

BY THE HON JUSTICE MICHAEL KIRBY

Justice Graham Hill Memorial Speech

Hobart, 15 March 2007

JUSTICE GRAHAM HILL WAS THE QUINTESSENTIAL EXPERT IN AUSTRALIAN TAXATION LAW. HE DIED IN AUGUST 2005. IN THIS ADDRESS THE AUTHOR, A FRIEND FROM SCHOOL DAYS, REMEMBERS GRAHAM HILL AS A TOP SCHOLAR, ACCOMPLISHED PRACTITIONER, EXCELLENT JUDGE AND DEDICATED EDUCATIONALIST. HE COLLECTS SOME OF THE MANY TRIBUTES PAID TO GRAHAM HILL AFTER HIS DEATH.

REMEMBERING JUSTICE GRAHAM HILL

Justice Graham Hill was an outstanding lawyer and judge. His contribution to the law of taxation is fittingly captured by Professor Richard Vann's reference to him as a "tax titan"¹ and by Mr Robert Richards's remark that²:

"Over the last 30 years, [Justice Hill] and the late Professor Ross Parsons were effectively the final arbiters of tax thought in this country."

His contribution to the law extended far beyond tax law, as Chief Justice Black of the Federal Court of Australia observed during his eulogy³:

"I keep coming back to tax [law]. That, of course, was his primary field, but as I hope will become apparent, his work extended throughout the whole field of law and legal and judicial education."

In delivering this Memorial Speech to the Institute, in the midst of so many of his professional friends and admirers, I wish to pay tribute to Graham Hill's contribution to the law of taxation and to the whole of the law, to lawyers and to Australian society.

SCHOLAR

Legal texts: There was early evidence of his boundless energy. In 1970, Graham Hill published *Stamp, Death, Estate and Gift Duties (New South Wales, Commonwealth and Australian Capital Territory)*. From 1973-76, a supplement to this work was published in looseleaf form.

In 1979, the second edition of that work was published, titled *Stamp and Death Duties (New South Wales and Australian Capital Territory)*. The removal of an analysis of estate and gift duties from the work reflected the Commonwealth's repeal

of those duties. Graham Hill explained that the second edition "took on the form of a looseleaf service, for the fashions in legal publishing had changed"⁴. Following the abolition of death duty by New South Wales, this magnum opus was renamed *Stamp Duties (New South Wales and Australian Capital Territory)*.

In 1998, it was transformed into a new publication titled *Duties Legislation* in response to the repeal of the *Stamp Duties Act 1920 (NSW)* and the enactment of its successor, the *Duties Act 1997 (NSW)*. Throughout the life of this work, and through its several iterations, it has been and remains the seminal text in its field.

Graham Hill, together with Steven Economides, also edited *Australian Sales Tax Law & Practice* (1991) which contains insightful contributions from many leading taxation practitioners. That compilation, as Graham Hill suggested, filled "the vital role of providing an accessible introduction to sales tax"⁵.

Articles and papers: Aside from these two major works for legal practitioners, accountants, officials and other users, Graham Hill wrote or presented countless articles and papers to conferences like this. Indeed, when Sydney University conferred the Honorary Degree of Doctor of Laws upon Graham Hill in 2002, the Chancellor of Sydney University, Justice Kim Santow, said justly that Graham Hill had "a research and publication record of which a full-time academic could be proud"⁶.

Mr Colin Fong is compiling a list of Graham Hill's publications for an article which will appear in the Australian Tax Forum. I thank Colin Fong for providing me with a copy of the current list. I will not

reveal the number of articles contained in the list in advance of his publication. Let me simply affirm Justice Santow's comments. It is an astonishing record of industry mixed with patience, deep thought and fine analysis. I applaud Colin Fong's initiative in producing the definitive list. It will be a tribute to Justice Hill. Also an encouragement to all who came after.

COUNSEL

A talented barrister: In 1976, after 12 years as a solicitor, Graham Hill was admitted to the New South Wales Bar. He was an excellent advocate. In 1984, after only six years at the junior Bar in Sydney, he was appointed Queen's Counsel. In 1988, he appeared before me in the Court of Appeal of New South Wales in *John Fairfax & Sons Ltd v Deputy Commissioner of Taxation (NSW)*⁷. The deft way in which he wove his arguments earned my admiration at the time⁸.

Importantly, Graham Hill upheld the best values of the Bar. Justice Richard Edmonds of the Federal Court, who was Graham Hill's junior on a number of occasions in the mid eighties, has written that⁹:

"To his great credit, Graham treated all retainers, whether they be for taxpayers or the Commissioner, on the same basis, applying all his intellectual and forensic skills in his scholarly fashion without discrimination."

Before the High Court: According to the record in the reported cases, Graham Hill appeared as counsel before the High Court of Australia on 16 occasions¹⁰. These were all cases involving taxation law – the subject in which by then, Graham Hill was recognised as one of Australia's pre-eminent lawyers.

in three of those matters, Graham Hill appeared as Queen's Counsel¹¹. Even before his appointment as Queen's Counsel, however, Graham Hill had appeared in the High Court on four occasions without being led by Queen's Counsel – and in three of those cases, his opponent was Queen's Counsel¹². This demonstrates the very high regard in which Graham Hill was held in the field of taxation law, even before being elevated to silk¹³. It shows the confidence in his high talents of practising solicitors, accountants and fellow barristers. More, it demonstrates his own growing touch of assurance which was to mark his time as leading counsel and as a judge.

JUDGE

Justice Hill's decisions: In 1989, Graham Hill was appointed a Judge of the Federal Court. During his tenure of this office, he wrote dispositions in over 1,000 proceedings. A list of his published judicial reasons has been collated and can be found on the Atax website¹⁴. Over 200 of them dealt with the law of taxation. He was indeed an outstanding judge and I made my respect for his accuracy and precision as a judge evident during his lifetime¹⁵. I emphasise it again now. Although it is natural, especially before this Institute, to place emphasis upon his decisions in cases involving taxation law, it would be very unfair to stereotype him as confined to that field. He was a sound lawyer with catholic skills in a wide range of law, especially that connected with federal causes.

In relation to Justice Hill's judicial reasons Associate Professor Cynthia Coleman has said that¹⁶:

"His interest in teaching was reflected in his judgments. Whenever he could make a contribution in a difficult area he did. *Davis's* case was his first judgment and he stated obiter that when calculating trust income the proportionate view was preferable to the quantum one."

I agree with this interpretation of Justice Hill's judicial reasons. He always sought to set out the law in a clear and intelligible manner, including in tax cases where the law is often complicated and sometimes nearly incomprehensible. The intractability of certain aspects of taxation legislation was, of course, reflected in his famous criticism in *Commissioner of Taxation v Cooling* that s 160M(6) of the *Income Tax Assessment Act 1936* (Cth)¹⁷:

"is drafted with such obscurity that even those used to interpreting the utterances of the Delphic oracle might falter in seeking to elicit a sensible meaning from its terms."

Let me briefly review some of the assessments made by commentators of Justice Hill's jurisprudence dealing with fundamental concepts of taxation law.

Income: Justice Hill's contribution to the understanding of the concept of income for the purpose of Australian taxation law was highlighted by Justice Edmonds in his moving tribute to Justice Hill¹⁸:

"In terms of basic concepts, one only has to look at the cases he decided in the area of the basic concept of income. One might call it: 'From *Cooling* to *Montgomery*'; while he was not involved at any stage in *Montgomery's* case, there can be no doubt that the ultimate slim majority in *Montgomery*, whether one agrees with it or not, had its source in Graham's decision in *Cooling*. In the same area is Graham's contribution to a proper understanding of what he called the two strands of reasoning in *Myer Emporium* in their application to various sets of facts which subsequently came before the Court. One only has to look at cases such as *Westfield*, *Henry Jones (IXL)*, *Hyteco Hiring*, *Reuter*, *SP Investments* and other cases which raised the implications of the High Court's decision in *Myer Emporium* to the facts of those cases. Graham contributed greatly to the evolution of the reasoning process that came out of *Myer Emporium*."

Capital gains: Justice Hill's impact upon the development of capital gains tax law was explained by Professor Chris Evans, Geoffrey Hart and Matthew Wallace in their creatively titled tribute to Justice Hill "Wrestling with the 'Terrible Twins' and other heroic endeavours: the contribution of Mr Justice Hill to jurisprudence in the area of Australia's capital gains tax provisions"¹⁹.

In that paper, the authors review the three judicial opinions in which Justice Hill examined ss 160M(6) and 160M(7), or the "terrible twins" as they became widely known among taxation specialists. Those three cases were *Federal Commissioner of Taxation v Cooling*²⁰, *Hepples v Federal Commissioner of Taxation*²¹ and *Ashgrove Pty Ltd, Gooch, Davey, Wadley & Swain v Deputy Federal Commissioner of Taxation*²². In that paper it is suggested by the authors that Justice Hill's criticism in *Cooling* and *Hepples*²³, among other things, provided:

"at least part of the impetus for the abandonment of the asset, acquisition, disposal paradigm embodied in Part IIIA in favour of the CGT event paradigm adopted in the rewrite of the CGT provisions in Parts 3-1 and 3-3 of the *Income Tax Assessment Act 1997* [(Cth)]."

Trust income: In an article titled "Taxation of trust income under Div 6: a reflection on Justice Hill's contribution", Mr Michael Blissenden examined the very issue to which Associate Professor Cynthia Coleman was adverting in her commentary to which I have referred, namely on the taxation of trust income. Mr Blissenden explains the competition between the "quantum" and "proportionate" approaches when calculating trust income in Div 6 of Part III of the *Income Tax Assessment Act 1936* (Cth).

Mr Blissenden asserts that "there is little doubt that the weight of authority rests with the proportionate approach"²⁴. He credits the acceptance of this conclusion to Justice Hill's approach in *Davis v Federal Commissioner of Taxation*²⁵. He contends that this case "provide[s] a leading example of [Justice Hill's] ability to identify, to explore and to provide guidance to the tax community at large"²⁶.

It would be inappropriate for me to endorse the proportionate approach or quantum approach or to express any other partisan view. I will, however, endorse the sentiment expressed by Mr Blissenden that Justice Hill was a wonderful leader of the Australian taxation profession. For those like me, who are sometimes found beyond the pale in this discipline, Justice Hill was a bright light, often showing the way.

Appeals to the High Court: Justice Gzell of the New South Wales Supreme Court has published a list of the 14 judicial opinions of Justice Hill which have been considered by the High Court²⁷. When his list was published, the High Court had affirmed Justice Hill's judgments on 6 occasions²⁸ and reversed his judgments on 7 occasions²⁹. The decision of the High Court in the fourteenth case, *Federal Commissioner of Taxation v Citylink Melbourne Ltd* had been reserved. That case has now been decided³⁰. Over my dissent, I am afraid, the joint opinion of Justices Hill, Stone and Allsop was upheld. Therefore, Justice Hill's "record" in the High Court was 7-7.

This is by no means a record to be ashamed of. From time to time I too was overturned by the High Court before my elevation to it and, as is well known, I regularly disagree with my fellow judges. It is in the very nature of High Court adjudication, and particularly in appeals which must now, universally, secure the agreement of two or three Justices as being reasonably arguable, that such cases stand at the cusp. Highly trained and experienced lawyers can frequently disagree about their disposition. In tax appeals that feature is the rule and not the exception.

INTERPRETATION OF TAXATION STATUTES

HP Mercantile: One of Justice Hill's greatest legacies to the law of taxation in Australia may be in his approach to the interpretation of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) which he explained and applied in *HP Mercantile Pty Ltd v Commissioner of Taxation*³¹.

Justice Gzell reviewed that decision, which was the last tax decision that Justice Hill wrote, in a paper titled "The Legacy of Justice Graham Hill". After setting out paras 13, 16 and 17 of Justice Hill's reasons in *HP Mercantile* in full, Justice Gzell wrote³²:

"Hill J's explanation of the structure of our GST system in *HP Mercantile* is a powerful piece of jurisprudence, not only for its erudition, but also for its insightfulness and simplicity of expression. It was powerful enough to convince Allsop J (who with Stone J constituted the other members of the Full Court) to change his mind."

Justice Gzell noted that an application for special leave to appeal the High Court in *HP Mercantile* had been filed but not listed at the time that Justice Gzell's paper was delivered. Justice Gzell predicted, however, that³³:

"Whatever the outcome of that application, I venture to suggest that Hill J's analysis will be regarded as the seminal analysis of our GST system."

Justice Edmonds has a similar impression of the importance of Justice Hill's reasons in *HP Mercantile*, stating³⁴:

"I think it likely that [Graham Hill's] approach in *HP Mercantile*, with its emphasis on policy and contextual considerations rather than delving into a syntactical analysis of textual matter will be a template for the future, not only in the area of GST, but in other revenue law areas as well. I know

that special leave has been sought in that case but irrespective of the outcome, I predict that Graham's approach will make that case a 'watershed' in the development of tax jurisprudence in Australia in the first half of this century."

It would be inappropriate for me to comment specifically on whether I too wholly endorse Justice Hill's approach in this regard. The thought of being disqualified from participating in a single appeal on tax law is not one that would lead me to expressing an indiscreet prejudgment. I would observe, however, that it was Justice Gummow (as Acting Chief Justice) and I who sat on the special leave application in *HP Mercantile*. In giving our joint reasons for dismissing the application for special leave, Acting Chief Justice Gummow stated³⁵:

“ Highly trained and experienced lawyers can disagree ... In tax appeals that feature is the rule and not the exception. ”

"Despite the strong arguments put by counsel for the applicant we have reached a conclusion similar to that of Justice Allsop in the Full Court of the Federal Court. A purely textual analysis of section 11.15(5) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) may give some support to the argument for the applicant. However, as Justice Hill showed in what was the leading judgment delivered in the Full Court, the statutory scheme and legislative context and purpose carry the day for the respondent Commissioner."

This outcome will probably give some comfort to Justices Gzell and Edmonds in regard to their predictions.

Purposive Interpretation: In his analysis of *HP Mercantile*, Justice Gzell stated³⁶:

"The decision in *HP Mercantile* demonstrates the significance of context and purpose in the statutory construction process."

I agree. The tenor of the approach adopted by Justice Hill is conveyed by the following two paragraphs in his reasons in that decision³⁷:

"A more profitable approach to the question of construction is to consider both the policy which is enshrined in Div 11 and the legislative context, so far as that casts light upon the proper interpretation of s 11-15(2)(a)."

It is clear, both having regard to the modern principles of interpretation as enunciated by the High Court in cases such as *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 and s 15AA of the *Acts Interpretation Act 1901* (Cth) that the Court will prefer an interpretation of a statute which would give effect to the legislative purpose, as opposed to one that would not. This requires the Court to identify that purpose, both by reference to the language of the statute itself and also any extrinsic material which the Court is authorised to take into account."

This is a useful and accurate statement of the applicable interpretive principle. A glance at some of his earlier decisions suggests that, during his judicial service, he progressed in his thinking about the proper approach to interpreting taxation legislation³⁸. This thought leads me to an important question concerning the general interpretation of taxation statutes.

Tax law interpretation principles: In considering the question of how to interpret legislation which imposes taxation, one question that must be addressed is whether any special common law rules of interpretation apply when construing taxation statutes as a *genre* of the written law. It is my view that there are not³⁹. I have said this in many decisions over the years. At first it was regarded as hereby by many tax lawyers brought up in the thinking that tax law was a special category of legislation, subject to a special approach of strict interpretation in deriving its meaning. In *Federal Commissioner of Taxation v Citylink Melbourne* ("Citylink Melbourne"), although

as I have said in dissent, I restated what by now was becoming a familiar *Leitmotiv*⁴⁰:

"Income tax law is not a mystery unto itself, to be preserved separate from other parliamentary law as a legal canon reserved to a specialised priestly caste."

I hold that view in relation not only to income tax law, which was being considered in *Citylink Melbourne*, but to all tax law.

Instead, the general approach now taken to interpreting statutes in Australia must also, in my opinion, be applied to tax statutes. That approach requires that a purposive approach rather than a strictly or narrowly literal one be employed when construing such statutes⁴¹. At the peril of offending some of my hosts on this occasion, in *Federal Commissioner of Taxation v Ryan*, I had earlier remarked⁴²:

"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 key premise that sustains my approach to the interpretation of taxation statutes is that laws imposing taxation are no more than statutes of a Federal or State Parliament concerned⁴³. Once this feature of their essential character is recognised, it necessarily follows that the principles of interpretation set out in the relevant Interpretation Act must be applied. Such interpretation laws do not exclude taxation statutes from their general operation. Neither should judges in approaching the declaration of the meaning of such laws.

At the federal level, s 15AA(1) of the *Acts Interpretation Act 1901 (Cth)* imposes a legislative injunction requiring federal statutes to be construed in a manner which promotes "the purpose or object underlying the Act": in addition, s 15AB of that Act allows the use of extrinsic materials to assist with the interpretation of statutes. There are equivalent provisions now in all of the States and Territories. Moreover, the common law itself has developed "to adopt a more purposive approach to the task of statutory construction"⁴⁴. It is because taxation statutes are statutes, without

any special status as a class, that these approaches apply equally to them as to all other statutes.

Although, like all Australian judges today, I am bound to give effect to the purposive approach, required by sections such as s 15AA and high judicial authority, I am also supportive of this approach as a matter of general legal policy. I have indicated as much in many reasons. In *Federal Commissioner of Taxation v Ryan*, I referred to the purposive approach as⁴⁵:

"[A]n approach proper, in my respectful view, to the relationship between modern democratically elected legislatures and the independent courts. The price that will be exacted for spurning the legislative instruction to give effect to the purpose of legislation is increasingly complex and detailed statutory provisions, difficult for citizens to understand and for courts to construe."

The benefit of ambiguity?: Now, it is true that there was once a rule at common law that courts should interpret ambiguities in taxation statutes in favour of the taxpayer. However, as I remarked in *Austin v Commonwealth*⁴⁶:

"[I]n more recent times, this Court has departed from the narrow and literal interpretation of words appearing in legislation, including that imposing taxation, in favour of an interpretation that seeks to achieve the apparent purposes or objects of the enactment as expressed in its terms."
[footnote omitted]

Justice Hill disagreed with this analysis of the law. In the article "A Judicial Perspective on Tax Law Reform"⁴⁷, he criticised two of the reasons for judgment that I had delivered while President of the Court of Appeal of the Supreme Court of New South Wales⁴⁸. Justice Hill set out his own view as follows⁴⁹:

"It is, in my view, important in a democracy, that the government be required to legislate with precision if it is to impose a liability upon its subjects, and conversely it would be a sad day if the courts were to abandon the rule, even if it is but a rule of last resort. A rule which says that in tax cases there should be an attempt on the part of the courts to make the legislation work (in favour of the revenue) is an encouragement to sloppy drafting."

As is evident from my reasons in *Austin*, I was not persuaded by Justice Hill's criticism. In my view, the earlier approach

no longer applies. This development is consistent with the move to a purposive interpretation of statutes being applied to taxation legislation, as it is applied to all other legislation. If taxation legislation is to be interpreted against the revenue as a matter of legal principle, it is more likely to frustrate the achievement of the purpose of the legislation. Such an approach creates an unwelcome incentive for the legislature to enact ever more specific, particular, detailed and complex taxation law which is undesirable for the reasons that I have already expressed. It seems to me that Justice Hill's insistence on the continuing existence of the earlier approach, even as a last resort, reflects his early training as a tax practitioner to a rule that had not then been entirely swept away by the new purposive approach to statutory interpretation.

There is a further social and historical reason for the shift to this approach in expressing the meaning of taxation statutes. It explains how the shift in approach came about and why it rests not only on legal authority but also on social and political realities. At the time when the strict approach to the interpretation of taxing statutes was first expounded, the legislature in Britain comprised an unrepresentative collection of vested interests, rotten boroughs and the landed gentry. Property qualifications excluded ordinary citizens from the franchise and women were outside the franchise until the reforms of the twentieth century. With such reforms came the wider franchise, ultimately, universal. This accompanied and stimulated the larger role of the state and the growth of social welfare and other governmental initiatives that had to be funded from the revenue.

It was this new legislative environment that both explained and necessitated a much less hostile judicial attitude to the interpretation of taxation statutes. No longer were such laws burdens on taxpayers imposed by unrepresentative Parliaments. Now they could be taken to be the expressed and necessary will of the representatives of the population as a whole. An approach to interpretation that would defeat that will would be inappropriate and ultimately ineffective. The modern states that have succeeded are those that enacted, enforced and

respected their taxation laws. The contrasting social and economic conditions of Argentina and Australia, that started the 20th century at roughly equal economic strength, has been attributed, at least in part, to the effectiveness of their respective taxation laws and practices.

GENERAL ANTI-AVOIDANCE PROVISIONS

Justice Hill made a significant contribution to general anti-avoidance provisions in Australia. Through his papers and articles, he enhanced an understanding of general anti-avoidance provisions⁵⁰.

It was Graham Hill who, in 1980, together with Murray Gleeson QC (as the Chief Justice then was), was invited by the then Australian Treasurer, the Hon John Howard MP, to draft a new anti-avoidance provision for inclusion in the *Income Taxation Assessment Act 1936* (Cth). In 1981, the new Part IVA was enacted, based on their joint recommendations. It substantially continues in operation today.

The aim of this undertaking was to 'bolster' the general anti-avoidance provision following a series of controversial decisions of the High Court during the Barwick Court⁵¹. Justice Hill observed that Part IVA of the *Income Tax Assessment Act* appears to have succeeded in reducing tax avoidance, suggesting that⁵²:

"It is perhaps correct to say that since the 1980s, with the advent of Pt IVA, paper tax avoidance schemes have largely been eliminated."

In a very recent article published in the *Law Quarterly Review*, Professor Judith Freedman, KPMG Professor of Taxation Law at Oxford University, undertook a comparative law analysis of general anti-avoidance provisions and principles in several jurisdictions. Professor Freedman endorsed Australia's approach of establishing a statutory general anti-avoidance rule in Part IVA⁵³. Although noting that there might be a consensus forming that Part IVA was perhaps slightly over-weighted in favour of the Commissioner⁵⁴, Professor Freedman argued that such a statutory mechanism was preferable to a judicially-created general anti-avoidance mechanism such as that propounded by the House of Lords in decisions such as *W.T. Ramsay v IRC*⁵⁵. She argued that a similar statutory

mechanism should be adopted in the United Kingdom, contending that⁵⁶:

"The Australian experience does suggest ... that those who argue that a GAAR [General Anti-Avoidance Rule] can do nothing more than a normal rule of statutory construction are mistaken."

We may yet see the legacy of Justice Hill spread to the United Kingdom in the form of a general anti-avoidance provision in the taxation laws of that country. If that were to happen it would be a fitting accolade because, like myself, Graham Hill grew up in the era of Privy Council appeals and of the profound influence of English law and English judicial ways on the legal system of Australia. We were proud of our links with the common law system of England. Although, for constitutional reasons, taxation law is primarily enacted law, our approaches, principles and judicial techniques remain profoundly English. Neither Graham Hill nor I ever felt an embarrassment in acknowledging this. It was part of our cultural heritage and legal training. It was fruitless to deny it.

Finally, Justice Hill developed the jurisprudence of anti-avoidance regarding Part IVA. Justice Edmonds has explained that⁵⁷:

"[Justice Hill's] involvement with our current general anti-avoidance rule from before its birth in 1981 up to and including his participation in the Full Court in *Commissioner of Taxation v Hart* (2004) 217 CLR 216 and as the trial judge in *Macquarie Finance Ltd v Commissioner of Taxation* (2004) 210 ALR 508 has led to his Honour having made an indelible contribution to the development of the law in this area. Some might well say that it is his most important contribution and time might well prove them right."

TRIBUTES

An award, known as the Graham Hill Annual Award, was established by Mr Robin Speed, a colleague of us both from law school days and a great admirer of Justice Hill's work in this field, "in recognition of the contribution made by Graham Hill to improving revenue law in Australia."⁵⁸ In 2006, fittingly, the first award was conferred upon the Hon Daryl Davies QC.

A collection of tributes to Justice Hill has been compiled on the website for the Graham Hill Annual Award⁵⁹. Examination of these tributes conveys the extremely high

regard for his incisive intellect and deep scholarship as a lawyer and a judge; sincere gratitude for his enormous contribution to the law and to lawyers and law students in Australia and internationally; and a deep sense of loss at his passing. I will make reference to some of these tributes as part of my own reflection upon Justice Hill's contribution to the law beyond the courtroom and to his personal qualities⁶⁰.

A BROADER CONTRIBUTION

Legal education: Graham Hill made a huge contribution to the education of law students, lawyers and judges, both in Australia and overseas. After returning from his studies abroad in 1965, Graham Hill became a part-time lecturer at Sydney University (while also being employed as a full-time solicitor). His subject was stamp duties and estate planning law which he taught with Russell Fox QC (later Justice Fox). There were no texts and few precedents. He remedied this deficiency. He also played a large part in establishing Sydney University's successful postgraduate programme in revenue law. It was to earn the University many plaudits.

In 1967, he was appointed Challis Lecturer in Taxation and held this post for 38 years – a most remarkable achievement. At the time of his death, he was the longest serving teacher at the Sydney Law School. Graham Hill was involved in the creation of the Australian School of Taxation ("Atax") at the University of New South Wales⁶¹. He had also been a judicial fellow at Flinders University and Chair of the Law Faculty Advisory Committee at the University of Wollongong. As a mark of the affection and gratitude of ordinary law students he was elected Patron of the University of Western Sydney's Law Student Society.

As I am sure members of the Taxation Institute of Australia are aware, Graham Hill was involved for many years with the Institute, including as its National President in 1984-1985 and, in 1986, he was awarded honorary life membership. Paul Dowd, Chair of the NSW State Council of the Institute, has written that Graham Hill's "involvement in the affairs of [this Institute] at both a National and State level is ... legendary"⁶².

Graham Hill was patron of the Australasian Tax Teachers' Association ("ATTA"). Patrick Gallagher, the Foundation President of that Association, has written that "year

after year [Graham Hill] attended its annual conferences to the great benefit of all tax teachers across NZ and Australia"⁶³. Apart from everything else it showed an amazing endurance, sense of duty and forbearance for those lawyers, amongst whom I would include myself, who lacked the deep knowledge of, and familiarity with, his chosen field of analysis and expertise.

Additionally, Graham Hill assisted in the development of the law and lawyers in Australia and internationally through a host of other legal organisations such as Australian Tax Research Foundation⁶⁴, Law Council of Australia, the Law Society of New South Wales, the New South Wales Bar Association and the International Fiscal Association.

For many years, Justice Hill was Convenor of the Federal Court's education committee. In his eulogy to Graham Hill as a federal judge, Chief Justice Black acknowledged that in the area of judicial education, he had made a "massive contribution to the Federal Court and to the judiciary generally, here and overseas."⁶⁵ Chief Justice Black observed that⁶⁵:

"[Graham Hill] was involved with the Commonwealth Judicial Education Institute and more recently was appointed to the Board of the newly formed International Organisation for Judicial Training."

He was alternate representative and later primary representative of the Federal and Family Courts on the Council of the National Judicial College of Australia.

Graham Hill's contributions to law extended to Thailand and China. He travelled to Thailand with other Australian lawyers to conduct an intensive course for Thai judges and tax practitioners⁶⁷. In China, Graham Hill:⁶⁸

"as part of a program funded by the Australian Government, ... outlined the significance of the rights of appealing taxation rulings and assessments to independent courts[.]"

Technology: Chief Justice Black also highlighted Graham Hill's "huge contribution to the Court" in the field of technology⁶⁹. He noted that "Graham Hill was a member of the Federal Court's information technology committee for some 16 years, and for 14 years ... he was its Convenor"⁷⁰ and that "Graham Hill's leadership in this risky area was

indispensable."⁷¹ Fortunate was the Federal Court of Australia, that in its early years, when it was winning professional, community and judicial confidence, it had in so many departments a judge of such energy, foresight and devotion.

THE PERSON

Efficiency: Graham Hill's efficiency was remarkable. Bill Cannon, who assisted Graham Hill in editing his text on duties over many years, has written that⁷²:

"In 1997, Graham entirely rewrote the book when the Duties Act was introduced. He did that over a period of approximately 4 weeks, a task which, in my view, could not have been accomplished in that time frame by any other living person."

Justice Edmonds has also mentioned Justice Hill's swift turn around of the judgments in the Consolidated Press cases⁷³:

Truly he was a man of remarkable ability and gifts of intellect and energy.

"His Honour had an enormous capacity to turn judgments around and he did so, generally speaking, without sacrificing quality in the reasoning process. The best example of this is his Honour's judgments at first instance in what were colloquially known as the 'Packer tax cases', cases involving companies within the private ownership of the late Mr Kerry Packer and his family. They all involved the most complex of issues – the application of s 177E for the first time; the application of s 177D to a scheme the parties to which it was alleged had the dominant purpose of evading the quarantining provisions of s 79D; the application of Part X dealing with controlled foreign companies to a defeasance profit of a kind which arose in Unilever Australia Securities Limited and Orica Limited; and the interaction of the provisions of Part X and the thin capitalisation provisions of Division 16F to controlled foreign companies. ...

The cases were heard at first instance by his Honour over a period of some seven to eight days and his Honour turned the judgments around in all four cases within fourteen days. Not everyone agreed with his Honour's findings of fact or conclusions of law, but I do not believe any other judge in this country could have replicated that performance with the quality of the reasoning process."

Truly, he was a man of remarkable ability and gifts of intellect and energy.

Generosity: One of the recurring comments that I have observed, on reading through the tributes, relates to Graham Hill's generosity with his time and immense knowledge. In paying tribute to Graham Hill at an ATTA meeting, Associate Professor Coleman reflected on the fact that he "was a wonderful patron [of ATTA] who was always generous with his time and intellectual support."⁷⁴ She recalled that⁷⁵:

"He came to every conference, he gave a fabulous technical talk, and he always said 'put me up in the cheapest accommodation so I can meet the most people' he made himself available to everybody."

Patrick Gallagher remarked that⁷⁶:

"Graham spoke at a huge number of tax conferences over many years – for an array of organisations. He was generous with his time and his knowledge and concerned to ensure clear understandings and mutual gratification in learning and in work. He enjoyed meeting delegates from all areas of all professions and he had no time for grandeur or graces – but all the time in the world for people and their opinions. When at Atax UNSW, I was honoured time and again to have Graham accept invitations to attend events I was organising. His generosity was simply without equal – with all people."

Bill Cannon also attested to Graham Hill's generosity:

"[T]he remarkable thing about Graham was that I cannot recall there being any occasion when I asked him to do something for me when he said no. In my experience he never thought of himself

on such occasions. He never thought, or at least never gave any indication that he thought about himself or whether what you were asking him to do was in his interest. If at all physically possible he would do it."

Christopher Bevan has recalled and illustrated his dry sense of humour.⁷⁷

Commitment to the rule of law:

Unremarkably, Graham Hill felt very strongly about the importance of the rule of law. In a speech following the conferral upon him by Sydney University of the Honorary Degree of Doctor of Laws, he made some powerful observations about migration, and specifically refugee, law⁷⁸. He made particular reference to legislation restricting judicial review of decisions to refuse to grant refugee visas to asylum seekers.

These remarks secured a lot of attention in the public media. They were the product of Graham Hill's deep-seated belief in the importance of the rule of law which Graham Hill had expressed over a number of years. Some were surprised that such a technical guru, in one of the most difficult areas of legal analysis, would reveal himself as a compassionate man and a lover of the basic bedrock of our constitutional arrangements. But it was not surprising to me for I had sat with him in classrooms in the public school at Summer Hill in Sydney in 1949 and 1950 (and later at Fort Street Boys' High School in Petersham). Together we imbibed wonderful values – Australian values – from our public education. His mother was a teacher in public schools. Like him I shared a deep love of the ethos of public schools – their universality and their democracy. I was not the slightest surprised when he proclaimed the deep well-springs of his feeling for the plight of asylum seekers and the need for the law to protect such people in Australia, always. He was, I believe, a profoundly democratic person.

In 1996 Justice Hill gave a speech to the Tasmanian Division of this Institute in which he stated that⁷⁹:

"Many ministerial decisions and many bureaucratic decisions can be the subject of judicial review. ...

Many administrative decisions made by Ministers are set aside on review because there has been some error of law affecting the decision-making process. That often does not endear the courts to the decision-maker shown to be wrong. ...

I need not apologise if courts set aside decisions made by politicians, even if those politicians are our elected representatives. Politicians are not above the law; they must abide by it. Parliament of course may change the law, but until it does the law exists to be obeyed."

words concerning Mr Attlee, he could sometimes seem immodest; but with plenty to be immodest about. As a judge, he was reputedly greatly attached to his draft reasons. Getting him to change even a semicolon was reportedly something of an ordeal for his judicial colleagues who participated with him in the Full Court of the Federal Court. However, especially in tax cases, he knew more than most. He was not reticent, when he felt the occasion required, to let the ignorance of occasional intruders into his field of law to be disclosed⁸⁰.

“ Over the years he became generally cautious in his social and economic views. Possibly this is a hazard for taxation professionals. ”

A few frailties: Of course, Graham Hill, like all of us, was not without human frailties. Although he felt very strongly about the answerability of power to the rule of law and to the decision of independent judges, on many substantive subjects, he was quite conservative. He came from a family of comparatively modest means. Both of his parents were very intelligent and well-educated. But, over the years, he became generally cautious in his social and economic views. Possibly this is a hazard for professionals. By definition, they are usually (although not always) dealing with substantial amounts of money, and with people in possession of more than trivial incomes and capital. Otherwise, it will be rare that their services will be engaged; and rarer still to have their causes pressed into litigation. Propinquity probably helped to make him a social preserver rather than a changer. Something happened to us in our respective journeys from schooldays that took us in slightly different directions from our common starting points:

His was a complex personality. He could be prickly and occasionally difficult to deal with. He had great pride in his capacity and talent. To adapt Churchill's

I was myself sometimes to receive this treatment. I knew that, like the cold showers that were urged on us in schooldays, to tame the ardour of erroneous passions, his disdain was probably good for my soul. Even when I did not agree or give it effect. Yet he was respectful of our judicial institutions. He might not agree with a decision of the High Court. But he was not a judge who would endeavour to undermine or circumvent its authority. For example, in *Macquarie Finance Ltd v Commissioner of Taxation*⁸¹ ("Macquarie Finance"), Justice Hill appeared to be critical of some aspects of the reasoning of the High Court in *Commissioner of Taxation v Hart*⁸² relating to Part IVA. Nevertheless, he indicated that, if he had been required to decide whether Part IVA applied in the *Macquarie Finance* case, he would have held that it did apply, stating⁸³:

"I might add that I reach this conclusion with some reluctance. I doubt if the legislature would have regarded the present "scheme" as involving the application of Pt IVA when the Part was enacted in 1981. However, it seems to me that the approach of the High Court in *Hart* requires me to reach the conclusion I have."

Respecting complexities: He could occasionally display a short fuse as, for example, when he had had enough of judicial complaints concerning his role on the information technology committee of the Federal Court. On the other hand, there are still a few judges who live in the dark ages before the new technology arrived, puzzled and alienated by the strange world of informatics and nano developments with which we must all now live and work. Justice Hill resigned from leadership of the Federal Court committee on information technology. But not before securing important advances for the Court.

Within the Federal Court, his leadership of the education committee is still remembered with the greatest of appreciation. He would welcome the proposals of the judges, including some whose world view he did not share, concerning topics that should be discussed. In this sense, he was meticulous and intellectual in his outlook. However, he was sometimes hard to know on a personal level. Even I, who had been very close to him in schooldays, drifted apart from his world. We were never able to rekindle the intense friendship of our early school years.

Diversity is a precious feature of trained professionals. It is a special badge of honour in the judiciary. The frailties of Graham Hill are, in the big picture, insignificant. His differences with us were no more than the expression of his character, upbringing, interests and life experiences. I have not spoken of his personal life because I know little of it. We are not gathered to reflect upon it. Even in childhood he was self-contained. No doubt this reserve was the product of his Scottish ancestors and Australian experiences. I know that he was deeply respected by his personal staff. They came to see me after he had died, clutching, through conversations with me, for memories and images of Graham Hill when he was young and carefree. Yet even in those far-off days, he was his own person. One knew that it was possible to go so far and no further. There were deep currents at work. He was sensitive and he remembered perceived slights.

We do not enlarge our respected colleagues and beloved friends by ignoring the light and shade in their personalities. Reflections on these elements help us to reconstruct, after their passing, the full

portrait – as Cromwell said, warts and all. Justice Graham Hill can certainly withstand such an evaluation. Keeping all of the qualities in proportion and respecting truth as one sees it, are necessary features of the judicial vocation.

this Institute has allowed me the privilege of recording some of his achievements and recollecting to the inward eye his shy, intelligent, energetic, complex personality.

*The Hon Justice Michael Kirby AC CMG**

“

His energy and industry are now stilled. But his legacy lives on. We must nurture it.

”

LEGACY

Justice Graham Hill leaves us a rich legacy. Chief Justice Murray Gleeson credits Justice Hill with introducing “a search for principle, rationality and order into an area of the law that had in the past lacked to a large extent those qualities”⁸⁴.

In the preface to *Duties Legislation*, Graham Hill wrote that⁸⁵:

“[The work] has, I believe, also contributed to the growth of a well-informed body of professionals able to advise in the area. It is my hope that it continues to do this[.]”

Graham Hill certainly achieved these stated goals and much more. He is directly responsible for increasing the number of people able to provide a high standard of advice on taxation matters. He greatly assisted tax professionals in understanding taxation law. He improved the quality of taxation law in Australia and overseas. More than all this, he served his fellow citizens in education, law and the Judiciary with fidelity and devotion. I hope that in his life of so much service, Graham, my friend from schools days, also found that modicum of happiness and love and joy that is vouchsafed for most of us, mere human beings, whilst accomplishing our journey through life. His energy and industry are now stilled. But his legacy lives on. We must nurture it and, in our different ways, keep it before us as an example of the very best that our institutions and our professions can produce in Australia. I am grateful that

Reference notes:

- * The author acknowledges assistance in the preparation of this paper of Mr Adam Sharpe, Legal Research Officer in the Library of the High Court of Australia who, in collecting some of these materials, came to know of the qualities and legacy of Justice Graham Hill as, it is hoped, other young Australians will do from reading such tributes.
- 1 See F Buffini, “Tax Titan was no heir but had all the graces”, *The Australian Financial Review* (Sydney), 26 August 2005, 29, available at <http://www.grahamhillaward.com.au/web/taxititan.pdf>, accessed 9 February 2007.
- 2 R Richards, “Justice Graham Hill: The end of an era” (2005) 43(9) *Law Society Journal* 45.
- 3 M Black, “Vale Justice Graham Hill 1938-2005” (2005) September *ATTA News* 4 at 6, available at <http://www.atax.unsw.edu.au/atta/newsletters/2005/2005-09_ATTA_News.pdf>, accessed 9 February 2007.
- 4 D G Hill, *Duties Legislation*, vol 1 (at Update 5) at [53].
- 5 D G Hill & S Economides (eds), *Australian Sales Tax Law & Practice* (1991) at vi.
- 6 Quoted in *Alumnus Recognised: Award in Honour of Justice Graham Hill* (2007) *The University of Sydney* <http://www.usyd.edu.au/news/alumni/155.html?newscategoryid=20&newsstoryid=1533>, viewed 14 February 2007.
- 7 (1988) 15 NSWLR 620.
- 8 I have discussed his arguments at greater length in M Kirby, “The Late Justice Graham Hill” (2005) 8 *Journal of Australian Taxation* 206 at 634.
- 9 R Edmonds, “Tribute to the late Justice Graham Hill” (Paper presented at the Law Council Tax Workshop, Sydney, 22 October 2005) at 2.
- 10 The cases in which Graham Hill appeared as junior counsel were *Brayson Motors Pty Ltd (In Liq) v Federal Commissioner of Taxation* (1985) 156 CLR 651; *Clyne v Deputy Commissioner of Taxation* (1984) 154 CLR 589; *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622; *Avco Financial Services Limited v Federal Commission of Taxation* (1982) 150 CLR 510; *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431; *F J Bloemen Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 360; *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336; *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440; *Slutkin v Federal Commissioner of Taxation* (1977) 140 CLR 314. The remaining cases in which Graham Hill appeared in the High Court are discussed in the next paragraph.