frequently develop. The process of advocacy is not confined to well ordered thoughts, elegant presentation and emotive appeals. The process of advocacy requires an understanding of the grinding mechanics of decision making with divergent facts, contested issues and evidence scattered about throughout the court materials like debris.

It is instructive to look at how issues are framed in cases where the outcome was difficult, as it so frequently is, to see how the framing of questions guide the way in which decision makers reach outcomes. The logical power of framing an issue can be decisive to the outcome of difficult questions where the answer may not be obvious. One example I have frequently used in my teaching is that of *Cliffs International Inc v Federal Commissioner of Taxation*[8] in which a taxpayer had claimed a tax deduction of 15 cents (US) per tonne of ore mined arising from an obligation to pay that amount which had been assumed in a purchase agreement for the shares in a mining company. The Commissioner had treated the payment as part of the purchase price for the shares in the company and, therefore, as a non-deductible capital outgoing. The

[8] (1979) 142 CLR 140

Commissioner's counsel framed the question for the court as being a need to decide whether the payments were "for the sale and purchase of an asset"[9], whilst counsel for the successful taxpayer framed the question within the context of the current regular business outgoings[10]. The account of the argument for the taxpayer in the Commonwealth Law Report is as follows:

> The fact of mining, transporting and selling one ton of ore gives rise to obligations. First, the appellant must pay a royalty to the State. Secondly, the consortium mining the ore is obliged by its agreement with the appellant to pay it an amount equal to that royalty. Thirdly, the appellant must pay a royalty of 15 cents (US) to the persons from whom it bought the shares in the mining company. That outgoing is calculated by reference to the amount of income-earning activity which takes place. Applying standard tests, the expenditure has the indicia of a revenue outgoing. The consideration (other than the sum of $200,000) for the purchase of the shares was executed, namely the promise to make further payments if mining took place. It is not enough only to look at what was acquired to determine the nature of the payment. The asset acquired was different in its nature from that involved in *Colonial Mutual Life Assurance Society Ltd* v *Federal Commissioner of Taxation*. The advantage sought by the appellant in agreeing to make the deferred payments was the mineral lease which enabled it to sub-let to the participants in the consortium which was an advantage of a revenue nature: *Federal Commissioner of Taxation* v *South Australian Battery Makers Pty Ltd.* The question is, what takes from the expenditure the character of revenue expenditure which one would otherwise have unhesitatingly attributed to it? There was no obligation to mine the land. If the appellant had not caused mining to take place, it would not have been obliged to give the shares back. It was well-known that the company was to be wound up. The payments were a cost of mining, analogous to any other payment quantified by use: *Jones* v *Inland Revenue Commissioners*: *Commissioner of Stamp Duties (NSW)* v *Henry*. The purchase was consummated when the $200,000 was paid. The subsequent payments were not for the shares.[11]

[9] Ibid, 142
[10] Ibid, 141-142
[11] Ibid, 141-142

The teaching of tax principles and tax rules are of course important, but that teaching can usefully be informed by the significance to outcomes of heuristics and other influences on decisions. Unconscious biases affected by such things as reference points created by statute and submissions play their part in critical ways. Achieving outcomes may also be affected by such mundane matters as the mechanical ordering of issues, facts and evidence. Instructing students about the mechanical process by which decisions are made is likely to better inform what practitioners need to do to secure favourable outcomes by leading decision makers to outcomes in a way that is helpful and effective. Judges typically end trials with a mass of materials in many places that need co-ordination and reliable synthesis. Those advocates who can do so reliably are likely to have a greater impact on the mind of the decision maker.

These are not either idle nor obvious matters. Students who learn a succession of rules ultimately understand little of the law[12]. The student who understands how the rule gets applied in the complex debris of contested facts may have a better understanding of how the rules becomes part of the totality which comes together in a particular decision. The student who, in addition, understands the mechanical process of picking up the debris by the judge producing the judgment will have a head start in understanding how tax law gets decided as it does.

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[12] K.N. Llewellyn, *Bramble Bush – Some Lectures on Law and its Study* (New York, Columbus University of School of Law, 1930 (12)