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Hubris contained: why a separate Australian Tax Court should be rejected

PROPOSALS THAT A SPECIALIST TAX COURT BE CREATED SHOULD BE REJECTED. THE FEDERAL COURT HAS FULFILLED THE EXPECTATIONS OF ITS FOUNDERS. GENERALIST LAWYERS QUESTION ORTHODOXY AND CHALLENGE THE ASSUMPTIONS OF SPECIALISTS. THE COSTS AND DISADVANTAGES OF A SPECIALIST COURT OUTWEIGH ANY SUPPOSED GAINS. REFORM OF FEDERAL APPELLATE ARRANGEMENTS MAY, HOWEVER, BE WORTH CONSIDERING.

THE ISSUE: A SPECIAL COURT?

It is a privilege to be invited to address a group of specialists in Australian taxation law. Especially so because, for many years, I have been expressing reservations about the notion that income tax law in Australia is so specialised that the legislation must be approached in a particular way, divorced from the current streams that now govern the interpretation of legislation more generally. In *Federal Commissioner of Taxation v Ryan*[1], I said, in words to which I have since returned in the context of taxation and other fields of the law, that there is a danger in the hubris that can occasionally accompany the inward looking world of high professional specialisation[2]. In *Ryan* I said[3]:

> "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".

The Challis Taxation Discussion Group is obviously blessed with charitable and forgiving members.

The objective of these remarks is to continue a tribute to the late Justice Graham Hill, judge of the Federal Court of Australia. He was my friend from primary school days, through our time at the University of Sydney Law School and subsequently in legal practice and judicial service. Soon after his untimely death in August 2005, I wrote a memoir of him, since published in the *Journal of Australian Taxation*[4]. Later, in March 2007, I enjoyed the considerable privilege of being invited by the Taxation Institute of Australia to deliver the first Justice Graham Hill Memorial Speech at the Institute's annual conference in Hobart[5].

Graham Hill was one of the most brilliant and distinguished of the judges who have served on the Federal Court of Australia. In his own writings, he recounted the way in which that Court had come to play an integral part, both at trial and on appeal, in the elucidation and application of Australian taxation law. Thus, in his essay "What do we Expect from Judges in Tax Cases?"[6] he recounted the changing design of Australia's federal taxation appellate process. He explained how, for more than fifty years, there had been two avenues of "appeal" in taxation cases in this country: an administrative and a judicial one. As he wrote[7]:

> "In early times administrative appeals went to special Taxation Boards of Review, comprised usually of a lawyer, an accountant and chaired by a former taxation official. Judicial appeals went directly to the High Court and later to the Supreme Court. Those two avenues are now reflected in administrative review of an objected decision by the Administrative Appeals Tribunal (AAT) and appeal to the Federal Court of Australia".

Justice Hill was proud of his service in the Federal Court where he sat continuously from 1989 until his death. In his essay, he defended the Federal Court, both in its trial and appellate work. Correctly, he recognised that, for most cases involving federal taxation law in Australia, the Federal Court was "in essence the court of last resort"[8]. This followed from the universal system of special leave to appeal to the High Court, introduced in 1976[9], as well as from the physical and temporal limitations inherent in the function of a national final and constitutional court, which the High Court is.

The position of the Full Federal Court as effectively the last word on disputed questions of federal taxation law was implicit in the approach of Mason CJ, announcing the refusal of special leave to appeal to the High Court in *Commissioner of Taxation v Westfield*[10]. Mason CJ then said that special leave to appeal from the Full Federal Court would only be given in taxation appeals in "exceptional cases". Whilst the discretion inherent in special leave decisions, as provided by law, is not shackled and a steady flow of federal taxation appeals still comes to the High Court, the indication of Mason CJ has generally been borne out by the practice of succeeding panels of the High Court, on special leave days, over the past two decades.

Special leave to appeal to the High Court is, as described, special. Although for many decades, the High Court was both the first and final court of appeal in Australian federal taxation cases, consistent with the constitutional functions of the High Court and its ever-expanding workload both on appeal and in its original jurisdiction, there will be no return to that arrangement.

Justice Graham Hill was therefore correct to perceive, and identify, these realities. Rightly, he acknowledged that the creation of the Federal Court of Australia, as a general federal Court, and the effective finality of taxation rulings by its Full Court, imposed on it an added obligation to ensure that it decided controversies in

taxation law correctly[11]. However, what is "correctly" in the law is often a matter of legitimate dispute.

In questions of statutory construction (which taxation cases usually involve) there will often be arguable interpretations, at least by the time a case reaches the Full Court of the Federal Court or the High Court[12]. Objective correctness does not necessarily belong to a group of specialised "experts". In the field of income tax law, for example, views generally held today concerning schemes of tax avoidance are quite different from those held forty or fifty years ago and then deemed "correct"[13].

There has probably been no area of Australian law that has been the subject of more external reviews, commonly by independent committees, than federal income tax law. In little more than fifty years, we have witnessed the Spooner Committee (1950-54); the Hulme Committee (1954-55); the Ligertwood Committee (1959-60); the Aspery Committee (1972-75); the Mathews Committee (1974-75); the Ralph Committee (1999); the Hawke Government's Tax Summit (1985); the Howard Government's *A New Tax System* (1998) and moves for textual simplification of the main legislation[14]. a glance at the federal income tax legislation suggests that nothing is ever finally written; no aspect of the substantive or procedural law is fixed in stone; and fine-tuning is constantly occurring not only to enhance the revenue but also to improve the efficiency and predictability of the administration of revenue law. It is this constant process of change, dating back to the earliest exercise of the Federal Parliament's constitutional power to make laws with respect to[15]:

"[t]axation; but not so as to discriminate between the States or parts of States"

that stimulates lawyers, accountants and officials who work in the field of taxation law constantly to hypothesise and speculate about changes that might improve the law.

At the Hobart conference, when I delivered my tribute to Justice Hill, I was struck by two themes that recurred in conversations with members of the large audience gathered there. The first was the strong feeling of gratitude for Graham Hill's work as a practitioner, judge and educator in the field of taxation law. The second appeared to be somewhat antithetical and in conflict with his own expressed opinion, recorded in the published essay that I have mentioned.

Many of the participants in Hobart privately (and some publicly) expressed a strong conviction that a specialist taxation court should be created to replace the Federal Court of Australia in this respect. If taxation law could not secure the stable excellence of the High Court itself, so it was suggested, there was need for a new specialist federal court of taxation trials and appeals in Australia to replace the role the Federal Court has played and to bring consistency and uniform quality (as it was expressed to me) into curial taxation decisions.

> It is healthy for specialist lawyers (or other professionals) occasionally to have to justify settled ways of thinking

In his article, Justice Hill acknowledged that there were "unfortunate examples" of inconsistent decisions as between different panels of the Administrative Appeals Tribunal that gave rise to corrective resolution of points of law by Full Courts of the Federal Court[16]. He acknowledged "rare cases where differently constituted Full Courts [of the Federal Court] have given apparently inconsistent decisions"[17]. However, he mentioned the ways adopted within the Federal Court to constitute special benches to resolve such inconsistencies[18].

I was unsurprised to hear the praise of Justice Hill; but I confess to feeling some surprise over the strongly expressed views I heard about the supposed need for a new special federal tax court.

For a short time before my appointment to the New South Wales Court of Appeal, I myself served as a judge of the Federal Court of Australia[19]. However, as I was then concurrently the Chairman of the Australian Law Reform Commission, my involvement in the life of the Federal Court was limited and it was overtaken by my later career. I believe that I can address the notion of a specialised federal taxation court with appropriate dispassion: looking at it from an institutional and functional perspective free of personal loyalties. My view is that such a specialised court would be an undesirable development. I will say why.

ARGUMENTS AGAINST A SPECIALISED COURT

Success of the Federal Court: From the perspective of the High Court of Australia, I can understand feelings of concern about perceived unevenness in appellate decisions, inconsistency of approach and anxiety that particular decisions will depend upon the judges constituting the trial or intermediate court. After nearly twelve years of service on the High Court and nearly 23 years as an appellate judge, I have a fair understanding of this concern. However, it relates to a problem that, to some degree, is inherent in any human system of justice and in any court.

The creation of a specialist federal tax court would presumably conform to the requirements of tenure and independence mandated by Ch III of the Constitution. Once appointed, federal judges are not easily removed. Indeed, none has ever been removed by the Parliament. Variations in ability, diligence, collegiality and attitudes are inherent in the independence of our courts and the modes of appointment that we observe in Australia. However, overwhelmingly, the judges appointed to federal (as well as State and Territory) judicial office are tested and well reputed lawyers, normally of relevant suitability for appointment, experience and ability.

Since 1976, the appointments to the Federal Court of Australia have been of a high standard. Appointment to that court is rightly viewed in the Australian legal profession as a considerable professional accolade. As in any court, there are occasional disappointments and (rare) mistakes. Yet, viewed from the perspective of thirty years since the Federal Court of Australia was first created[20] out of the remnants of the Australian (formerly Commonwealth) Industrial Court and the earlier Federal Bankruptcy Court, its judges have earned a generally high reputation for the Federal Court by the quality, evenness and timeliness of their judicial work.

From the start, as Justice Hill himself pointed out[21], the Federal Court has always included a significant cohort of lawyers with experience in Australian federal taxation law. The first Chief Judge, Sir Nigel Bowen, had such experience when at the Bar. So did others:

> "A number of judges on the court did practice extensively in taxation matters. Apart from myself, mention could be made of Davies J, certainly one of the most prominent taxation practitioners in Melbourne and a former member of the Taxation Board of Review No 2; Lockhart and Beaumont JJ, who each had an enviable reputation in taxation matters; Jenkinson, French, O'Loughlin and Nicholson JJ often appeared or advised in taxation matters in their respective States, and, of course, a number of other judges appeared occasionally in tax cases. Three judges, O'Loughlin, Nicholson JJ and myself have held office in the Institute, two as National Presidents".

At any given time the Federal Court has normally included judges with specialist experience in federal taxation law. It would be invidious to name them all, but amongst recent appointees, Edmonds J, Young J (since resigned) and Gordon J are obvious examples. Ministers with powers of appointment and their officials know the importance of maintaining this seam of expertise within the Federal Court.

Viewed from the perspective of the High Court, it is common to see, in taxation appeals, that a judge with specific experience in taxation law is normally a participant (and leading writer) in appeals in tax cases. Internal arrangements for the constitution of Full Federal Courts secure their participation. Similarly, first instance cases commonly involve judges with experience in taxation law. Not all judges, including of the Federal Court, find taxation work interesting or congenial. The statute is now of horrendous length. It is easy to lose one's way, especially without the assistance of skilled and knowledgeable lawyers. The participation in tax appeals of at least one expert judge is normally desirable. In my experience, this is ordinarily assured by the participation of members from the Tax Panels constituted within the Federal Court. It may come as a hurtful surprise, but I do not doubt that some judges of the Federal Court, who are not experts in tax law, are just as happy when they are not assigned to taxation appeals. Never once, in my experience on the High Court have I been tempted, in a taxation appeal to which I have not been rostered, to follow the robust practice of Starke J in the 1930s and to order: "Pull up my chair".

When specialist insiders criticise a particular decision; perceive inconsistency in reasoning as between decisions; or feel that an individual case did not secure the "A team" (as they might describe it), they should reflect on the generally uniform and high quality of the judicial work of the Federal Court. In its relatively short life, it has more than achieved the high expectations held of it by those who established it.

Role of generalists: In any case, especially in appeals to multi-member benches, there is a role for generalist lawyers and a danger in constituting a court exclusively of specialists.

As President of the New South Wales Court of Appeal, it was my function, every month, to deploy the judges in that court for the ensuing month. I observed a number of rules which were discussed with my colleagues. They included an endeavour to vary the constitution of the court for particular appeals so as to ensure a fair mixture of participation in large and small cases; important and minor ones; interesting and predictably boring ones; and cases in which judges had expert legal knowledge and those in which they had no expert acquaintance. My experience was that sharing of the labour in such ways made for better outcomes.

The common law system works, substantially, by means of analogical reasoning. Judges will see pathways to elucidation of a legal problem by analogy with the solutions offered in different cases which bear some analogical similarity. Although most income taxation law involves statutory interpretation, the construction of federal legislation often invokes common lines of reasoning. Knowledge of other federal laws (or of similar State laws) or of the common law can spark ideas, or suggest advance or caution, which a person with limited and only specialist experience might not immediately perceive.

It is healthy for specialist lawyers (or other professionals) occasionally to have to justify settled ways of thinking. The modern process of institutional law reform grew out of a recognition that the legislature needed assistance, generally from lawyers themselves, but also from others, in identifying defects, inconsistencies and injustices in the law so that they can be rectified. In appellate judging, this process is more likely to occur effectively if at least one member of the Court is viewing the problem from outside the field of specialty and questioning assumptions that other specialist colleagues take for granted.

In his book, *Why Societies Need Dissent*[22], Professor Cass Sunstein of the University of Chicago points to the value which such questioning brings to judicial and other decision-making. It internalises and institutionalises a process of effective review[23]. It helps to ensure that a small and sometimes opinionated group of experts accommodates to a healthy edge of self-criticism. Thus, whilst expertise in a field of law is essential, and contributes to consistency of outcomes and efficiency of dispositions, non-expertise fulfils different but equally important qualities that contribute to the assurance of open-mindedness, self-questioning and true impartiality. These too are hallmarks of the judicial performance in Australian courts. The creation of a generalist Federal Court permits such a mixture of talents, certainly in appeals. The creation of a specialist tax court might sometimes enhance consistency, efficiency and speed of determination but at a loss of introspection and self-criticism that would be regrettable.

Institutional remove: The arrangements for the appointment of judges to the Federal Court and for the assignment of particular cases within that court help assure that the decision-maker truly

holds the scales evenly as between the litigants. Under our constitutional system, federal judges are appointed by the Federal Executive Council, effectively the government of the day. Once appointed, they are independent. Their independence is specially important because of the role of the federal judiciary in upholding the Constitution and subjecting the other branches of government and all officers of the Commonwealth, to obedience to the law[24]. In federal suits it is particularly important that courts and judges should be, and be seen to be, completely impartial as between the citizen and the government.

A danger of a specialist tax court would be at least the possibility of an appearance of too close a proximity between the decision-makers and the regular clients of the court. Inevitably, the Commissioner of Taxation would be the principal, repeat litigant in a court whose members were appointed by the federal government having an interest in its outcomes. By convention, our mode of appointment does not diminish the independence of judicial officers once appointed. However, in a field of large scale litigation, with repeat performers who become known to a bench of limited numbers, the risk of the appearance (or actuality) that other litigants (such as taxpayers) would be, and appear to be, outsiders is a real one. Ensuring that the bench is constituted from a larger pool of judges, including many who have no special familiarity to or affinity with the repeated litigants or issues in taxation cases, is desirable both for the actuality and appearance of impartial justice in our community.

Fifty years ago, some State magistrates became (or appeared to become) too close to the police because of the practical consideration that their days were occupied in repeated familiarity of litigation involving the same police prosecutors who sometimes even travelled with the magistrate to country towns on circuit. The larger the judicial pool and the more disparate the composition of a court, the greater will be the chance that judges will come to cases without any actual or suspected "form". In courts of small numbers, such reputational considerations soon become known to repeat players. Even in a court of the size of the Federal Court, it may be inescapable. However, it would be inevitable that a specialist taxation court would be constituted by a much smaller pool of judges. In larger numbers, there is a greater practical chance that truly impartial decision-making will prevail. So-called "expertise" can sometimes amount to little more than fixed attitudes. In larger numbers lies a greater probability of successfully challenging transient orthodoxy and subjecting specialist assumptions to the scrutiny of non-experts.

In my earliest days as a young lawyer, I remember how impressed I was when a decision of the High Court overturned years of assumptions about the interpretation of the *Workers' Compensation Act* 1926 (NSW)[25]. It was an interpretation that had been universally regarded as correct in many decisions of the specialist Workers' Compensation Commission. When read, the reasoning of the High Court, reversing the settled thinking, was compelling. It demonstrated to my young mind the value of having non-experts look at issues from time to time so as to haul the experts back to the text of the statute[26]. It is a lesson that I have never forgotten. It applies equally to the very function of courts and to their contribution to upholding the rule of law as expressed in the federal statutes in which the relevant law is contained.

Relation to general law: There is a particular reason in federal income taxation law for avoiding the creation of a specialist court. It is that taxation law necessarily involves courts in elucidating and applying concepts of the general law as they impinge on the operation of taxation statutes. Much tax law depends on accurate fact finding, a skill not confined to taxation law experts. But sometimes important questions of legal doctrine are at stake. Thus, many important decisions of the High Court, and also the Federal Court, have involved an understanding of general legal concepts which is enhanced by the involvement of taxation specialists with lawyers of broad training and experience, including judges with such varied backgrounds.

Instances of this point may be illustrated by a glance at decisions in taxation cases concerned with such concepts as goodwill[27]; royalties[28]; assignments[29]; and various concepts in the field of company law[30]. There are many other instances. In some of them the High Court itself divided on the resolution of the issues. That is of the nature of such contests. However, for a full appreciation of the dimension of the contests, there can be no doubt that a broad and deep experience in the law, especially in property law, is important for the "correct" fulfilment of the role of a court in taxation cases.

A danger of a specialist court is that it may be cut off, in personnel, physical propinquity and attitudes from the general developments that are happening in the law more broadly, as for example in the principal legal task of courts today – the interpretation of contested legislation[31]. The work of the Federal Court, in the approach to the construction of federal legislation, and in the application of federal administrative law generally, ensures a background of experience that is beneficial for tax litigation. It would be lost or diminished by committing federal taxation law to a specialist tax court.

In his article to which I earlier referred, Justice Hill mentioned the problems that can arise where issues are presented to specialist judges with little knowledge about their complexity. He instanced the many difficult questions of property law that can now arise in practice in the field of family law[32], a value of a larger generalist court is that a judge, unfamiliar with a particular field of law, generally has available informal discussions with several trusted professional colleagues who can put him or her on the correct path to an accurate legal understanding of the issue.

Infrastructure costs: Self-evidently, the creation of specialist courts could not stop at a special federal taxation court. From time to time, demands are made for a specialised intellectual property court. The creation of the Australian Industrial Relations Court (never formally abolished[33]) was justified, at the time, by the need to have judges experienced in, and empathetic with, industrial relations. As Justice Hill pointed out, that court was created following criticism of decisions in secondary boycott cases. An arguably preferable solution might have been to alter the substantive and procedural law or to create a specialised division within the Federal Court[34]. Following a change of

government, the jurisdiction in industrial relations matters was returned to the Federal Court. Care needs to be exercised in sensitive areas such as income taxation and industrial law to ensure that specialist courts or special divisions are not, and are not perceived to be, illicit governmental attacks on judicial independence[35].

Plainly, the infrastructure costs of creating special courts are substantial. What is involved is not simply the transfer of already commissioned judges to another office. The independence of courts will normally require their separate accommodation; the provision of separated staff, library, research and other facilities; separate registry arrangements; and separate court buildings or accommodation. In a country such as Australia, these arrangements often have to be multiplied seven or eight times over in the several jurisdictions. The costs are significant, as the creation of the new Federal Magistrates Court illustrates. The workload of that Court is already large and broad. On presently known cases, the number of trials and appeals involving federal taxation law would be unlikely to be more than a couple of hundred cases. This would be a very small base on which to constitute a new, self-standing federal court.

The creation of separate courts can sometimes be justified by hierarchical considerations and by the range and difficulty of their respective jurisdiction and powers. However, once created as separate courts, experience shows that the personnel rarely have contact with each other, save for occasional social functions. The collegiality and community that can serve useful functions in newly established courts especially, is reduced by a proliferation of such courts. Moreover, the more specialised is the jurisdiction of a court, the less likely may it be that appeals of general importance will arise, warranting a grant of special leave by the High Court. Whereas a steady stream of appeals comes to the High Court from the generalist Federal Court of Australia, the number of appeals from the Family Court of Australia is typically quite confined[36].

Judicial satisfaction: a feature of modern judicial life, which was not common in the past, is the incidence of early judicial retirement. To some extent, this has come about by reason of the increased and unrelenting pressure of the work of judicial officers; the unrelieved media, political and other attacks that were not a feature of earlier times; and the increased perception by lawyers that a legal life can be successful, and certainly more profitable, without judicial appointment.

> Within the Federal Court ... the appellate arrangements ... look increasingly old fashioned in Australia today

In recent decades there has been a growing appreciation of the stresses of judicial life[37], a subject not spoken of in earlier more buttoned up times. One feature of judicial service that can make it more congenial is a variety of experience. Mass litigation involving repeated consideration and determination of substantially similar problems may be less stimulating and satisfying than a variety of engagements. Moreover, mixing and working with lawyers of different backgrounds, experience and interests can be stimulating in a way that life within a narrow professional cocoon is not.

Whilst it is not society's particular obligation to create a cosy environment in which judges are to work, experience teaches that variety of deployment can enhance job satisfaction and thus the quality and speed of judicial outputs. This is a reason for avoiding specialist courts; appointing judges to generalist courts; and then deploying them in ways that are suitable to their expertise and (so far as possible) congenial, varied and stimulating.

The isolation of industrial courts and, to some extent, of family courts, though doubtless well-intentioned, may not necessarily have been in the best interests of the administration of justice in the long haul. The role of industrial courts and tribunals in Australia is undergoing re-evaluation in the light of recent decisions of the High Court of Australia[38]. There may one day be an occasion for review of their separate existence. At some stage, the separation of the Family Court of Australia may warrant reconsideration of the reconstitution of that court as a division of a generalist Federal Court. (There is already an overlap with the jurisdiction and powers of the Federal Magistrates Court).

One separate superior court that has proved very successful is the Land and Environment Court of New South Wales. However, the isolation of that court from the judicial mainstream (and from a direct line of appeal, under the Constitution, to the High Court[39]) suggests that (especially with State courts) the establishment of special courts is not to be encouraged. The unity of the law in Australia is one of the great blessings of the Constitution. To that unity of law, the integrated judicature makes an indispensable contribution.

CONCLUSIONS

It is for the foregoing reasons that I would reject the idea that a special federal taxation court or taxation court of appeals should be established, separate from the Federal Court of Australia.

Within the Federal Court, and outside it, there is an ongoing debate concerning the appellate arrangements. Those arrangements, which follow the Full Court mode of sharing appellate work amongst the trial judges, look increasingly old-fashioned. In Australia today, specialised appellate courts have been created in New South Wales, Victoria, Queensland, Western Australia, and to some extent in the Australian Capital Territory and the Northern Territory. As well, the Family Court of Australia has its own separately constituted appellate structure[40].

I have long held the view that appellate judging requires different skills and different institutional arrangements[41]. The general belief is that the quality, accuracy and efficiency of decision-making in appeals improve when that function is

committed, substantially, to permanent appellate judges. Here too there is a need to ensure a mix of expertise, backgrounds and experience. Monochrome uniformity does not become more tolerable because occurring in an appellate court. Whilst there are arguments both ways in the case of the Federal Court[42], it seems likely that the Federal Court will move, in time, to having a specialist appellate court or division. This might coincide with an accretion to the variety of the work of trial judges of the Federal Court being contemplated in areas of criminal law and potentially in prospect by a reconfiguration of that court, appropriate following the establishment of the Federal Magistrates Court as the major federal trial court.

In addition to such internal arrangements, there remains on the table a proposal which French J has made for a national general intermediate appellate court of appeal, created by cooperative legislation and constituted by federal, State and Territory judges exercising multiple commissions.[43] Assuming this idea to be constitutionally feasible, the variety of judicial work in the future in Australia is likely to expand. Changes in the judicial role will be necessary if courts are not to price themselves out of relevance to the contests of ordinary citizens. And this includes in the field of federal taxation law in which most ordinary citizens have a stake and many have a grievance from time to time.

I hope that these remarks of mine will become known to Australia's taxation law experts, in the legal and accounting professions. And that they will cause a serious reconsideration of any push for a specialised Australian tax court. In my view it is a bad idea. It is neither in the interest of taxation law nor of the nation, its institutions and citizens.

The Hon Justice Michael Kirby AC CMG

Reference notes:

1 *(2000) 201 CLR 109; cf Steele v Deputy Federal Commissioner of Taxation (1999) 197 CLR 459 at 477 [52].*

2 *FCT 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 411 at 460 [137]; R v Lavender (2005) 222 CLR 67 at 97 [94].*

3 *(2001) 201 CLR 109 at 146 [84].*

4 *M D Kirby, "The Late Justice Graham Hill" (2005) 8 Journal of Australian Taxation 206.*

5 *M D Kirby, "Justice Graham Hill and Australian Tax Law" in (2007) 42 Taxation in Australia (forthcoming).*

6 *(1995) 69 ALJ 992.*

7 *(1995) 69 ALJ 992 at 993.*

8 *(1995) 69 ALJ 992 at 1000.*

9 *Carson v John Fairfax and Sons Ltd (1991) 173 CLR 194 upholding the validity of amendments introduced into the Judiciary Act 1903 (Cth), s 35 and the Federal Court of Australia Act 1976 (Cth), s 33(3).*

10 *(1991) 22 ATR 400 at 402. See Hill (1995) 69 ALJ 992 at 999.*

11 *(1995) 69 ALJ 992 at 1000.*

12 *News Ltd v South Sydney Rugby League Football Club Ltd (2003) 215 CLR 563 at 582 [41] per McHugh J.*

13 *J Freeman, "Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament" (2007) 123 Law Quarterly Review 53; Michael Littlewood, "The Privy Council and the Australasian Anti-avoidance rules" (2007) ..... Tax Review 175.*

14 *M Kobetsky, M Durkis and a O'Connell (eds), Income Tax (3rd ed, 2001) 3-5.*

15 *Constitution, s 51(ii). See also s 55.*

16 *Referring to Lighthouse Philatelics Pty Ltd v FCT (1991) 91 ATC 4, 942. See Hill (1995) 69 ALJ 992 at 996.*

17 *Citing Jobbins v Capel Court Corp Ltd (1989) 25 FCR 226 and Western Australia v Wardley Australia Ltd (1991) 30 FCR 245.*

18 *(1995) 69 ALJ 992 at 1000 (occasional constitution of appellate benches of five judges).*

19 *From May 1983 to September 1984.*

20 *By the Federal Court of Australia Act 1976 (Cth).*

21 *(1995) 69 ALJ 992 at 997-8.*

22 *See C Sunstein, Why Societies Need Dissent (Harvard University Press, 2003).*

23 *See also M D Kirby, "Judicial Dissent – Common Law and Civil Law Traditions" (2007) 123 Law Quarterly Review 379.*

24 *Plaintiff S 157/2002 v The Commonwealth (2003) 211 CLR 476 at 513 [103]-[104].*

25 *s 7(1)(b).*

26 *The case was Scoble v KD Welding Co Pty Ltd (1959) 103 CLR 314.*

27 *See eg FCT v Ford Motor Co Ltd (1942) 66 CLR 241 and FCT v Murry (1998) 193 CLR 605. See also (1996) 68 FCR 156 where Kiefel J's dissenting opinion was upheld by the majority.*

28 *Stanton v FCT (1955) 92 CLR 630.*

29 *Norman v FCT (1963) 108 CLR 9; Shepherd v FCT (1965) 113 CLR 385.*

30 *FCT v McNeil (2007) 81 ALJR 636 esp at 641 [5] reversing (2005) 144 FCR 513; FCT v Linter Textiles Australia Ltd (2005) 220 CLR 592 reversing (2003) 129 FCR 42.*

31 *See Judicial Commission of New South Wales, Statutory Interpretation – Principles and pragmatism for a new age (2007) (T Gotsis, ed). Reviewed by the writer in (2007) 19 Judicial Officers' Bulletin (NSW) 49.*

32 *Hill (1995) 69 ALJ 992 at 998.*

33 *Industrial Relations Reform Act 1993 (Cth), s 56, inserting Part XIV in the Industrial Relations Act 1988 (Cth) (s 361).*

34 *Hill (1995) 69 ALJ 992 at 998.*

35 *Ibid. Note the strong criticism by the Full Court of the Federal Court of the suggested failure of the Commissioner of Taxation to comply with judicial precedents in Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd [2007] FCAFC 16.*

36 *This may be influenced by the large discretionary considerations often present in Family Court determinations. In the High Court, taking 2004-2005 as a typical year, the number of appeals subject to special leave applications (and granted) were: Federal Court of Australia: 250 (21); Family Court of Australia: 17 (0). High Court of Australia Annual Report 2004-5, 91.*

37 *M D Kirby, "Attacks on Judges – a Universal Phenomenon" (1998) 72 ALJ 599; M D Kirby, "Judicial Stress" (1997) 71 ALJ 774, 791.*

38 *New South Wales v The Commonwealth (WorkChoices Case) (2007) 81 ALJR 34. See also Batterham v QSR Ltd (2006) 80 ALJR 995 and related cases.*

39 *Constitution, s 73.*

40 *Family Law Act 1975 (Cth), s 21A inserted in 1983.*

41 *M D Kirby, "Permanent Appellate Courts – The New South Wales Court of Appeal Twenty Years On" (1987) 61 ALJ 391 at 398-405.*

42 *Hill (1995) 69 ALJ 992 at 999.*

43 *R French, "Federal Courts Created by Parliament" in B Opeskin and F Wheeler, The Australian Federal Judicial System (Melbourne University Press, 2000) 159.*