30 May 2015

Tax White Paper Task Force
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C/- Mr. P Galvin
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Dear Sir,

My paper attempts to address the issues raised by Re:Think, namely:

Discussion Question 58[1]. "What system-wide approaches could have the greatest impact on reducing complexity in the tax system? Why have previous attempts to address complexity in the Australian tax system not succeeded? How might it be done in a way that is more successful?"

It answers the question by advising that Income tax, GST and FBT are all based on the ownership of property that fit the criteria or preconditions of the tax. That issue is not explicitly raised or addressed in Re:Think.

I also address:

Discussion Question 1. Can we address the challenges that our tax system faces by refining our current tax system? Alternatively, is more fundamental change required, and what might this look like?

Discussion Question 20. In what circumstances is it appropriate for certain types of businesses to be subject to special provisions? How can special treatment be balanced with the goal of a fair and simple tax system?

Discussion Question 42. What other options, such as a flow-through entity (like an S-Corporation), would decrease the overall complexity and costs for small business

[1] "Re:Think Tax discussion paper Better tax system, better Australia AGPS March 2015. P 177. http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf

involved with choosing a business structure? How would such an entity provide a net benefit to small businesses?

Discussion Question 59. In what ways can reforms of tax administration best assist in reducing the impact of complexity on taxpayers? Are there examples from other countries of tax administration reform to reduce the impact of complexity that Australia should adopt?

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Tim Galvin

Unresolved ownership issues spilling over from High Court decisions on GST, Income Tax Law and Fringe Benefits Tax

Tim Galvin

EXECUTIVE SUMMARY - An introduction to the survey of Full High Court cases

Nearly all property taxes[2] expand to attempt to assess non-owners.

Taxes have principally imposed on owners, because they have the property to pay them. All the three above taxes are based on assessing ownership of property on the former or current owners and imposing statutory liabilities on owners, but often the Parliamentary legislation attempt and successfully attempts according to a number of High Court decisions to also impose taxation liabilities on non-owners. This imposition on non-owners has been upheld[3] by the Full High Court. In this paper we attempt to set out within our lodgement deadline[4] for this paper our incomplete survey of ideas and Full High Court cases that indicate that there may well be limitations on Parliament in its zest to tax. Our incomplete survey of Full High Court cases tentatively suggests that there are actually technical limitations, but that not only that all the limitations must be presented to the Full High Court together, but also the person objecting must make the compelling argument that convinces all members (or at least the majority) of the Full High Court that non-owners are excluded from all Tax Acts that have their primary objective of assessing owners. That is a high standard to set for the objector, unless the High Court have actually in their past Full High Court decisions already mapped for us to make our task easier for us taxpayers/ you's[5] (who do not own the property) being assessed within such "limitations" on Parliament's power to enact tax legislation This is more likely to occur in "seven member" decisions, where all members of the Court sit to adjudicate and that tends to be on Constitutional[6] Law issues such as in South Australia[7]. More instructively as authors we note that the tax deeming is frequently upheld, if all preconditions to the

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[2] ITAA: South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)
GST: Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)
FBT: Queensland v Commonwealth [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)

[3] For example:
Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)
Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[4] http://bettertax.gov.au/publications/discussion-paper/
http://bettertax.gov.au/have-your-say/join/

[5] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[6] Commonwealth Of Australia Constitution Act http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[7] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

tax liability imposed on a non-owner are not identified for the Full High and are not pressed systematically by the objector, so that the Courts are forced to focus on all preconditions to the tax liability that are statutorily required to be satisfied by a tax Act. These preconditions are obviously necessary to prevent one person being assessed on another person's income, supply[8] or benefit[9].

Sometimes the tax is administered[10] in relation to non-owners in contravention of the legislation. But unless the person assessed is a person who wishes to object, we as observing taxpayers have no legal rights of protest.

High Court decisions appear to go either way on assessing non-owners, but the cases indicate that it is not so much the merits of the taxpayer's cases when they argue that they are not the taxpayer or not the owner of the property being assessed that carries weight, but whether they have identified all the preconditions to the taxation liability and then force the Courts to determine issues on the satisfaction of all preconditions[11] to the legislation and exclude irrelevant facts to the issue, so that the Full High Court is forced to focus.

So this is the survey executed within the Treasurer's time limits imposed on us, but our research of High Court cases on the issue is incomplete.

Survey of "ownership" possibilities to illustrate where this survey is leading us				
Past owner	**Current owner**	**Deemed owner**	**Non-owner (and which non-owner)**	**Simply does not exist or "Is"**

[8]A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[9] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[10] Income Tax Assessment Act 1997 - Sect 1.7
A New Tax System (Goods And Services Tax Administration) Act 1999 - Schedule 1
Fringe Benefits Tax Assessment Act 1986 - Sect 3

[11] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

Parliament can enact suitable words to cover and deal with the situation.	Parliament can enact suitable words to cover and deal with the situation.	Parliament can enact suitable words to cover and deal with the situation, but our incomplete survey tends to indicate that Parliament in its enactments tends to "trip" itself up with the more deeming it introduces. Cornell's case says Full High Court will uphold the concept of income including deemed attributable income. But income is only one word of the s 10 preconditions of assessability under ITAA 1915.	Parliament can enact suitable words to cover and deal with the situation, but our incomplete survey tends to indicate that Parliament in its enactments tends to "trip" itself up with the more deeming it introduces. Cornell's case says Full High Court will uphold the concept of deemed attributable income. But income is only one word of the preconditions of assessability under ITAA 1915, 1922, 1936 and 1997. Unit Trend decision never investigates who was the "you" subject to GST liabilities and assume that it was the GST Group Representative.	Parliament can enact suitable words to cover and deal with the situation, but it tends to "trip" itself up the more deeming it introduces such as treating a "trust estate" or "Group Representative" to be a person. Cornell's case says Full High Court will uphold the concept of deemed attributable income. The problem with fictitious tax entities that only exist for tax purposes is where provisions enacted can still apply to actual owners of the property.

CONFLICT				
		The issue often is what are the identifiers that prevent one person being assessed on another's "income", "supply" and "benefit", where there also attribution and GAAR legislation parameters encountered or "tripped over" especially identified in past Full High Court decisions?		
		How do the timing rules apply to "income", "supply" and "benefit" when one set of rules apply to the legal owner and probably the same to the beneficial owner, but a different set of timing rules could apply (such as year-end calculations) to deemed owners, non-owners (and which non-owner) and tax personality that simply only exist for taxation purposes (and usually only for specific Acts)?		

CONTENTS SCHEDULE

The problem with the preconditions to property taxes[12] is that you want preconditions that assess owners

To show how we are going to develop our theme, especially by executing a survey and increasing surveys of relevant Full High Court decisions, the following contents schedule has been prepared:

	Full High Court case survey – incomplete as date of submission deadline
EXECUTIVE SUMMARY (See above)	An introduction to our survey of Full High Court decisions on Income Tax, GST and FBT.
INTRODUCTION	To the Full High Court judgements analysed to date (before 30 May 2015)
ILLUSTRATION OF THE ISSUES	The taxation issues the authors identify arising from the Commissioner visiting a general practitioner doctor

[12] ITAA: South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)
GST: Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)
FBT: Queensland v Commonwealth [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)

IS OWNERSHIP AN EXPLICIT PRECONDITION TO TAXATION LIABILITY?	See: • Bamford; • Bohemians; • Channel (Full Federal Court); • **Cornell;** • Galland; • Harding; • MBI; • Peabody; • Purcell; • Queensland; • South Australia; • Sutton Motors; • Unit Trend; • War Assets;
PURPOSES OF THIS PAPER	The purpose of this paper is to set out the ideas and more importantly identify the principles of taxation legislation as enacted and judicially interpreted by the Full High Court that allows non-owners to successfully object to assessments etc. where the non-owner currently faces the taxation liability. See: • MBI; • McNeil;
ALBERT EINSTEIN	"The hardest thing in the world to understand is the income tax"
OBJECTIVES	
WHAT THIS PAPER DOES NOT ACCOMPLISH	
EXCLUDED AND SPECIALLY TREATED PROPERTY	We currently identify: • Arthur Murray; • Reliance Carpets
ASSUMPTIONS BEHIND THIS PAPER	The strengths and weaknesses of this paper are highlighted by us setting down our assumptions
MBI PROPERTIES PTY LTD DECISION	Full High Court case learning of 3 December 2014 of same issues appearing in GST decisions that appeared 100 years ago in ITAA

MBI: MEETING ALL THE PRECONDITIONS TO PRIMARY LIABILITY	The Full High Court recognised that all preconditions to the specialist provision liability needed to be met
CONTRASTING UNIT TREND DECISION	The problem with the "Unit Trend" decision of 1 May 2013 is that Unit Trend could not satisfy any of the preconditions to liability mentioned in the MBI unanimous decision by the full High Court!
ILLUSTRATION OF THE PROBLEM	Comedian Magnate tax problems
ANALYSIS OF SOME DIFFICULT FULL HIGH COURT DECISIONS	We choose: • Cornell; (three being Isaacs, Gavan Duffy and Rich JJ also adjudicating on Harding) • Harding; (three being Isaacs, Gavan Duffy and Rich JJ also adjudicating on Cornell) • Gulland; • Bamford.
HARDING	Harding decision is a four justice (three being Isaacs, Gavan Duffy and Rich JJ also adjudicating on Cornell decision of 1917) that was affirmed in 1992 in relation to the meaning of "income derived" by five of the seven justices of the Full High Court in South Australia
CORNELL	In the Cornell decision by 6 unanimous justices (three being Isaacs, Gavan Duffy and Rich JJ also adjudicating on Harding) of the Full High Court upheld in 1920 the right of the Federal Parliament to allow the Commissioner to exercise his discretion to deem the undistributed profits of the incorporated company to be deemed to be income of the shareholders.
GULLAND	Here the Full High Court applied s 260 GAAR provisions to strike down the transfer of the conduct of a medical practice from a partnership of doctors to the trustee of a unit trust just after s 260 was replaced as the GAAR by Part IVA

OVERREACH BY ALL TAX LEGISLATION	Examples identified of over reach of Federal Tax legislation, namely: • Waterhouse • Purcell • Bohemians • Peabody • Cridland • Arthur Murray
QUO VADIS - WHO IS LIKELY TO COMMERCIALLY TAKE UP THE ISSUE OF OWNERSHIP	
DIFFERENCES FROM SLATER'S PAPER	
RAISING DOUBTS	• Barger • Fairfax
OUR RECOMMENDATION	
WHAT NEEDS TO BE DONE MOVE FORWARD	
IMPROVEMENTS	
TACTICS OF OBJECTORS, IF WE DO NOT MOVE FORWARD	
AUTHORS' CONCLUSIONS	
ABBREVIATIONS	

INTRODUCTION to the judgements

Most taxes are imposed on property. It is rare to be otherwise.

The Full[13] High Court[14] have been delivering decisions since the enactment of the GST legislation in 1999 that set out their judicial interpretation of the Goods & Services Tax (GST) tax system, very much like how the full High Court also did so

[13] Operation of the High Court http://www.hcourt.gov.au/about/operation

[14] http://www.hcourt.gov.au/about/role-of-the-high-court

commencing just under 100 years ago for Income Tax that commenced Federally in 1915[15] and since 1986 for Fringe Benefits Tax[16]. But the High Court (and Privy Council[17] when it was the final Court of Appeal for Australia) has been actually deciding some very interesting points about primary tax liability as compared with provisions in the various Acts that:

- confirming that owners[18] of property are liable under the various property Acts with the beneficial owner[19] displacing the legal owner[20] where the beneficial owner also satisfies the preconditions;
- actually supporting the imposition of tax on the person primarily liable, such as withholding taxes[21] imposed on the payer/owner/controller of property in relation to the person primarily liable;
- supporting year-end[22] calculations[23], such as to ensure that all persons with beneficial interests in the property/income have correctly reported their

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[15] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[16] Fringe Benefits Tax Assessment Act 1986

[17] Appeals to the Privy Council from decisions of the High Court were effectively ended by the combined effects of the Privy Council (Limitation of Appeals) Act 1968 and the Privy Council (Appeals from the High Court) Act 1975. However, a right of appeal to the Privy Council remained from State courts, in matters governed by State law, until the passage of the Australia Acts, both State and Federal, in the 1980s: http://www.hcourt.gov.au/about/history-of-the-high-court

[18] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[19] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007

[20] Deputy Federal Commissioner of Taxation v Purcell [1921] HCA 59; (1921) 29 CLR 464 (12 August 1921)

[21] Barwick C.J., Mason and Jacobs JJ and then Gibbs J. in Federal Commissioner of Taxation v Barnes [1975] HCA 61; (1975) 133 CLR 483 (22 December 1975)

For example of such legislation:
(1) Division 11A of Part Iii--Liability to Taxation of Income Tax Assessment Act 1936 --Dividends, interest and royalties paid to non-residents and to certain other persons
Income Tax Assessment Act 1997 - Sect 840.1
(2) PAYG withholding from interest, dividends and royalties paid to non-residents https://www.ato.gov.au/Individuals/International-tax-for-individuals/In-detail/Australian-income-of-foreign-residents/PAYG-withholding-from-interest,-dividends-and-royalties-paid-to-non-residents/

[22] For example see paras 22 to 46 in Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[23] Division 5—Partnerships of Part III--Liability to Taxation of the Income Tax Assessment Act 1936
Division 6--Trust income of Part III--Liability to Taxation of the Income Tax Assessment Act 1936

liabilities[24]. The authors recognise that it may be difficult for the Commissioner[25] to identify all person with beneficial interests who displace the legal owner so a "year-end[26]" return by "partnerships"[27] and "trust estates"[28] covering the legal, equitable and beneficial owners of the trust estate property would be a sensible enactment by Parliament;

- adjudicating on "reporting" provisions that impose the reporting and possibly also tax liability of another person or one person of a group, so that that the one person not only reports the tax liabilities - but is statutorily made to be supposedly liable to pay the designated tax of others[29]. Such situations could cover a group, such as "co- or joint venturers[30]"
- provide adjudication around the creation of artificial "groups[31]" that contradict general, common or corporate law. Such could include the Australian resident Head Company[32] and wholly owned subsidiaries[33], the Australian resident Head Company of Australian resident companies - where the subsidiaries are not necessarily directly wholly owned by that specific Head Company, but possibly "wholly owned" by a company further up the corporate chain where

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[24] Federal Commissioner of Taxation v Galland [1986] HCA 83; (1986) 162 CLR 408 (16 December 1986). the High Court were not dealing with assessments of equitable interests under s 25 of ITAA 1936 or s 6-5 of the ITAA 1997 (even though the Commissioner argued as reported by Mason and Wilson JJ at para 6 "*The Commissioner's principal submission in support of the appeal is that partners, like individual taxpayers, derive income when they can sue for it, so that they derive income for the purposes of the Act before the accounts of the partnership are prepared for the year of income and the amount of the distribution to each partner is ascertained*.") but such occurred in relation to a beneficiary in Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007. The High Court did not review s 25 with its gross income and allowable deductions approach as compared the inclusion of only the "net income" of s 92 of Division 65 as argued before the High Court. Their Honours assume that the only way to determine revenue assessable income is through year-end calculations (see paras Mason and Wilson JJ at paras 7 and 9, Brennan J. paras 3 and 5, Deane J para 3, Dawson J para 2 and 9) whilst CGT under s 106-5 of ITAA 1997 is determined in relation to partnership assets at the partner level in relation to the same very property and double taxation is avoided through s 118-20(1)(b). The High Court was not asked to adjudicate on the treatment of including income under s 25 or whether income assessable under year calculations was also subject to the tests and preconditions of s 25. Such issues were not before the High Court.

[25] Commissioner of Taxation and Registrar of the Australian Business Register https://www.ato.gov.au/About-ATO/About-us/Who-we-are/Our-Executive/

[26] For example see paras 22 to 46 in Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[27] Income Tax Assessment Act 1936 - Sect 91

[28] Division 6--Trust income - Income Tax Assessment Act 1936

[29] The issue was assumed to apply in Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[30] For example entities engaged in a joint venture can form a GST joint venture: A New Tax System (Goods And Services Tax) Act 1999 - Sect 51.1

[31] For example with Tax Consolidation: Income Tax Assessment Act 1997 - Sect 700.1 and GST groups: A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1

[32] Income Tax Assessment Act 1997 - Sect 701.1

[33] Income Tax Assessment Act 1997 - Sect 700.5, s 703-15 and s 703-30 etc.

that company is a non-resident, but where all the Australian companies have a 100% common heritage through international corporate chains. Another example of groups would be unincorporated co-operatives[34] and unit trusts where the unincorporated co-operative[35] or trustee[36] is treated like an incorporated[37] company[38] and the unit holders[39] like shareholders[40] (but unlike a company where the company owns the corporate property and unlike a company where the unit holders can own the beneficial interests[41] in the property held by the trustee, but not necessarily so[42]) but where the trustee's lien[43] does not exceed the value of the property held by the trustee[44].

The implications of the Full High Court judicial decisions may not have yet been broadly registered by:

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[34] For example see Owen J's decision clashing with Bohemians Full High Court decision - Mildura & District Dried Fruit Growers' Hail Storm Damage Compensation Scheme v Federal Commissioner of Taxation [1968] HCA 70; (1968) 118 CLR 342 (31 October 1968)

[35] For example see Owen J's decision clashing with Bohemians full V Court decision - Mildura & District Dried Fruit Growers' Hail Storm Damage Compensation Scheme v Federal Commissioner of Taxation [1968] HCA 70; (1968) 118 CLR 342 (31 October 1968)

[36] Chief Commissioner of Stamp Duties (NSW) v Buckle [1998] HCA 4; 192 CLR 226; 151 ALR 1; 72 ALJR 243 (23 January 1998)

[37] Income Tax Assessment Act 1936 - Sect 102K
Income Tax Assessment Act 1936 - Sect 102S

[38] Income Tax Assessment Act 1936 - Sect 102J
Income Tax Assessment Act 1936 - Sect 102P

[39] For example:
Charles v Federal Commissioner of Taxation [1954] HCA 16; (1954) 90 CLR 598 (23 April 1954)
CPT Custodian Pty Ltd v Commissioner of State Revenue [2005] HCA 53; (2005) 224 CLR 98; (2005) 221 ALR 196; (2005) 79 ALJR 1724 (28 September 2005)

[40] Income Tax Assessment Act 1936 - Sect 102L
Income Tax Assessment Act 1936 - Sect 102T

[41] For example:
Charles v Federal Commissioner of Taxation [1954] HCA 16; (1954) 90 CLR 598 (23 April 1954)
CPT Custodian Pty Ltd v Commissioner of State Revenue [2005] HCA 53; (2005) 224 CLR 98; (2005) 221 ALR 196; (2005) 79 ALJR 1724 (28 September 2005)

[42] Cridland v Federal Commissioner of Taxation [1977] HCA 61; (1977) 140 CLR 330 (30 November 1977)

[43] The issue of the trustee's lien keeps being mentioned such as in French CJ at para 38 in and … at para 232 in Korda v Australian Executor Trustees (SA) Limited [2015] HCA 6 (4 March 2015) *"Octavo Investments Pty Ltd v Knight* [1979] HCA 61; (1979) 144 CLR 360 at 367 per Stephen, Mason, Aickin and Wilson JJ; [1979] HCA 61; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 245–246 [47]; [1998] HCA 4; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* [2005] HCA 53; (2005) 224 CLR 98 at 120–121 [50]; [2005] HCA 53; *Trustee Act* 1936 (SA), s 35(2)." at para 232 "[1901] AC 118 at 123-125. See also *Trautwein v Richardson* [1946] ALR 129 at 134-135; *Marginson v Ian Potter & Co* [1976] HCA 35; (1976) 136 CLR 161 at 175-176; [1976] HCA 35; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 244 [42]; [1998] HCA 4; *Jessup v Queensland Housing Commission* [2001] QCA 312; [2002] 2 Qd R 270 at 275 [14]."

[44] Chief Commissioner of Stamp Duties (NSW) v Buckle [1998] HCA 4; 192 CLR 226; 151 ALR 1; 72 ALJR 243 (23 January 1998)

- the Federal Government;
- the current Commissioner of Taxation, Chris Jordan[45] or by or his predecessors;
- the Inspector General of Taxation[46];
- professionals,

We want in this paper to principally to focus on the "ownership of the property being assessed" issues as the base precondition that no Commissioner we currently understand has ever included as a "raging" issue that needs to be addressed as a matter of genuine concern in his annual report[47] as Commissioner to Parliament or to be explicitly adjudicated by the High Court as the sole issue between the taxpayer/ non-owner in question. The ownership principles may contrast with economic equivalent[48] principles that are not found in High Court decisions. The issue is, in the authors' opinion, that non-owners of property (and also the legal owner where there is an identifiable beneficial owner of the property, where the Act can also apply to the beneficial owner of the property) are not liable to be taxed where the tax in question is based on assessing property[49] so owned. Another way of expressing the issue is to conclude that operation of the ITAA, GST and FBT cannot be extended to include non-owners, where there is also an identifiable legal or beneficial owner of the property to whom the preconditions of the Act can also apply at the taxing time. We note that the High Court is quite "reluctant" in ever coming out to confirm that an assessment on a non-owner is correct[50]. But Cornell[51] is the early tax 1920 decision stating that we are incorrect. But so many subsequent decisions by the Full High Court, one would want you to relook at the issues in Cornell[52] in 2015+ so that they can be comprehensively re-argued before the Full High Court. We dissent respectfully

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[45] https://www.ato.gov.au/About-ATO/About-us/Who-we-are/Our-Executive/

[46] http://igt.gov.au

[47] **annualreport.ato**.gov.au/
https://www.ato.gov.au/Print-publications/Previous-years/Commissioner-of-Taxation-Annual-Report-2010-11/
https://www.ato.gov.au/uploadedFiles/Content/CR/downloads/B22AE913.pdf

[48] Slutzkin v Federal Commissioner of Taxation [1977] HCA 9; (1977) 140 CLR 314 (25 February 1977)

[49] Waterhouse v Deputy Federal Commissioner of Land Tax, South Australia [1914] HCA 16; (1914) 17 CLR 665 (24 March 1914)

[50] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[51] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[52] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

from Slater[53] QC analysis that:

> *"Tax is imposed on relationships or events which occur or exist outside the tax Act: as an observed fact, or by reason of the operation of the general law. Whether the taxed relationships or events (such as ownership of property, dealings in goods or earning of income) are present or absent is a matter to be determined according to the general law concerning, for example, the efficacy*
>
> *of assignments or the status of shareholder."*

We assert that the High Court decisions since 1915 are stating that ITAA[54] (including CGT[55]), GST[56], FBT[57]and the former Federal Land Tax[58] are taxes on property owned or previously owned by a person when aor where ll the preconditions are met. But any tax Act may well claim to extend to assess non-owners. Certain property that are designated and other property characterised as income are assessable, if ALL the preconditions are met. Certain Taxable Supplies[59] are subject to GST (and certain ownership situations are subject to GST liabilities), if ALL[60] the preconditions are met. Certain provisions of benefits[61] by an employer to an employee are subject to FBT, but most are excluded as they largely fall under the s 136[62] exclusion *"(f) a payment of salary or wages or a payment that would be salary or wages if salary or wages included exempt income for the purposes of the Income Tax Assessment Act 1936."* But certain non-owners such as Unit Trend[63] have not always been willing to raise the issue of non-ownership of the property, as they either have not identified the issue at the time of lodging the objection or considered that commercially not the issue they wish to dispute with the Commissioner. What as authors we notice from High Court decisions where the non-ownership is not directly raised for adjudication by the High Court, that the High Court is deft in their decision. Then to persuade the High Court, comprehensive and exhaustive argument must be made to convince the

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[53] A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 11

[54] Income Tax Assessment Acts 1915, 1922, 1936 and 1997.

[55] see Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 of 1986 for introduction

[56] A New Tax System (Goods And Services Tax) Act 1999

[57] Fringe Benefits Tax Assessment Act 1986

[58] Waterhouse v Deputy Federal Commissioner of Land Tax, South Australia [1914] HCA 16; (1914) 17 CLR 665 (24 March 1914)

[59] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[60] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[61]Fringe Benefits Tax Assessment Act 1986 - Sect 136

[62] Fringe Benefits Tax Assessment Act 1986 - Sect 136

[63] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

High Court that the tax actually does not encompass non-owners in defiance of specialist provisions of the taxing Act[64]. This is because the High Court would not previously know the limitations of taxing Act, without being convinced. But where the High Court do encounter non-owners, they frequently indicate their appreciation that there may be issue in the area, so for example, in Unit Trend[65] where the Full High Court merely state in relation to each argument that the Court unanimously decide:

- *For[66] these reasons, we reject Unit Trend's first argument;*
- *Unit[67] Trend's second argument, namely … should also be rejected;*
- *As[68] to the third argument advanced by Unit Trend … On those findings, which were not challenged on the appeal to the Full Court or in this Court, it is clear that s 165-5(3) was not necessary to bring this GST benefit within Div 165.*

ILLUSTRATION OF THE ISSUES

To illustrate the point that only the objector needs to understand the taxing Acts (including non-ownership), we focus on one simple non-exempt taxpayer.

A eminent but clinically simple patent goes to the doctor. The consultation is private and confidential. XYZ Pty Ltd bills Chris Jordan[69] for services rendered subsequent to his attendance to Senate Hearings into Tax Avoidance[70].

As Commissioner of Taxation Chris notices:

- He had asked the receptionist to meet Dr. Jekyl[71] as his regular consulting general practitioner. Occasionally he refuses to meet with Dr. Dastyari or Dr. Edwards[72];
- There was no sign advising him that XYZ Pty Ltd was trading on the premises either on entry to the building or in the surgery waiting room;
- The deliberations between him and Dr. Jekyl were confidential and did not leak to this illustration;

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[64] For an example of an unsuccessful litigant see Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[65] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[66] Austlii para 63

[67] Austlii para 64

[68] Austlii para 66 and 67

[69] https://www.ato.gov.au/About-ATO/About-us/Who-we-are/Our-Executive/

[70] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Corporate_Tax_Avoidance

[71] Strange Case of Dr Jekyll and Mr Hyde http://en.wikipedia.org/wiki/Strange_Case_of_Dr_Jekyll_and_Mr_Hyde

[72] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/References_Committee_Membership

- When Chris returned to the receptionist he was presented with a bill from XYZ Pty Ltd, which was mentioned only in fine print.

If Dr.Jekyl wishes:

- to charge more the Medicare[73] re-imbursement amount, XYZ Pty Ltd charges Chris more than the Medicare amount;
- to charge no more the Medicare re-imbursement, XYZ Pty Ltd and Dr. Jekyl asks Chris to assign the right to recover the amount from Medicare and no cash/credit card charges passes through Chris' hands.

But Dr. Jekyl wants Chris to come back once the blood tests results are out. Is derivation[74] deferred until each of the services are complete like the tax dancing lessons[75] Chris attended in his youth?

Chris walks out of the consulting rooms (feeling much better though), but he should ponder:

- does commercial, common law and equity and Trade Practices Act [76]apply to the transaction and to any application of income tax, GST and FBT legislation;
- did he only contract with Dr. Jekyl for provision of services or is it even acceptable to him that he was only consulting XYZ Pty Ltd or an employee/ director of XYZ Pty Ltd with XYZ Pty Ltd providing unwritten professional advice to him as orally expressed through the employee;
- at what stage does Chris accept the existence of the fictitious legal personality and accept that the company is providing the professional services. For example, the Personal Services Income[77] legislation is based on the assumption that the income was owned by the PSI entity and only a Tax Act of Parliament can assert (as in Cornell[78]) that the corporate income is the PSI individual's income and, which individual, is actually not explicitly specified by the legislation[79]. Is Chris concerned that there will invariably be an issue of what are the identifiers in the Core[80]/Central[81] Provisions of the Act that

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[73] http://www.humanservices.gov.au/customer/subjects/medicare-services

[74] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[75] Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965)

[76] Trade Practices Act 1974

[77] Income Tax Assessment Act 1997 - Sect 84.1

[78] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[79] Income Tax Assessment Act 1997 - Sect 84.5

[80] Income Tax Assessment Act 1997 - Sect 2.5

[81] Chapter 2--The basic rules PART 2-1--The Central Provisions of A New Tax System (Goods And Services Tax) Act 1999

prevent one person being assessed on another's "income", "supply[82]" and "benefit[83]", where there also attribution by the specialist provision and by GAAR[84] legislation parameters encountered or "tripped over" or when PSI legislation does not actually identify who is liable[85] under the PSI legislation;

- was XYZ Pty Ltd no more than a collection agency for Dr. Hyde;
- were the accounts and tax return of was XYZ Pty Ltd incorrect in reporting that the fee was income of XYZ Pty Ltd;
- if XYZ Pty Ltd was trustee for Dr. Jekyl and Mr. Hyde discretionary trust[86], would he as Commissioner be disturbed about the non-application of Part IVA[87];
- did XYZ Pty Ltd make a taxable supply[88] or did Dr. Jekyl and did an exemption apply to the medical services supply[89];
- if ATO[90] were picking up the "Bill" for services rendered to Chris, is Fringe Benefits Tax payable and if the medical bill was assigned does he need to tell anyone? If the Federal Government are picking up the Medicare Bill, then Chris as a Statutory Appointment[91] of Federal Parliament does Chris want to

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[82] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[83] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[84] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html

[85] Income Tax Assessment Act 1997 - Sect 84.5

[86] Treasury describes discretionary trusts in the following manner: "*A discretionary trust can offer more legal protection to business owners than a partnership or sole trader. Further, a trust with a corporate trustee offers business owners similar legal protection to a company but offers tax advantages, such as greater flexibility in distributions and access to the 50 per cent capital gains tax concession when an asset appreciates and is then sold. A company must distribute dividends in proportion to the size of holdings, a trustee of a discretionary trust has complete discretion about the size of distributions to beneficiaries of a trust. This allows the tax position of beneficiaries to be taken into account in making distributions to beneficiaries of trusts. In addition, the growth in the number of companies and trusts may reflect the increasing sophistication of business structures, where individual businesses involve a number of companies and/or trusts. One example is where a trust will have a corporate beneficiary that acts as a 'bucket company'. In this instance, income is either distributed and held, or made presently entitled. If income is made presently entitled, there must be a reciprocal Division 7A-compliant loan arrangement, which enables the trust to avoid distributions to individuals in high marginal tax brackets. The Board of Tax has reviewed the operation of the tax law as it relates to some business structures often involving trusts, in particular the extraction and retention of profits from private companies and provided advice to Government.*"
"Re:Think Tax discussion paper Better tax system, better Australia" AGPS March 2015 pp 107 -108 http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf

[87] Income Tax Assessment Act 1936 - Sect 177A etc

[88] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[89] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[90] https://www.ato.gov.au

[91] https://www.ato.gov.au/About-ATO/About-us/Who-we-are/Our-Executive/

ponder whether the ATO is an associate of the Parliament of Australia[92]. There is no payment on the ATO provided credit card.

Only a person with a Master's of Tax and a degree in law[93] would be able to answer the technical issues, if they had all the documents before them. "Walk on" and assume that XYZ Pty Ltd was only a collection agent and a deal with the next major issue is the usual and practical course of action. No, check whether a predecessor Commissioner has issued a taxation ruling[94] to cover the possible situations. But what happens, if FBT and GST were enacted subsequently or ITAA had been re-enacted since the Ruling was issued? Should Chris merely check that XYZ Pty Ltd was on a State or Territory corporate register and therefore merely existed. Certainly he had not attended the general practice rooms in his capacity of a tax auditor[95]. Chris has delegated that function. So does the Commissioner focus on Conglomerate Corporate profit shifting especially of International Pharmaceuticals? But nothing resolves the problem of who owned the debt for services rendered. Who owned the cash received from the credit card provider? If equity law applies and Dr. Jekyl beneficially owned the cash received, then McNeil[96] case says that Dr. Jekyl needs to return the income not the company[97]. That would mean that the supply[98] was not by XYZ Pty Ltd, but Dr. Jekyl.

Authors conclusions

The authors assume that the income belongs to Dr. Jekyl, as that was the only person Chris agreed to meet and accept professional advice from under contract law and not from a previously undisclosed corporation whose directors or employees had not been disclosed to him prior to the consultation. Dr. Jekyl made the taxable supply[99]. But the accounts and tax returns may say otherwise!

IS OWNERSHIP AN EXPLICIT PRECONDITION TO TAXATION LIABILITY?

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[92] http://www.aph.gov.au

[93] https://www.ato.gov.au/About-ATO/About-us/Who-we-are/Our-Executive/

[94] Taxation Ruling No. IT 2503 updated to 9 August 2006

[95] http://www.artizans.com/image/TON343/tax-auditor-doesnt-believe-elfs-story/

[96] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[97] See St George Custodial Pty Ltd as trustee Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[98] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[99] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

The proposition of this paper is that despite Cornell[100] unanimous decision, ownership of property is a precondition of all Australian Acts that tax property. In order to focus on property owned, the preconditions must be satisfied by owners.

We set down our thoughts to lodgement deadline[101] in a matrix format:

Does the legislation explicitly say that it is based on ownership?				
The three taxes				
Income Tax	**GST**	**FBT**		

[100] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[101] http://bettertax.gov.au/publications/discussion-paper/

Does s 10 of ITAA 1915, s 13 of 1922, 25 of 1936 Act and 6-5 and s 6-10 of 1997 Act explicitly state that “income” must be property owned? But see s 16(2) of 1915 Act. Short answer is technically “No”. Single justice in Harding provided a very expansive interpretation to “income provided from property”. This contrasts with: • s 160L of 1936 Act CGT legislation; • s 104-10 of 1997 Act.	It appears that neither the s 9-5 taxable supply nor the s 9-15 consideration needs to be explicitly owned. The group representative provisions assert that even where the Group Representative owns no relevant property, it is liable.	S 136(1) definition of a fringe benefit states: "fringe benefit", in relation to an employee, in relation to the employer of the employee, in relation to a year of tax, means a benefit: (a) provided at any time during the year of tax; or (b) provided in respect of the year of tax; being a benefit provided to the employee or to an associate of the employee by: (c) the employer; or (d) an associate of the employer; or		

		(e) a person (in this paragraph referred to as the ***arranger***) other than the employer or an associate of the employer under an arrangement covered by paragraph (a) of the definition of arrangement between: …		
High Court Cases: • Cornell • See also Sutton Motors (Majority v Minority judgement)	High Court cases: . Unit Trend dodges the issue; . MBI	High Court cases: • Queen sland		
What additional test does Act impose in addition to the word “income”?	What additional test does Act impose in addition to the word “supply”?			

Core Provisions S 6-5 • you (same "you" as in s 6-10?) • resident (same "resident" as in s 6-10?) • income (same "income" as in s 6-10?) • derive directly or indirectly • source (same "source" as in s 6-10?) and also ss 6-5(4) deeming in order to assess: • existing mere property identified by Parliament to be income; • the profit on mere property subsequently utilised in a business; • increments to existing property; • property earned; • etc. s 6-10 • amounts • you (same "you" as in s 6-5?) • resident (same "resident" as in s 6-5?)	In Central Provisions, for example s 9-5 • You • *supply* • consideration • in the course or furtherance of an enterprise that you carry on; • connected with the indirect tax zone; and • registered, or * required to be registered. • GST-free • input taxed.			

• statutory • income (same base meaning for word "income" as in s 6-5?) • source (same "source" as in s 6-5?) • on some basis other than having an Australian source				
Authors' re-check on common terms in s 6-5 and s 6-10 notices that "you", "ordinary", "income" and "source" has presumably the same common base meaning, but s 6-5 income is also delineated by "derivation" test and s 6-10 is delineated by "amount" or for non-residents also by "on some basis other than having an Australian source" This is where the authors consider that the Commissioner has his "tax technical knickers tied up in a tax technical knot", especially when attempting to assess non-owners (and which non-owner). One day the full High Court will need to adjudicate on conflicting decisions when all preconditions to the imposition of a tax liability under the Act are comprehensively agued before it.				

Past owner	Current owner	Year-end owner for Div Partnerships and Division 6 “trust estates”. Is the focus on year-end property rights?	Expectancy - Including discretionary beneficiaries who have not been appointed to any property at taxing point and/or have not been appointed at year end or merely subsequently appointed after year end	Non-owners - PSI Tax Head Entities; Group Representatives; Discretionary beneficiaries; Underlying interests;

Legal or identifiable equitable owner displacing legal owner Trustee with its valid lien being higher beneficial owner	Legal or identifiable equitable owner displacing legal owner	Legal or identifiable equitable owner displacing legal owner Is this focus upset by s 2-5 or is the ITAA the other way round so you pass though s 6-5 and s 6-10 to get to Division 5 and 6 of the partnership and trust provisions in the 1936Act? Section 10-5 suggests that you need to "pull out" of specialist provisions and feed into the Core Provisions.	Legal or identifiable equitable owner, but legal owner **not** the legal or equitable owner or not necessarily the same as at the taxing time or in the subject matter of the property being taxed at year end.	No ownership whatsoever. Head entities own their own separate property from subsidiary companies. PSI individuals are not and often never will be owner of the "income" they are assessed on. Ultimate and underlying owners not known to High Court.

		There is a fundamental clash between the expansion in 1986 of including CGT based on ownership as income being attributed to “year-end non owners” and its distinguishment from “income derived” in South Australia v Clth (despite citing Harding) and attributed income. They are irreconcilable. Thus the problem is amplified by year-end freeloaders in Bamford who are attributed under year-end rules. The freeloaders who had no interest whatsoever in income and CGT that got assessed!		

Constitutional limit on taxing: • States of Australia as taxpayers; • More than one subject matter Not researched in this paper to limit the paper to the lodgement deadline. But see Air Calondie below. We suspect that we are exposing un-researched parameters – but actually do not know.				
Property or consideration	Property or consideration	Property or consideration	No interest in property or interest in consideration	No interest in property or interest in consideration
Income Tax Assessment Act (GST and FBT analysis yet to be done)				

Feeds into s 6-5 for undefined “ordinary income” and s 6-10 statutory income where one needs to ascertain what is the meaning of the word “income” for tax purposes and whether it has the same base meaning as in s 6-5. All preconditions of legislation need to be satisfied. Is this what the following cases saying: • MBI (all preconditions for GST satisfied); • Purcell (not the legal owner); • Bohemians (not my property); • South Australia (derivation test distinguishes income from mere property). But how do you explain Cornell? He derived from mere ownership. But “derivation” and “source” issues on the attributed amounts not argued	Feeds into s 6-5 for undefined “ordinary income” and s 6-10 statutory income where one needs to ascertain what is the meaning of the word “income” for tax purposes and whether it has the same base meaning as in s 6-5. All preconditions of legislation need to be satisfied.	Feeds into s 6-5 for undefined “ordinary income” and s 6-10 statutory income to aggregate the liability of the partner, trustee or beneficiary with other income assessable. Therefore s 6-5 and s 6-10 need to apply to all income from trust estates or otherwise. All preconditions of legislation need to be satisfied.	Assignment of existing property. Assignment of dividends. Assignment of future property. All preconditions of legislation need to be satisfied. Booth says past owners can be focussed on.	Bohemian, Unit Trend The “source” and “derivation” tests in Esquire and South Australia apply to the owners of property and unlikely to be satisfied by non-owners.

Authors' re-check on common terms in s 6-5 and s 6-10 notices that "you", "ordinary", "income" and "source" has presumably same common base meaning, but s 6-5 income is also delineated by "derivation" test and s 6-10 is delineated by "amount" or for non-residents also by "on some basis other than having an Australian source" This is where the authors consider that the Commissioner has his "tax technical knickers tied up in a tax technical knot", especially when attempting to assess non-owners (and which non-owner). One day the full High Court will need to adjudicate on conflicting decisions, when all preconditions to the imposition of a tax liability under the Act are comprehensively agued before it.	Always a clash between assessing past and current owners and "year-end" owners, expectancies and non-owners (and which non-owner) and instructions ensuring that other persons are not assessed on another property. For example CGT conflicting instructions for partners to return CGT gains via s 6-10 and revenue income via Div 5.	Always a clash between assessing past and current owners and "year-end" owners, expectancies and non-owners (and which non-owner) and instructions ensuring that other persons are not assessed on another property. For example CGT

				conflicting instructions for wholly owned companies owning property to return CGT gains via s 6-10 and via Tax Consolidation where Head Entity does not own the property.
Revenue provisions cases (Non GAAR)				
		Galland Bamford	Bamford	
GAAR cases				
Purcell War Assets	Purcell War Assets	Peabody		

				No cases at Full High Court level. Unit Trend and Channel at FFC (to be read to investigate whether ownership issues raised) did not raise the issue.
This analysis needs to be continued for: • GST; and • FBT but deadline considerations do not permit.				
But the non-owner must unlike Cornell argue all the grounds in his objection and identify all unsatisfied preconditions to assessability and press all of the issues and all the relevant facts (in essence that she has no facts as she does not own and the owners facts are not before the Court) ruthlessly all the way to the full High Court. In essence the objector must read Cornell judgement and require all references to corporate facts be removed from the judgement. No funding from "Test Case Funding"				
Establishing outer limits of Tax Acts is a matter of logistics and convincing Full High Court who would not know them until made aware of them. Do the provisions that prevent double taxation, such as s 160ZA of ITAA 1936 and s 118-20 of ITAA 1997 oe Double Tax Agreements assist in this role of establishing outer limits?				

PURPOSES OF THIS PAPER

The purpose of this paper is to set out the ideas and more importantly identify the principles of taxation legislation as enacted and judicially interpreted by the Full High Court that allows non-owners to successfully object to assessments etc. where the non-owner faces the liability (even when the liability falls technically on a person that is very close to the non-owner – such as and including discretionary trustee[102] rather than discretionary beneficiaries[103], Head Entities rather than the separate companies that are and continue to be also assessable under s 6-5[104] and s 6-10[105] of ITAA 1997[106] and s 25[107] of ITAA 1936[108], Personal Services Income individuals, employers where the associate of the employer is providing the employee the benefit[109] subject to FBT[110], and beneficiaries/members of superannuation funds where the property is not owned by the person being assessed and Group Representatives[111] that do not make taxable supplies[112]. The MBI[113] decision on the GST legislation directly raises the possibility of contesting assessments when only one precondition of the legislation imposing a liability is not satisfied by the person being assessed (under a charging or aGeneral Anti-Avoidance Regime (GAAR)

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[102] Chief Commissioner of Stamp Duties (NSW) v Buckle [1998] HCA 4; 192 CLR 226; 151 ALR 1; 72 ALJR 243 (23 January 1998)

[103] Chief Commissioner of Stamp Duties (NSW) v Buckle [1998] HCA 4; 192 CLR 226; 151 ALR 1; 72 ALJR 243 (23 January 1998) at para 37
According to Federal Treasury *"Australian households can also use discretionary trusts to save. Discretionary trusts offer tax advantages to groups of individuals who share the income from savings, and the trustee of a discretionary trust usually has complete discretion to choose which beneficiaries receive distributions from the trust in any particular year. This can provide tax benefits if beneficiaries have different levels of income from other sources.*
A common example is a small family business, operated through a discretionary trust. The trustee of the trust can decide each year which family members should receive distributions of income or capital from the business. This typically results in all beneficiaries paying less tax than if all of the business income were taxable in the hands of a single taxpayer business owner or if a corporate structure was used (Box 3.3 on income splitting in Chapter 3)."
"Re:Think Tax discussion paper Better tax system, better Australia" AGPS March 2015 p 62 http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf

[104] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[105] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[106] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[107] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[108] GP International Pipecoaters Pty Ltd v Federal Commissioner of Taxation [1990] HCA 25; (1990) 170 CLR 124 (20 June 1990)

[109] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[110] S 136 definition of *"fringe benefit"* in para (d) of the definition in Fringe Benefits Tax Assessment Act 1986

[111] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[112] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[113] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

provision[114]). The non-owner is likely to find more than one precondition as to liability not being satisfied. By contrast, where there is an identifiable owner at the taxing moment, then the issue become whether the Act preconditions apply to that person and also what timing rules of the tax legislation make the owner of the property so liable and prevent the non-owner being technically liable. McNeil[115] decision infers that the technical specialist provisions (such as Division 6 of Part III of 1936[116] Act) do not need to be satisfied, so long as the Core Provisions[117] are satisfied. Cornell[118] says unanimously that the Federal Parliament has the Constitutional[119] power. Although Parliament has no limitation on its ability to enact tax legislation except the Constitution[120], the Commissioner must administer[121] in accordance with the written enactment that in the authors' opinion requires him to identify:

1. The preconditions to the primary tax liability and determine whether ownership (including beneficial ownership) is an explicit or implicit precondition;
2. Conflicting instructions in the enactments or identify where the preconditions are accumulative in addition to the "specialist[122]" provisions and then within the "Core[123]" or "Central[124]" provisions actually ascertain liability. Therefore,

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[114] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html
GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html
FBT Fringe Benefits Tax Assessment Act 1986 - Sect 67 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s67.html

[115] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[116] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[117] Income Tax Assessment Act 1997 - Sect 2.5

[118] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[119] Commonwealth Of Australia Constitution Act http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[120] Commonwealth of Australia Constitution Act http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/

[121] Income Tax Assessment Act 1997 - Sect 1.7
A New Tax System (Goods And Services Tax Administration) Act 1999 - Schedule 1
Fringe Benefits Tax Assessment Act 1986 - Sect 3

[122] For example "Tax Consolidation" Income Tax Assessment Act 1997 - Sect 700.1

[123] For example Income Tax Assessment Act 1997 - Sect 2.5

[124] A New Tax System (Goods And Services Tax) Act 1999 - Sect 5.1

s 701-1[125] of the Tax Consolidation[126] legislation may enact a "single entity rule", but s 6-5[127] and s 6-10[128] preconditions must also be satisfied where the Head Entity company will only own its own property (and not its subsidiaries') and where s 6-5 and s 6-10[129] (and their predecessor provisions under the 1936[130] and 1915[131] Acts) apply to single entity companies and other separate legal personalities such as Governments[132];

3. where the Australian Taxation Office[133] is administering[134] the Acts in contravention of the enactments. Another way of expressing the maladministration of Taxation Laws is to conclude that operation of the ITAA, GST and FBT cannot be extended to include non-owners[135], where the preconditions of the legislation apply to an identifiable legal or beneficial

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[125] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s701.1.html

[126] Australia has developed complex rules for the taxation of consolidated groups and for the taxation of certain financial arrangements. These regimes were designed, in part, to reduce compliance costs for businesses by better aligning the tax system with how large businesses operate in practice (that is, as groups of companies). The regimes also aimed to ensure that tax outcomes reflect the commercial substance of the financial arrangements that they undertake. However, the consolidation and TOFA rules are contained within a very large and complex set of legislation, rulings and ATO guidance material which create their own uncertainties and complexities. "Re:Think Tax discussion paper Better tax system, better Australia AGPS March 2015. P 97. http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf

The authors express doubt on the correctness of Treasury statements as the Full High Court ha upheld for Corporate Law principles the distinct separate legal existence of each incorporated company (Industrial Equity Ltd v Blackburn [1977] HCA 59; (1977) 137 CLR 567 (15 November 1977)) and the fact case law has always assessed the individual separate legal personality of each company under s 25 of 1936 Act but the issue has not yet been addressed under ss 6-5 and s 6-10 of 1997 Act.

[127] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[128] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[129] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[130] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[131] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[132] The authors assert that the Tax Consolidation on the assessing side of the legislation does no more than assert that the Head Entity and all eligible "wholly owned companies" are treated as a single entity for Income Tax Assessment Act purposes (but not for any other Federal Revenue Raising Act) but has nothing whatsoever to do with overriding the core provision requirements of say s 6-5 and s 6-10 of ITAA 1997, especially where those provisions apply to single entity companies. The actual legislation leaves the whole problem of assessing the Head Entity for income or Capital Gains "in the air".

[133] https://www.ato.gov.au

[134] Income Tax Assessment Act 1997 - Sect 1.7
A New Tax System (Goods And Services Tax Administration) Act 1999 - Schedule 1
Fringe Benefits Tax Assessment Act 1986 - Sect 3

[135] For example St George Custodial Pty Ltd in Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

owner[136] of the property to whom the Act the Core[137] or Central [138]Provisions can apply at the taxing time specifically specified[139] or judicially interpreted by the Full High Court[140].

We are not arguing so much that certain provisions being "struck down" down as a nullity[141], but more that the Act preconditions will apply to owners and not to non-owners. A purposive approach of interpreting legislation will provide meaning to the whole Act (especially to the Core[142] or Central[143] provisions), rather to any specialist provisions that attempt to move the incidence of taxation from a past or existing owner to a possible future[144] or completely non-owner[145] that for any administrative practice that assesses the non-owner. We go further to say for income tax where there is an element of uncertainty in relation to the consideration being assessed, then the correct approach to dealing with the uncertainty is to not assess on an "accruals" basis as to when the debt is created, but defer assessing the "uncertainty" until the "cash is received on a "cash basis"[146] and therefore being income derived.

More on ownership

The ownership test can be:

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[136] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[137] Income Tax Assessment Act 1997 - Sect 2.5

[138] Chapter 2--The basic rules PART 2-1--The Central Provisions of A New Tax System (Goods And Services Tax) Act 1999

[139] For example Income Tax Assessment Act 1997 - Sect 104.10

[140] For example Commissioner of Taxation v Sara Lee Household & Body Care [2000] HCA 35; 201 CLR 520; 172 ALR 346; 74 ALJR 1094 (15 June 2000)

[141] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[142] Income Tax Assessment Act 1997 - Sect 2.5

[143] Chapter 2--The basic rules PART 2-1--The Central Provisions of A New Tax System (Goods And Services Tax) Act 1999

[144] For example Income Tax Assessment Act 1997 - Sect 700.1 in relation to Tax Consolidation where the Head Entity is a "Holding company" but there is still the issue of the Head Company being a Multiple Entry Consolidated Group – see Income Tax Assessment Act 1997 - Sect 719.5

[145] The Personal Services Income individual – see Income Tax Assessment Act 1997 - Sect 84.5

[146] Fullagar J in Ballarat Brewing Co Ltd v Federal Commissioner of Taxation [1951] HCA 35; (1951) 82 CLR 364 (3 July 1951)
Hill, Heerey & Gyles J in Full Federal Court in BHP Billiton Petroleum (Bass Strait) Pty Ltd v Commissioner of Taxation [2002] FCAFC 433 (20 December 2002)

- an original building block of “income tax” as envisaged by William Pitt[147] to finance the United Kingdom’s efforts in the Napoleonic Wars[148];

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[147] Barton A.C.J. in Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917) stated:
In the earlier instance we find (p. 6) that Mr. Pitt in December 1798 spoke of his proposed measure as "a general tax upon all the leading branches of income." At p. 7 he said: "It will be necessary to simplify and to state with precision the different proportions of income arising from land, from trade annuity or professions which shall entitle to deduction." (I have italicized the words "income arising.") At p. 99 Mr. Pitt distinguished between a tax on income, and a tax on capital, and defended his Bill as an instance of the former. It is noticeable also that the publishers of the volume, in the heading to the pages last referred to, used the phrase "Debate in the Commons on the Income Duty Bill."
....
In one sense a tax in respect of the owner's occupation of his own property is not strictly a tax on "income," that is, where we limit "income" to money actually coming in. Neither is occupation of another person's property rent free in return for services strictly income—it is rather a substitution for income. Nor, strictly speaking, is the occupation of one's premises for the purposes of carrying on a business an outgoing (see Commissioners of Taxation v. Antill[13]). But in a broader sense these things are respectively equivalent to income and expenditure. A man who uses his own house for residence is receiving a benefit analogous to rent from letting the property, or interest upon the money value of the property, and calculable in cash. The employee is also receiving a benefit which can be reduced to money terms; and the third man is putting into the business the equivalent of the rent he could get from letting the property or the interest upon the money value of his land. I would refer to Coomber's Case—9 Q.B.D., 17, particularly the judgment of Grove J. at p. 26; 10 Q.B.D., 267, and particularly at p. 277; and 9 App. Cas., 61 (passim)—as strongly supporting in many ways the views I have expressed. Tennant v. Smith[14], particularly at p. 165, cited for the appellant, is not in his favour; it shows that, strictly, mere occupation of a house is not "income," but it also shows that occupation that may be turned into money may reasonably be considered as money. And, if that is so, the argument of invalidity vanishes. Corke v. Fry[15], and particularly Lord Kinnear's judgment, runs in the same direction. Subsequent English finance legislation has continued the same use of the word "income."
It is therefore an established fact that for about 100 years—even allowing for the gap between 1816 and 1842—millions of people in the United Kingdom have been familiar with the use of the word "income" for taxation purposes as comprehending the use of a person's own land where his possession is convertible into money.

[148] “A tax to beat Napoleon” HM Revenue & Customs www.hmrc.gov.uk/history/taxhis1.htm
War and the coming of income tax - UK Parliament www.parliament.uk/about/living-heritage/...lives/taxation/.../incometax/
Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)
Williams J in Perpetual Executors & Trustees Association of Australia Ltd v Federal Commissioner of Taxation [1948] HCA 24; (1948) 77 CLR 1 (22 September 1948)
Rich, Dixon and McTiernan JJ in Egerton-Warburton v Deputy Federal Commissioner of Taxation [1934] HCA 40; (1934) 51 CLR 568 (17 September 1934)

- explicit for CGT Part IIIA 1986[149] legislation, such as enactment of s 160L[150] prior to the CGT rewrite in 1998[151] with any net capital gain being entered directly into the taxpayer's hands[152] rather than Division 6 of Part III[153];
- explicit for changes in ownership for CGT legislation as enacted under ITAA 1997[154] since 1998 under s 104-10[155], but the legislation also attempts in the next section attempts to move forward the moment of acquisition for Hire Purchase property (presumably only for subsequent change in ownership to the hirer and away from the owner/finance company) under s 104-15[156] (and without central provision like s 160L through which all pre 1998 CGT events must pass under Part IIIA[157]);
- expanded for CGT purposes by making the tax also focus on and cover "capital receipts tax", where consideration is received under a contract, but no prior asset that was property that was previously owned, but where a contract was entered into: see s 104-35[158];
- expanded by not always requiring a creation of consideration or change of ownership, by allowing in certain circumstances a capital gain to arise on

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[149] http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[150] Brennan J para 6 of Hepples v Federal Commissioner of Taxation [1991] HCA 39; (1991) 102 ALR 497; (1991) 65 ALJR 650 (3 October 1991); and

Gaudron, McHugh, Gummow and Hayne JJ in Commissioner of Taxation (Cth) v Murry [1998] HCA 42; 193 CLR 605; 155 ALR 67; 72 ALJR 1065 (16 June 1998) at para 44 "The need to segregate the concept of goodwill as property from the sources that give rise to it is important in the field of capital gains covered by Pt IIIA of the Act. This is because capital gains tax is not payable in respect of assets acquired by a natural person before 20 September 1985[73] and disposed of on or after that date."

[151] Tax Law Improvement Act (No. 1) 1998 No. 46, 1998 - Schedule 2

[152] See s 160ZO of Part IIIA: see Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 of 1986 - Sect 19 and SS 160AX, 160AZ and 160AZ enacted by Taxation Laws Amendment Act (No. 5) 1992 No. 224 Of 1992 - Sect 5

[153] French CJ, Gummow, Hayne, Heydon and Crennan JJ assume in Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)
That "*If a "net capital gain", as defined in s 995-1(1) of the Income Tax Assessment Act 1997 (Cth) ("the 1997 Act"), is made it will be taken into account in computing the net income of the trust estate within the meaning of s 95(1) of the 1936 Act as part of the assessable income, which is defined by reference to Div 6 of the 1997 Act [19]. Special rules found in Subdiv 115-C of the 1997 Act then may allow beneficiaries to reduce their liability by their available capital losses and unapplied net capital losses."* Their Honours are not drawn to attention to the wording of 160AX, 160AY, 160AZ, 160A, 160L or s 160ZO or their earlier decision in Commissioner of Taxation (Cth) v Sun Alliance Investments Pty Ltd (in liquidation) [2005] HCA 70; (2005) 225 CLR 488; (2005) 222 ALR 286; (2005) 80 ALJR 202 (17 November 2005).\ where they decided how Part IIA capital gain entered into assessable income of the owner.

[154] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[155] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s104.10.html

[156] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s104.15.html

[157] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[158] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s104.35.html

cessation of Australian residency, but not always under s 104-160[159] and s 104-165[160];

- explicit to implicit with "income" in the definitional sections being defined as either "income from personal exertion/ income derived from personal exertion[161]" or "income from property[162]" under ITAA 1915[163], 1922[164] and 1936[165] (but no such yet definition under ITAA 1977[166]). McNeil[167] case suggests that the s 19[168] and s 6-5(4)[169] expansion to cover property dealt with by the taxpayer is a reference to property or contractual amount that is owned by the taxpayer./ However Cornell[170] decision says that the income from property is interpreted as everything that is not personal exertion income, so encompassing attributable income;
- explicit, such as under A New Tax System (Goods And Services Tax) Act 1999[171];

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[159] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s104.160.html

[160] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s104.165.html

[161] See for example Dixon C.J. and Williams J in Federal Commissioner of Taxation v. Dixon [1952] HCA 65; (1952) 86 CLR 540

[162] See Isaacs J in Blockey v Federal Commissioner of Taxation [1923] HCA 2; (1923) 31 CLR 503 (12 March 1923)

[163] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[164] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1922371922267/

[165] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[166] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[167] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[168] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[169] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[170]Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[171] Ss 9-5, 9-10 (by inclusion of goods and the consideration for services etc.), 9-15, 9-25

- confused, such as in the broad definition of a "benefit[172]" in s 136(1) of Fringe Benefits Tax Assessment Act 1986 ,but where the residual Division to assess "benefits[173]" is preceded by property[174] benefits provided[175].

But there appears to be no explicit Constitutional limit on Parliament attempting to deem one person's income to be another[176]. Such is the role of the identifier provisions that focus on who is liable to pay the tax and the deeming provisions that attempt to attribute income to another must attempt to override such identifying provisions.

What we are focusing on in this paper is that to trigger the relevant tax there is always the precondition of ownership of property (including consideration). The words of legislation that assess property will struggle to assess non-owners, especially when the legislation needs to distinguish between those who are liable and those who are not so liable, especially all those who are not liable. In other words the operation of the ITAA, GST and FBT cannot be extended to include non-owners where there is an identifiable legal or beneficial owner of the property to whom the Act can apply at the taxing time. Where Parliament unilaterally enacts the legislation to impose taxation there is a need for an identifier to whom the legislation applies and to whom it does

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[172] ***"benefit"*** includes any right (including a right in relation to, and an interest in, real or personal property), privilege, service or facility and, without limiting the generality of the foregoing, includes a right, benefit, privilege, service or facility that is, or is to be, provided under:
(a) an arrangement for or in relation to:
(i) the performance of work (including work of a professional nature), whether with or without the provision of property;
(ii) the provision of, or of the use of facilities for, entertainment, recreation or instruction; or
(iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;
(b) a contract of insurance; or
(c) an arrangement for or in relation to the lending of money.

[173] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[174] S40

[175] Ss 40 thru to 46

[176] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

not. At present the expansive[177] use of the word "you[178]" in the ITAA and GST Acts leads to confusion and conflict of statutory instructions especially, if one interprets that the tax liability can only be imposed on a person when all statutory preconditions are satisfied. Such was an issue in MBI[179] decision. What we are saying is that once the owner has been identified by the Act (such as by derivation or source), then the Act cannot successfully focus on another person despite Cornell[180] decision. Cornell decision never reviews whether Cornell satisfies the preconditions to the statutory income. Cornell was decided well before the division between "ordinary" and "statutory" income in ss 6-5 and s 6-10 of ITAA 1997.

Scenario 1

Owner of property	Owner of consideration	Controller of another person who owns the property or the consideration.	Not the Group Representative where such person neither owns nor even controls, but merely represents!

[177] The "you" has been held to encompass the owner of the property or the consideration: Mrs. McNeil and MBI for example. But the you in "A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1" For example also includes a "partnership" and "any other unincorporated association or body of persons", a trust and a * superannuation fund. But where:

(1) a partnership does not exist as a separate legal partnership (except under Scottish law) and where certain partners own certain property and all of the partners have equitable rights and obligations;
(2) The High Court in Bohemians Club refused to assess the company on "income" where the members of the club owned the interests in the unincorporated associations unspent funds;
(3) A trust is not a separate legal personality, but no more than equitable obligations imposed on a trustee who either owns the legal or equitable interests in property to hold such for a purposes or for beneficiaries who may or may not have the current beneficial interest in the property
(4) A superannuation fund trust is not a separate legal personality, but no more than equitable obligations imposed on a superannuation trustee who either owns the legal or equitable interests in property to hold such for the retirement, sickness who may or may not have the current beneficial interest in the property
(5)

[178] Some what similarly defined in
Income Tax Assessment Act 1997 - Sect 4.5
Income Tax Assessment Act 1997 - Sect 960.100
A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1
A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1

[179] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[180] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

Scenario 2

Legal owner	Declaration or imposition of trust	No identifiable beneficial owner - so discretionary or unadministered deceased estate beneficiary is outside the tax system, if ownership is preconditional.	Identifiable beneficial owner owning identifiable property displaces the legal owner in relation to that property	Year-end "check provisions" to "pick up" all legal and beneficial owners.	On change of ownership (either legal or beneficial) there is a new owner (but is the legal owner the relevant owner for taxation purposes?
➔	➔	➔	➔	➔	

So when the non-owner is assessed on property that it does not own, then the instructions will in most situations fail, where the legislation clearly assesses property owned and the owner is also identified as being liable under the legislation. Mere intention of the legislation and forceful maladministration of the relevant Act is not enough. The MBI[181] decision (in contrast to the Qantas[182] and Reliance Carpets[183] decisions in relation to statutory "non-supply[184]" situations) opens the thought for GST that as a matter of statutory construction all the preconditions to the taxation liability must be satisfied by the person being assessed and not necessarily by other group members or related persons. This is because where legislation assesses property, unless it assesses all property owned by a person, it must focus on a subject matter of the tax being imposed. This is in contrast to all the property owned by that person. Not all property is assessed under ITAA, GST and FBT - nor whether it be payroll[185] amounts, land[186], income, good and services supplied or fringe benefits[187]. Fringe Benefits can be interpreted as applying to situations where the employer

[181] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[182] Commissioner of Taxation v Qantas Airways Ltd [2012] HCA 41 (2 October 2012)

[183] Commissioner of Taxation v Reliance Carpet Co Pty Limited [2008] HCA 22 (22 May 2008)

[184] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[185] http://www.payrolltax.gov.au

[186] Waterhouse v Deputy Federal Commissioner of Land Tax, South Australia [1914] HCA 16; (1914) 17 CLR 665 (24 March 1914)

[187] See definition in Fringe Benefits Tax Assessment Act 1986 - Sect 136 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

retains the property or rights, but then if the tax is confined to property characterised as a benefit[188] to the employee, then FBT legislation may not actually imposes any liability on the employer. An historical analysis of Australian Commonwealth and State income and UK[189] income tax enactments leads one to conclude that "income tax" is merely a progressive extension of property taxes[190] by Governments progressively broadening the tax base[191]. Where one then reviews the income tax decision of McNeil[192] and realises that Mrs. McNeil[193] is being assessed on the passive increment to existing property that she owned as registered legal owner and was being assessed on her beneficial increment to that legal property under the Core[194] Provision of s 6-5[195] of ITAA Act 1997 and not the specialist Trust Estate Division 6 of Part III of 1936[196] Act (where the corpus of the trust estate would not assess the increment of Mrs. McNeil's existing property). Then one can conclude that all the provisions that need to be satisfied before a liability commenced to be created under a specialist provision must be satisfied to impose a taxation liability. Specialist provisions may expand the operation of Core Provisions and may not be exclusive codes: see McNeil. This is so unless you can argue that specialist provisions such Division 6 of Part III of ITAA 1936[197] liabilities totally "by-pass[198]" the Core[199] Assessing provisions of:

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[188] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[189] Tennant v. Smith [1916] HCA 62; 22 C.L.R., 367

[190] ITAA: South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)
GST: Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)
FBT: Queensland v Commonwealth [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)

[191] See in Barton A.C.J, Isaacs J. and Gavan Duffy and Rich JJ. in Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[192] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[193] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[194] Income Tax Assessment Act 1997 - Sect 2.5

[195] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[196] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[197] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[198] See A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 29 and following under subheading "Assumptions concerning present entitlement" namely "*The taxation of Trustees and Beneficiaries is principally provided for in Division 6 of Part III*" The Full High Court decision of Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007) is an example of assessing outside Division 6.

[199] Income Tax Assessment Act 1997 - Sect 2.5

- S 25[200] of the 1936[201] Act;
- Ss 6-5[202] and s 6-10[203] of 1997 Act, especially when the "Trust Provisions" of Division 6 is located in Part III of the 1936 Act are needed to aggregate with the beneficiary's and trustee's other income; and
- The Division 6 of 1936 Act[204] liability is not aggregated with any other deductions allowable under s 8-1 etc. of 1997[205] Act and only deductions allowable under Division 6 of the 1936 Act.

In McNeil's[206] case there was no need to satisfy the specialist provisions of "dividends" or trust estates as all the Core[207] Provisions preconditions[208] were satisfied.

The liability (and the GAAR[209] provisions) falls on the identified person who is the "you[210]" or s 177A(1)[211] taxpayer and the authors put forward that where property is being assessed, such person must be a past or present owner and not an expected future possible owner. So if a benefit[212] (widely defined) is still retained by the employer, it is unlikely that the benefit will be yet a benefit to the employee for FBT purposes. Where property is being assessed, it is important for most legislation to advise whose property is to be assessed and in whose hands. Therefore, one would expect "identifiers" for (1) ITAA, (2) GST and (3) FBT purposes such as:

(1) ITAA

- 1997 Act – Income (for tax purposes), source, derived, you[213] for ordinary income;

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[200] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[201] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[202] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[203] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[204] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[205] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[206] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[207] Income Tax Assessment Act 1997 - Sect 2.5

[208] Income Tax Assessment Act 1997 - Sect 6.5

[209] The General Anti Abuse Rules

[210] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[211] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html

[212] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[213] Income Tax Assessment Act 1997 - Sect 6.5

- Amount[214], income, source, you[215] and "some other basis than having an Australian source"[216] for statutory income; and similar words have been used in ITAA 1915, 1922, 1936 Acts.

Scenario 3

The problem – Gateway being assessed					
Property merely owned, but characterised as income	Property merely owned, but identified by Parliament to be included in income i.e. CGT Capital Gains	Beneficial owner displacing the legal owner	Timing or derivation of income	Add after appointed property, such as Division 5 and 6 of Part III of 1936 Act	Non-ownership Group representative

[214] *"amount"* includes a nil amount: Income Tax Assessment Act 1997 - Sect 995.1.

[215] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[216] Income Tax Assessment Act 1997 - Sect 6.10

S 6-5 preconditions satisfied under High Court decision in GP International Pipecoaters and McNeil	Presumably 6-10 satisfied. No High Court decision as yet on s 6-10. Source test for residents presumably satisfied as the source of the income will include source from being the owner of the property. See Harding.	High Court signs off in McNeil that Mrs. McNeil is liable as a beneficial owner not St George Custodial.	When does the income need to be reported or when is income derived? Timing is a major issue see: Sara Lee for CGT; and Arthur Murray re ordinary income.	The High Court has "signed off" in Bamford on interpretation of s 97 of what share of trust income the discretionary beneficiary is required to return, but NOT on the inclusion of the discretionary beneficiary inclusion in the calculation of s 95 trust "net income" or on the assessability of the s 97 income components under s 6-5 for "ordinary income" or s s 6-10 for the statutory income.	The problem with the s 701-1 Head Entity for Tax Consolidation is that when the Head Entity is treated as the "you" in s 6-10, it cannot satisfy the "income" test or the "source test" as it does not own the subsidiary's property. Nothing in the ITAA 1997 actually "switches off" the subsidiary's taxation liability. The words of the Act still apply to the subsidiary, even though s 701-1 attempts to treat the Head Entity as a single entity with the subsidiary or MEC subsidiary.

			These timing or derivation rules occur before "year-end" rules for trustee, beneficiaries and partners.	(specifically CGT capital gains, so that the discretionary beneficiary's non-trust estate income is aggregated with its other assessable. But Div 6 is constitutionally valid: see Cornell income.	The problem with Division 48 GST Groups is that they only own their own property and not the rest of the Groups' property or services supplied. Unit Trend owned nothing relevant whatsoever. Only the owner could satisfy the preconditions to Chapter 2 of GST's preconditions.

(2) GST (Generally)

- You[217], supply[218], consideration, enterprise, registered[219]

(3) FBT

- Employer, employee, provide, benefit[220], year of tax[221]

Therefore, this paper puts forward the proposition that both taxes (also like Fringe Benefits Tax) are a tax on property[222] owned or previously owned by an identified person where the identifiable beneficial owner displaces the legal owner where a co-existing beneficial interest in property is held at the relevant time of the taxing event

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[217] ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[218] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[219] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.5

[220] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[221] see definition of and exclusions from the definition of a "Fringe Benefit" in Fringe Benefits Tax Assessment Act 1986 - Sect 136

[222] ITAA: South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)
GST: Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)
FBT: Queensland v Commonwealth [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)

and where all the preconditions of the assessing provisions to primary tax liability are met by either the legal or beneficial owner[223]. This is so to prevent one person being assessed on another person's property. Although Parliament is not limited to taxing property (such as a tax to raise revenue for Speed Cameras, Departure Tax[224] or a Congestion Tax[225] making all (faulty) drivers/persons liable), if serious revenue needs to be raised by Parliament to fund Governments, then assessing the owner of the property will technically impose and raise the revenue up to the value of all ownership of property in the country or held by citizens, residents or situated within the country. By contrast, assessing the non-owner will always have the problems of identifying which non-owner is to be so liable, when and the criteria needed to assess such non-owner of property as compared with another non-owner and even more importantly the issues arising where a perfectly identifiable owner exists. There are always more non-owns that owners. As authors we are not saying that it is impossible for Parliament to enact legislation to impose tax on one person that is owned by another[226], but there will be real statutory drafting problems/issues when the Act clearly and has judicially interpreted as imposing tax on the identified owner, in the situation where the beneficial owner displaces the legal owneThe examples we raise for consideration are:

(1) Aggregation
(2) Assessing groups
(3) Tax Consolidation
(4) Moving the legal incidence of Taxation

The items for consideration include:

(1) *Aggregation*

223
ITAA
Deputy Federal Commissioner of Taxation v Purcell [1921] HCA 59; (1921) 29 CLR 464 (12 August 1921);
Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007

FBT
Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of
"Provide":
(a) in relation to a benefit--includes allow, confer, give, grant or perform; and
(b) in relation to property--means dispose of (whether by sale, gift, declaration of trust or otherwise):
(i) if the property is a beneficial interest in property but does not include legal ownership--the beneficial interest; or
(ii) in any other case--the legal ownership of the property.

224 http://en.wikipedia.org/wiki/Taxation_in_Australia#Departure_tax

225John Stanley The case for congestion charging in Australia http://theconversation.com/the-case-for-congestion-charging-in-australia-152

226 Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

- The ability of other taxation systems to aggregate husband and wives taxable income[227] to impose liability on a family unit. There would be problems in an Australian society where "de facto" relationships are prevalent to make such politically acceptable, as one needs to identify precisely which persons are to be aggregated and who is primarily liable. One can draft so that the husband is liable for wife's income, but the wife's is not his income. All that Parliament has done is to enact a "husband and wife" taxation system of taxing the family group. The next decision is to decide whether "de facto" couples are to be aggregated, when and on what criteria. Then the next decision is whether the children and "de facto" children and up to what age are also taxed as part of the "family group".

(2) Assessing groups - *Trusts*

- Whether one needs to aggregate trustees and beneficiaries so whole of the equitable interests are disclose to the ATO annually;
- Assessing the discretionary beneficiary on income and CGT gains, when it never owned the proprietary or equitable interest in the property involved and was merely appointed to different property being the net amount of "taxable/ net income" subsequent to the derivation of income or accrual of capital gain[228] by the trustee fwho actually owned the legal or beneficial interest (such as the trustee's lien). Unless the discretionary beneficiary had itself derived income, there is no income to aggregate with the trustee's income for s 95[229] purposes to arrive at the trust estate's "net income" to be allocated between the beneficiary and the trustee. The role of the Trust Division 6 makes sense to review annually who of the beneficial owners and trustees derived the income, but not to allocate tax liability to the person's who had no interest in the property being taxed and who can only be described as "free loaders". But allocation of income to freeloaders is not constitutionally impossible - see Cornell[230];
- Making the trustee liable for taxation as if it were an incorporated person, where the personality of the trust estate is schizophrenically split between the corporate trustee and the unit holder trust estate[231] where the Act has clearly

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[227] For example see: Archer-Shee v. Garland, [1931] A.C. 212

[228] See the facts at paras 4 to 6 in Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[229] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

[230] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[231] S 102L(6) "A reference in the definition of ***person*** in subsection 6(1) to a company shall be read as including a reference to a corporate unit trust or, as the context requires, to the trustee of a corporate unit trust."
S 102T(6) "For the purposes of the application of the definition of ***year of income*** in subsection 6(1), the reference in that definition to a company (except a company in the capacity of a trustee) shall be read as including a reference to a public trading trust or, as the context requires, to the trustee of a public trading trust."

been held to assess the beneficial owner under the primary assessing provisions[232];

Scenario 4

Owners	Beneficial owners	Aggregation of taxpayers quite possible	Reject in this paper
The trustee - but do not forget the beneficial interest in trust property for the trustee's lien	Beneficial owners interests are subject to the trustee's lien	Division 6 Part III of ITAA 1936	Control does not equate with ownership: see Linter Textiles Moving by statutory force the incidence of taxation from one person to another where "ownership" is a precondition to liability.

(3) *Tax consolidation - Legal owners*

- One can draft that Head Entity is liable for wholly owned subsidiary's income, but not make the subsidiary's income to actually be its income[233], if that income also needs to be "derived" and have a "source" to meet s 6-5 and more importantly s 6-10 preconditions;
- Assessing the Head Entity on subsidiary's income when there is no aggregation of the subsidiary's income with the Head Entity's income, but merely a limited statutory reversal of the fiction of the incorporation of the fictitious legal personality of each companies separate legal existence for

[232] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[233] The full High Court looked at the "net" issue of profits (rather than income in IEL v Blackburn;

ITAA 1997 purposes solely, if s 701-1[234] preconditions are met[235]. But we know that the assessing provisions of s 6-5[236] and s 6-10[237] of 1997 Act and its predecessor s 25[238] of 1936[239] Act have (and always been assumed for 1997[240] Act) have actually upheld by the High Court as applying to separate persons and to the separate legal fictitious personality[241];

(4) Legal moving of the incidence of taxation - *Personal Services Income*

- Unlike Tax Consolidations' attempt to treat all wholly owned companies as one single tax entity for ITAA 1997 purposes pursuant to s 701-1[242], PSI attempts in s 84-5[243] to make the income of a PSI entity to be the PSI individual's income where the meaning of the word "income" in relation to the PSI entity (whose income is recognised as owned and NANE[244]) has a different meaning in relation to the PSI individual who does not own the statutory income;
- The lack of specific identifier[245] who is to actually be assessed under the PSI income regime (where neither shareholding, ownership, directorship are utilised as the criteria) when the statute deems the PSI entities income to be

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[234] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s701.1.html

[235] As stated by Re:Think - Australia has developed complex rules for the taxation of consolidated groups and for the taxation of certain financial arrangements. These regimes were designed, in part, to reduce compliance costs for businesses by better aligning the tax system with how large businesses operate in practice (that is, as groups of companies). The regimes also aimed to ensure that tax outcomes reflect the commercial substance of the financial arrangements that they undertake. However, the consolidation and TOFA rules are contained within a very large and complex set of legislation, rulings and ATO guidance material which create their own uncertainties and complexities. "Re:Think Tax discussion paper Better tax system, better Australia AGPS March 2015. P 97. http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf

The authors express doubt on the correctness of Treasury statements as the Full High Court ha upheld for Corporate Law principles the distinct separate legal existence of each incorporated company (Industrial Equity Ltd v Blackburn [1977] HCA 59; (1977) 137 CLR 567 (15 November 1977)) and the fact case law has always assessed the individual separate legal personality of each company under s 25 of 1936 Act but the issue has not yet been addressed under ss 6-5 and s 6-10 of 1997 Act.

[236] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[237] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[238] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[239] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[240] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[241] The last decision the authors can identify is GP International Pipecoaters Pty Ltd v Federal Commissioner of Taxation [1990] HCA 25; (1990) 170 CLR 124 (20 June 1990)

[242] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s701.1.html

[243] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s84.5.html

[244] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s86.30.html

[245] Income Tax Assessment Act 1997 - Sect 84.5(1)

NANE[246] and not taxable. The subject matter of the "income[247]" in the PSI individual is only created by statue and not by any criteria external to the PSI individual in the PSI legislation[248]. The word "income" is given seven different meanings in subsection (1) of s 84-5[249]. That is before the meaning of the "word "income" is determined in subsections (2), (3) and (4) of s 84-5. An issue of what are the identifiers that prevent one person being assessed on another's "income", "supply[250]" and "benefit[251]" where there also attribution and and an issue with GAAR[252] legislation parameters encountered or "tripped over" when PSI legislation does not actually identify who is liable[253] under the PSI legislation;

Addition example of "Legal moving of the incidence of taxation losses - "Trust losses"

The treatment of tax losses where the only persons who can suffer or encounter a tax loss are the trustee's (where the trustee with his lien[254] is likely to be a real fact scenario[255] and also the fixed beneficiary's) who both have have losses encountered a

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[246] Income Tax Assessment Act 1997 - Sect 86.30

[247] Income Tax Assessment Act 1997 - Sect 84.5

[248] See Slater's discussion generally in A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 11 under the heading of "the general law context of fiscal statutes";
Tony Slater is not specifically focusing on PSI. In s 84-5 the authors assert that there are up to 7 different meanings to the word "income" in subsection (1);

[249] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s84.5.html

[250] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[251] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[252] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html

[253] Income Tax Assessment Act 1997 - Sect 84.5

[254] The issue of the trustee's lien keeps being mentioned such as in French CJ at para 38 in and … at para 232 in Korda v Australian Executor Trustees (SA) Limited [2015] HCA 6 (4 March 2015) *"Octavo Investments Pty Ltd v Knight* [1979] HCA 61; (1979) 144 CLR 360 at 367 per Stephen, Mason, Aickin and Wilson JJ; [1979] HCA 61; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 245–246 [47]; [1998] HCA 4; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* [2005] HCA 53; (2005) 224 CLR 98 at 120–121 [50]; [2005] HCA 53; *Trustee Act* 1936 (SA), s 35(2)." at para 232 "[1901] AC 118 at 123-125. See also *Trautwein v Richardson* [1946] ALR 129 at 134-135; *Marginson v Ian Potter & Co* [1976] HCA 35; (1976) 136 CLR 161 at 175-176; [1976] HCA 35; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 244 [42]; [1998] HCA 4; *Jessup v Queensland Housing Commission* [2001] QCA 312; [2002] 2 Qd R 270 at 275 [14]."

[255] A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 33 to 36

loss in the beneficial interest. In addition, where a trustee with a valid lien[256] has a right to recoupment[257] out of trust assets then the trustee has incurred no loss whatsoever unless his liabilities exceed the value of trust property. Where there are no fixed beneficiaries with equitable interests in the property, of the trust estate, then there is no loss encountered by anyone property, where the property is sufficient to cover the trustee's lien[258]. Parliament can then allow such a loss[259] to be subsequently included in the calculation of "net income". We compliment Slater[260] on raising the issue[261], but raise "trust losses" as one area where Court do not need to begin examining the context of the provisions without first determining to whom the Act applies to and whether the trust loss legislation can be applied without first actually

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[256] The issue of the trustee's lien keeps being mentioned such as in French CJ at para 38 in and … at para 232 in Korda v Australian Executor Trustees (SA) Limited [2015] HCA 6 (4 March 2015) *"Octavo Investments Pty Ltd v Knight* [1979] HCA 61; (1979) 144 CLR 360 at 367 per Stephen, Mason, Aickin and Wilson JJ; [1979] HCA 61; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 245–246 [47]; [1998] HCA 4; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* [2005] HCA 53; (2005) 224 CLR 98 at 120–121 [50]; [2005] HCA 53; *Trustee Act* 1936 (SA), s 35(2)." at para 232 "[1901] AC 118 at 123-125. See also *Trautwein v Richardson* [1946] ALR 129 at 134-135; *Marginson v Ian Potter & Co* [1976] HCA 35; (1976) 136 CLR 161 at 175-176; [1976] HCA 35; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 244 [42]; [1998] HCA 4; *Jessup v Queensland Housing Commission* [2001] QCA 312; [2002] 2 Qd R 270 at 275 [14]."

[257] Vacuum Oil Company Pty Ltd v Wiltshire [1945] HCA 37; (1945) 72 CLR 319 (10 December 1945)

[258] The issue of the trustee's lien keeps being mentioned such as in French CJ at para 38 in and … at para 232 in Korda v Australian Executor Trustees (SA) Limited [2015] HCA 6 (4 March 2015) *"Octavo Investments Pty Ltd v Knight* [1979] HCA 61; (1979) 144 CLR 360 at 367 per Stephen, Mason, Aickin and Wilson JJ; [1979] HCA 61; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 245–246 [47]; [1998] HCA 4; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* [2005] HCA 53; (2005) 224 CLR 98 at 120–121 [50]; [2005] HCA 53; *Trustee Act* 1936 (SA), s 35(2)." at para 232 "[1901] AC 118 at 123-125. See also *Trautwein v Richardson* [1946] ALR 129 at 134-135; *Marginson v Ian Potter & Co* [1976] HCA 35; (1976) 136 CLR 161 at 175-176; [1976] HCA 35; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 244 [42]; [1998] HCA 4; *Jessup v Queensland Housing Commission* [2001] QCA 312; [2002] 2 Qd R 270 at 275 [14]."

[259] See s 95 of ITAA 1936 definition of "net income" - ***" net income ",*** in relation to a trust estate, means the total assessable income of the trust estate calculated under this Act as if the trustee were a taxpayer in respect of that income and were a resident, less all allowable deductions, except deductions under Division 393 of the *Income Tax Assessment Act 1997* (Farm management deposits) and **except also, in respect of any beneficiary who has no beneficial interest in the corpus of the trust estate, or in respect of any life tenant, the deductions allowable under Division 36 of the *Income Tax Assessment Act 1997* in respect of such of the tax losses of previous years as are required to be met out of corpus**.

[260] A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015

[261] A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 33 to 36

examining the context of "losses[262]" before of the specific "Trust Loss[263]" legislation. One of the fundamental differences in the papers is that we do not follow Slater's[264] view point that no[265] taxpayer[266] would wish[267] to analyse[268] in this particular trust direction for commercial reasons, but point out that ownership of property is one of the building blocks of the Acts. Trust estates cannot lose money. Trust estates do not exist as separate legal personalities to lose anything. We do not assert that the Trust Loss legislation is unconstitutionally invalid, but it does not apply to:

- the legal owner of the property who actually lost;
- the beneficial owner who actually lost;
- the legal owner of the property who actually was protected from the loss, because the legal owner as trustee had a right of recoupment from trust property and therefore encountered no loss subsequent to recoupment from trust property.

We therefore conclude that there needs to be clear rules where and when the non-owner is assessable and there should be clear rules to prevent double taxation, such as arises:

- when the owner is assessed under the CGT provisions and the PSI individual is assessed under the revenue provisions[269].
- When a person is being assessed under withholding tax provisions and not as a primary tax liability

By contrast, Parliament will quite easily find the words to impose the liability on owners and find also constant judicial support from the Full High Court. Examples of such include:

- South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992);

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[262] Coles Myer Finance Ltd v Federal Commissioner of Taxation (Cth) [1993] HCA 29; (1993) 176 CLR 640 (19 May 1993)

[263] Income Tax Assessment Act 1936 - Schedule 2F

[264] A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015

[265] http://www.afr.com/business/mining/iron-ore/erosion-of-trust-rineharts-fight-over-hope-downs-20120312-j3cen

[266] A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 43.

[267] http://www.smh.com.au/nsw/obeid-wives-hit-with-8-million-tax-bill-20150401-1mczdc.html

[268] http://www.news.com.au/national/nsw-act/moses-trapped-in-icacs-wilderness/story-fndo4bst-1226566256463

[269] Income Tax Assessment Act 1997 - Sect 86.30 attempts such for PSI legislation, but has the problem that where the CGT liability is based on ownership of the property it will never fall to be assessed under the PSI legislation

- Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014); and
- Queensland v Commonwealth [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)

ALBERT EINSTEIN - on comprehension of Income Tax

There is a "fog of tax[270]", unless one identifies whether ownership of property is a base principle to liability

We wish to pay respect to Einstein's observation (other than E=mc2) that is attributed to him as saying that "*The hardest thing in the world to understand is the income*[271]

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[270] Deane J in Hepples v Federal Commissioner of Taxation [1991] HCA 39; (1991) 102 ALR 497; (1991) 65 ALJR 650 (3 October 1991) - "In the light of what has been said above about the settled principles governing the applicability of taxation provisions at least in cases not involving contrived artificialities of form, the Commissioner's submission can only be accepted if the relevant provisions of Pt IIIA of the Act express in "clear" or "plain" or "unambiguous" terms a legislative intent that they should be construed in a way which would (subject to any allowable expenses) include in the assessable income of an employee an amount received from his or her employer as consideration for covenants in restraint of his or her freedom to compete or to use or divulge certain information after the termination of employment. With due respect to those who see the matter differently, it appears to me to be plain to the point of incontrovertibility that the words which the Parliament has seen fit to use cannot properly be said to express such a legislative intent with even tolerable clarity. Indeed, when the provisions of s.160M(6) and s.160M(7) are read in the context of the other provisions of Pt IIIA, it appears to me that the preferable view is that any coherent legislative intent would probably have been to the contrary. I turn to explain why that is so."

[271] See also Box 3.2: Income definitions - "Re:Think Tax discussion paper Better tax system, better Australia" AGPS March 2015 p 49

A number of the concessions and offsets administered through the tax system are targeted using means tests that use an expanded definition of income. There are several different definitions of income used for this purpose in the individuals income tax system.
Each definition seeks to better reflect a person's means by taking account, in some way, of some or all of: voluntary superannuation contributions; fringe benefits; net investment losses (rental and financial); foreign income; and government payments that are exempt from tax.
Currently, none of the income definitions used in the individuals income tax system include the capital gains tax discount, the value of exempt fringe benefits, or tax-free superannuation. As information about these is not collected for tax purposes, it is difficult to determine the extent to which they are used by people at different income levels.
The number of income definitions, and the extent to which they vary, adds significant complexity to the tax system — particularly for people trying to work out their eligibility for multiple concessions or offsets.
A further source of compliance burden arises when income tests are applied based on the income of a couple, which must be administered through the individuals income tax system that is designed using the individual as a unit of taxation.

tax[272]." The authors put up the proposition is that Albert was reportedly observant and his attributed observation was not confined to income tax. This is so because income tax legislation in Australia (and probably elsewhere) is not confined to a single tack of theory, but encompasses a number of concepts that judicially have been "signed off" by the superior court of adjudication[273], as including:

- There are very few Constitutional limits[274] on what the Federal Parliament can draft in relation to taxation;
- Increments (including passive increments) to a person's existing property (whether or not such impair the existing property or not, so long as the increment does not extinguish the existing property rights[275];
- Amounts "earned" by somebody (whether cash or property)[276];
- Amounts arising from conducting a business[277];
- Amount contractually payable to an employee or contractor, but usually only derived when actually received[278];
- Amounts of mere property owned by a person where the amount is identified by Parliament as to be characterised as income and included as income[279];
- The gain component of the increment in the monetary value of mere property that Parliament identifies as to be treated as "income", such as capital gains tax;
- Compensation receipts that are compensation for income amounts;

As authors we have identified from the above Treasurer's the following Treasury definitions of "income" no yet signed off by the Full High Court:

- voluntary superannuation contributions which were previously included in the contracted amount due to the employee, but "dealt with" by employer and employee so as not paid to employee but paid to superannuation trustee. In the authors' opinion with the extended s 6-5(4) definition of income: see McNeil decision;
- fringe benefits. If amounts contractually payable to employee or payable under an award most likely to be "income" under s 6-5(4) (see McNeil) and nil FBT amount;
- capital gains tax is a statutory calculation of mere property is to be included in s 6-10 statutory income, so that the "capital gains tax discount" would exclude the statutorily calculated amount from being so included;
- the value of exempt fringe benefits, if contractually payable to the employee or under an award are likely to be s 6-5 assessable income;

[272] http://www.irs.gov/uac/Tax-Quotes

[273] High Court of Australia http://www.hcourt.gov.au

[274]Commonwealth of Australia Constitution Act - Ss 55 and 114

[275]Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[276] Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965)

[277] Commissioner of Taxation v Stone [2005] HCA 21; (2005) 222 CLR 289; (2005) 215 ALR 61; (2005) 79 ALJR 956 (26 April 2005)

[278] Authors could only find a s 26(e) decision to support proposition namely Smith v Federal Commissioner of Taxation [1987] HCA 48; (1987) 164 CLR 513 (13 October 1987)

[279]Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

- Claims by legislation that another person's income is the designated person's income (even if there is no identifier between the two person's or not);
- Accruals under domestic Australian legislation of another person's income (even if a double taxation agreement allocates taxing rights between jurisdictions) to a person owning property, like owning shares in another company;
- Whether income is to be reported on a "cash" or "accruals" basis.

Albert would have even noticed that when all seven members of the Full High Court reconciled the difference between income derived v CGT capital gains accrued under Part IIIA[280] that Cornell's[281] concept of "attributable income" was not mentioned. Good on you Albert!

The above may not be comprehensive. Parliament's need to "buttress" its ability to raise revenue clashes with any theoretical property basis of the tax. Parliaments ability to draft legislation with conflicting statements excels its ability to claim Supremacy in the Law[282]. For example Section 6 -25(2) of ITAA 1997 states: "*Unless the contrary intention appears, the provisions of this Act (outside this Part) prevail over the rules about ordinary income."* Section 6-10(4)[283] states "*If you are an Australian resident, your assessable income includes your statutory income from all sources, whether in or out of Australia."* Therefore, if the income assessed is a reconstructed or attributable amount that is owned by another, the non-owner according to High Court decisions[284] will not own the property and even if the amount was income[285] it would fail the "source" test, if the source needs to be third party or externally based and not a source merely arising from meeting the requirements of the legislation itself. No wonder one future chief justice, but then a member of the High Court member asked

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[280] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[281] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[282] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[283] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[284] See a divided High Court in Esquire Nominees Ltd v Federal Commissioner of Taxation [1973] HCA 67; (1973) 129 CLR 177 (24 September 1973)

[285] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

for legislation with clear[286] instructions to assess.

Isaac's J at the very end of his judgement in Harding[287] explains the gaunlet that the objector has, as the onus is on him clearly establishing the contrary.

The problem of lack of identified theory and overreach of legislation is not confined to income tax with GST applying to "non-supplies" and Fringe Benefits[288] being taxed to employer, when it did not own the property in question[289].

Slater QC[290] poses an additional issue, which Albert probably did not think about.

> "*Thes(r)e are cases where the departure from observable reality, or from the fundamental precepts of common law or established statutory frameworks, is specifically enacted by a statute directed to that end. In such a case the court must deal with the altered reality resulting from the enactment of the new statute. More difficult is the case where the new statute is directed to another end and proceeds upon an assumption contrary to existing enactments or to the common law. How should the courts deal with the misconception which is the premise of the new statute? Should they take the misconception as an accepted premise in their reasoning, disregarding the inconsistency with the general law? Or should they hold the new statute simply to have failed to achieved its inferred objective?"*

Then Slater QC poses three possible solutions[291]. We suggest that the High Court

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286 Deane J in Hepples v Federal Commissioner of Taxation [1991] HCA 39; (1991) 102 ALR 497;1991) 65 ALJR 650 (3 October 1991) at his para 3 "*In circumstances where the heavy burden of legal costs is likely to constitute an insurmountable obstacle to the challenge by the average taxpayer of an assessment in the courts and where successive administrations have allowed the Act to become a legislative jungle in which even the non-specialist lawyer and accountant are likely to lose their way in the search to identify the provisions relevant to a particular case, the least that such a taxpayer is entitled to demand of government is that, once the relevant provisions are finally identified, a legislative intent to impose a tax upon him or her in respect of a commonplace transaction will be expressed in clear words. So to say is not, of course, to deny that complicated and even obscure taxation provisions may be necessary either to deal with technical situations or to prevent the avoidance of tax by artificiality of form or other device. However, it could not realistically be suggested that there would be any difficulty at all in plainly expressing a legislative intent that an amount received by an employee as consideration for a promise to refrain from competing with his or her employer or divulging or using the employer's information after the termination of the employment should be included in the employee's assessable income for income tax purposes."*

287 Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

288 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

289 see s 136 defintion of a "fringe benefit". http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

290 A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 10-11

291 A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 11 and following

precedent requires the whole of the Act (say for ITAA 1936 and 1997[292]) to read together[293] and their "prevention of double tax provisions[294]" to ascertain its core preconditions as to liability, rather attempting to make the specialist provisions operable or more importantly override the "Core" or "General Provisions"[295].

Albert would have chuckled

Albert would have chuckled when he realised that he had judicially misidentified the fundamental issue according to Isaacs J who in Harding[296] stated:

> "But, further, if I were not so clearly satisfied I would still be prepared to hold that the appellant had not satisfied the onus on him of clearly establishing the contrary, so as to invalidate the Act—in other words, he has not clearly demonstrated that Parliament could not reasonably have considered the word "income" as sufficiently comprehensive; and I should have held accordingly that the objection equally failed.

Albert does not to need understand what is "income tax", but merely prove to the highest Court in the Land that the Federal Parliament does not understand. But for an ECM2 person such is not asking too much.

Everyone is telling "Porkies[297]"

Albert would soon realise where money and property exist, even the Federal Government is telling "Porkies" as to what is encompassed by the word "income".. A simple recent example would be Australian Federal Treasury[298] in March 2015[299] advising that:

> *"For example, rather than a general income tax that captures all realised gains and then carves out intended exceptions and concessions, Australia's*

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[292] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[293] Project Blue Sky v ABA [1998] HCA 28; 194 CLR 355; 153 ALR 490; 72 ALJR 841 (28 April 1998)

[294] Such as:
Statutory income takes precedence over "ordinary income" Income Tax Assessment Act 1997 - Sect 6.25 namely in subsection (2) "*Unless the contrary intention appears, the provisions of this Act (outside this Part) prevail over the rules about * ordinary income.*"
S 160ZA(4) of the 1936 Act;
Income Tax Assessment Act 1997 - Sect 118.20

[295] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[296] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[297] http://www.urbandictionary.com/define.php?term=Porky

[298] http://bettertax.gov.au/files/2015/03/10_Complexity-and-admin-of-tax-system.pdf

[299] http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf p 167

income tax law is based on a narrower concept of income. This was construed by the courts as embracing the Court of Chancery trust law understanding of 'income of a trust[300]', to which income beneficiaries are entitled, and distinguished from the 'capital of a trust', to which any 'remainderman' is entitled. The persistence of distinctions like this, as well as the additional complexity it generates, illustrates the difficulty of a system designed for previous generations but operating in a modern context."

We know that this is a Treasury "Porkie[301]" as:

- From the first Federal Income tax decision[302] that Full High Court was not following a narrower concept of income" and have never done so. The English Court of Chancery[303] trust law understanding of 'income of a trust' may have influenced one head of "What is trust income", but even that asserted head of income is uncertain. But income includes "attributed amounts" and merely owned property when designated by Parliament;
- The second[304] income decision before the Full High Court raised the issue (which was answered in the affirmative) whether mere property (not earned and not an increment to existing property) identified by Parliament in the Income Tax Assessment Act could itself as mere owned property be "income" and also income derived for the purposes of the 1915[305] Act. The Chief Justice identified the provision (s 14(e)[306] before the Court as:

> *The income of any person shall include" (inter alia) "five per centrum of the capital value of land and improvements thereon owned and used or used rent free by the taxpayer for the purpose of residence or enjoyment and not for the purpose of profit or gain."*
>
> Barton A.C.J. identified that "*In England, the income tax laws extend back to the year 1799. In that year Schedule A to the Act 39 Geo. III. c. 22 substituted a new schedule for Schedule A to C 13, which imposed the income tax. In that schedule we find the following expressions:—*
>
> *1."Income arising from lands, tenements, and hereditaments.—General*

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[300] See also A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 36 Re Professor Parsons

[301] http://www.oxforddictionaries.com/definition/english/porky

[302] Foster Brewing Co Ltd v Federal Commissioner of Taxation [1916] HCA 87; (1916) 22 CLR 288 (25 October 1916)
Federal Commissioner of Taxation v Foster Brewing Co Ltd [1917] HCA 7; (1917) 22 CLR 545 (15 March 1917)

[303] http://en.wikipedia.org/wiki/Court_of_Chancery

[304] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[305] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[306] Income Tax Assessment Act 1915 (No. 34, 1915) http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

Rule... Annual value of lands" is "to be understood as signifying the aggregate amount of the rent at which the same are let, or if not let, are worth to be let by the year" &c.

- The full bench of the High Court needed to distinguish between "income' and capital gains in South Australia v Commonwealth[307] and review the major decision on what constitutes income derived under the Federal ITAA since 1915[308] and their analysis (by five of seven members) is a total rejection of Treasury asserted incompetence. The Full High Court have already executed the "heavy lifting";
- Treasury have not obviously been reading the Full High Court decisions since 1915 including Bohemian[309], Harding[310] or Cornell[311].

The ITAA 1997[312] still assesses/exempts mere property, such as CGT gains and superannuation pension amounts held in trust for the beneficiary, where all of the trust funds are held exclusively for the beneficiary. We say Treasury like everyone else even Treasury tell "Porkies", where money is involved and where fundamental research as to what an enactment is assessing has not been executed. But the Commissioner has never executed such and made it public.

Albert may like more tax quotes attributed to him. We assert that all three taxes have a theoretical base that is ownership of property/consideration and then each Act focuses on the taxpayers who satisfy the preconditions of "income", "supply[313]" and "benefit[314]".

Expansion of the tax Base

We assert that tax Act based on ownership can expand to assess current owners on future property when acquired, but only when it becomes so owned. The Act also can

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[307] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[308] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[309] Bohemians Club v Acting Federal Commissioner of Taxation [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918)

[310] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[311]Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[312] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[313] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[314] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

expand on its "ownership" concepts such as s 19[315] of the 1936[316] Act which stated: *" Income or money shall be deemed to have been derived by a person although it is not actually paid over to him but is reinvested, accumulated, capitalized, carried to any reserve, sinking fund or insurance fund however designated, or otherwise dealt with on his behalf or as he directs.[317]"*

We as authors can safely conclude that Income Tax, GST and FBT are taxes on property owned by a person by identifying all of the preconditions to liability will be satisfied by owners and not by non-owners (and which non-owner), especially where there is an identifiable owner to whom the preconditions apply to asthe owner. But can the non-owner be assessed with primary liability? We focus on the full High Court, as they appear to be the only body that creates judicial law and are willing on extremely rare occasions to say that Parliament has been misinterpreted or that the Federal Government's powers are limited to the enacted powers. But the non-owner must force the issue by identifying in the objection which of the preconditions are not satisfied and having the finance to press the issue and convince the full High Court that they are as objectors are correct. There is no Guardian Angel[318] helping the non-owner (and the Guardian Angel needs to identify which non-owner).

The propositions of this paper are that:

- Income Tax, Goods and Services Tax and Fringe Benefits Tax as progressively enacted Federally in Australia since 1915[319] are property taxes[320] and one

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315 http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

316 http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

317 Brennan CJ in Commissioner of Taxation v Orica Ltd [1998] HCA 33; 194 CLR 500; 154 ALR 1; 72 ALJR 969 (12 May 1998) interpreted s 19 in the following manner:
However, I would not hold that s 19 of the Act has application to payments made by MMBW in the 1987 income year. That section [38] reads:
" Income or money shall be deemed to have been derived by a person although it is not actually paid over to him but is reinvested, accumulated, capitalized, carried to any reserve, sinking fund or insurance fund however designated, or otherwise dealt with on his behalf or as he directs ."
"*To attract the operation of that section, the "income or money" must, I think, be income or money that the taxpayer would have been entitled to receive but for the fact that it was dealt with [39]. In the present case, ICI was not entitled to receive any payment of money from MMBW. And it did not "deal with" the benefit which it obtained by having the debentures redeemed. It was entitled only to have MMBW pay money to the Trustee or the debenture holders. However, it is not necessary to define the operation of s 19 to determine this case."*

318 http://www.google.com.hk/imgres?imgurl=http://upload.wikimedia.org/wikipedia/commons/4/4e/Guardian_Angel_1900.jpg&imgrefurl=http://en.wikipedia.org/wiki/Guardian_angel&h=1800&w=1215&tbnid=oO90hNP04r3kIM:&zoom=1&tbnh=160&tbnw=107&usg=__2Ovs0nLNPGCXmuJqxw_szUAly9c=&docid=HdhDNOYCaEDRrM&itg=1

319 http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

320 ITAA: South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)
GST: Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)
FBT: Queensland v Commonwealth [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)

needs to identify who is the owner to identify who is the you[321]. Such will align with legal and equitable ownership. The authors assert that the owner will invariably triumph over non-owner, except where the legislation is unambiguous in favour of the non-owner[322]/taxpayer. The proposition of this paper is that the legislation actually only assesses the owner. Can the non-owner successfully object, such as in Purcell[323], Peabody[324], and Waterhouse[325] or unsuccessfully such as Cornell[326]? If one does not conclude that these taxes are "property taxes[327]" or assessing "gains" of a person then what are the taxes? Who and why do you assess them? Where one tries to follow tax legislation expansion applying to persons who are not the owner of the relevant property, one encounters many issues as set out by Slater[328]. Slater strongly hints at the terrible rift in Income Tax Assessment Act since 1915[329]

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[321] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html
"you " : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[322] See the confusion as to is eligible to be an "entity" in say Income Tax Assessment Act 1997 - Sect 960.100. Some entities do not even exist! See also A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 pp 26 to 28

[323] Deputy Federal Commissioner of Taxation v Purcell [1921] HCA 59; (1921) 29 CLR 464 (12 August 1921);

[324] Federal Commissioner of Taxation v Peabody [1994] HCA 43; (1994) 181 CLR 359; (1994) 123 ALR 451; (1994) 28 ATR 344; (1994) 94 ATC 4663 (28 September 1994) at Austlii paras 24, 30, 33 and 35.

[325] Waterhouse v Deputy Federal Commissioner of Land Tax, South Australia [1914] HCA 16; (1914) 17 CLR 665 (24 March 1914)

[326][326] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[327] ITAA: South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)
GST: Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)
FBT: Queensland v Commonwealth [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)

[328] A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 21 and following. Tony illustrates the issues using Limited Partnerships whilst Tax Head Entities under s 701-1 single entity rule raise more commonly encountered issues by most practitioners.

[329] A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 32 to 37.

especially in relation to the beneficial interest of the trustee for his valid lien[330] over trust property that is constantly upheld and referred to[331] by the Full High Court (of Equity Law[332]). We as authors state the rift occurs because the Act is tracking owners and beneficial owners and the trustee with its valid lien[333] is a beneficial owner. The tax legislation has created tax fictions of a personalities (such as "trust estates") that do not own the relevant property being assessed;

- The identifiable beneficial owner will displace the legal owner, where the legislation allows the beneficial owner to satisfy the other preconditions of being assessed to primary tax liability. This occurs because where an Act focuses on property then both the legal owner or ultimate beneficial owner (in a chain of beneficial owners, such as occurs with master trusts[334]) can qualify as the owner. Where there is a trustee and no current identifiable beneficial owner, then there can only be the legal owner subject to equitable obligations but no aggregate and progressively taxation of income with higher tax rates the beneficially owned property. This may well explain the role of s101 where discretionary beneficiaries are subsequently appointed to "net income" share amounts which are then deemed to be presently entitled. Where there is a

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[330] The issue of the trustee's lien keeps being mentioned such as in French CJ at para 38 in and … at para 232 in Korda v Australian Executor Trustees (SA) Limited [2015] HCA 6 (4 March 2015) *"Octavo Investments Pty Ltd v Knight* [1979] HCA 61; (1979) 144 CLR 360 at 367 per Stephen, Mason, Aickin and Wilson JJ; [1979] HCA 61; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 245–246 [47]; [1998] HCA 4; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* [2005] HCA 53; (2005) 224 CLR 98 at 120–121 [50]; [2005] HCA 53; *Trustee Act* 1936 (SA), s 35(2)." at para 232 "[1901] AC 118 at 123-125. See also *Trautwein v Richardson* [1946] ALR 129 at 134-135; *Marginson v Ian Potter & Co* [1976] HCA 35; (1976) 136 CLR 161 at 175-176; [1976] HCA 35; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 244 [42]; [1998] HCA 4; *Jessup v Queensland Housing Commission* [2001] QCA 312; [2002] 2 Qd R 270 at 275 [14]."

[331] See as the issue of the trustee's lien keeps being mentioned such as in French CJ at para 38 in and … at para 232 in Korda v Australian Executor Trustees (SA) Limited [2015] HCA 6 (4 March 2015) *"Octavo Investments Pty Ltd v Knight* [1979] HCA 61; (1979) 144 CLR 360 at 367 per Stephen, Mason, Aickin and Wilson JJ; [1979] HCA 61; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 245–246 [47]; [1998] HCA 4; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* [2005] HCA 53; (2005) 224 CLR 98 at 120–121 [50]; [2005] HCA 53; *Trustee Act* 1936 (SA), s 35(2)." at para 232 "[1901] AC 118 at 123-125. See also *Trautwein v Richardson* [1946] ALR 129 at 134-135; *Marginson v Ian Potter & Co* [1976] HCA 35; (1976) 136 CLR 161 at 175-176; [1976] HCA 35; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 244 [42]; [1998] HCA 4; *Jessup v Queensland Housing Commission* [2001] QCA 312; [2002] 2 Qd R 270 at 275 [14]."

[332] http://en.wikipedia.org/wiki/Equity_(law)

[333] The issue of the trustee's lien keeps being mentioned such as in French CJ at para 38 in and … at para 232 in Korda v Australian Executor Trustees (SA) Limited [2015] HCA 6 (4 March 2015) *"Octavo Investments Pty Ltd v Knight* [1979] HCA 61; (1979) 144 CLR 360 at 367 per Stephen, Mason, Aickin and Wilson JJ; [1979] HCA 61; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 245–246 [47]; [1998] HCA 4; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* [2005] HCA 53; (2005) 224 CLR 98 at 120–121 [50]; [2005] HCA 53; *Trustee Act* 1936 (SA), s 35(2)." at para 232 "[1901] AC 118 at 123-125. See also *Trautwein v Richardson* [1946] ALR 129 at 134-135; *Marginson v Ian Potter & Co* [1976] HCA 35; (1976) 136 CLR 161 at 175-176; [1976] HCA 35; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 244 [42]; [1998] HCA 4; *Jessup v Queensland Housing Commission* [2001] QCA 312; [2002] 2 Qd R 270 at 275 [14]."

[334] http://www.oasisasset.com.au/Wrapsvsmastertrusts

trustee and no identifiable beneficial owner who could be considered to be the relevant owner. Therefore, under the GST legislation the beneficial owner would need to be conducting an "enterprise" to be liable for supplying taxable supplies[335], but most business transactions merely pass ownership of legal title that are not subject to equitable obligations. Rarely in practice is the purchaser in the business/enterprise context be willing to acquire the mere beneficial interest;

- The trustee with its lien beneficially[336] owns the property and the beneficiary is not absolutely entitled[337] to the property held by the trustee. Therefore, the trustee can beneficially derive the income. There is an unresolved issue in relation to the expansion of the tax base. But the authors know of no High Court ITAA decision directly on the issue. ITAA case law currently assume that the beneficiary is assessable on the property, after the trustee's lien is taken into account. This issue is well highlighted by Slater[338];
- The tax legislation may attempt as part of the expansion of the tax base to anticipate changes of ownership before ownership changes/vests, such as making the taxpayer who is absolutely entitled[339] to be the beneficial owner prior to his attaining the beneficial interest;
- For the person to be liable the Core[340] (if any) or Assessing Provisions[341] need to be satisfied and not just the Specialist Provisions where the Specialist Provisions "feed into" the Core[342] Provisions – such as to aggregate various amounts of income and to allow deductions to reduce the assessable income[343]. The proposition is that the tests are accumulative and where one precondition is missing, then liability does not fall on that person[344]. For example the ITAA does not assess all income. For example ss 6-5[345] and s

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[335] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[336] Octavo Investments Pty Ltd v Knight [1979] HCA 61; (1979) 144 CLR 360 (27 November 1979) Paras 48 to 51 of joint judgement of Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ of Chief Commissioner of Stamp Duties (NSW) v Buckle [1998] HCA 4; 192 CLR 226; 151 ALR 1; 72 ALJR 243 (23 January 1998)

[337] Income Tax Assessment Act 1997 - Sect 106.50 and s 160V of 1936 Act

[338] A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 pp 32 and following

[339] Income Tax Assessment Act 1997 - Sect 106.50 and s 160V of 1936 Act

[340] Income Tax Assessment Act 1997 - Sect 2.5

[341] For example see Guide to Division 6 - http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s5.15.html

[342] Income Tax Assessment Act 1997 - Sect 2.5

[343] Therefore s 6-5 and s 6-10 need t o apply to all income from trust estates or otherwise. Division 6 is not a code for assessing trustee/beneficiary/trust income.

[344] Para 46 of Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[345] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

6-10[346] only assess the ordinary income and statutory income of residents of Australia, if that income has a "source"[347] and the ordinary income is derived. We raise the problem of how words of the legislation can be drafted to apply to non-owners, especially in relation to this Act that clearly state the owner is so assessable and there is an identifiable qualifying owner in addition to the contemplated non-owner, especially when the legislation operating in relation to the tax fictitious person (say Limited Partnership[348]) or extended operation of a person (such as Head Entity of a Tax Consolidated Group[349]). The Limited Partnership and Tax Head Entity are attempting to operate whilst the Act still operates in relation to:

  - the legal personality of a partner; or
  - a wholly owned subsidiary company.

  The Act can still continue to operate in relation to the facts and property owned under common and equity law by the partner or wholly owned company. This appears to be the consequence of McNeil[350];

- The Taxation Acts and their expansion of the tax base need to be interpreted on a holistic basis with any impacting legislation such as the existing provisions of the Income Tax Assessment Act 1936 and its ownership based "taxpayer[351]" based provisions, Double Tax Agreement (DTA[352]) being taken into account (where applicable). Therefore, a Double Taxation treaty needs to be interpreted to determine who is liable under domestic legislation and who is entitled to relief under the DTA legislation (as compared with unilateral relief under domestic tax legislation) in an environment where one country recognises equitable interest and the other may not and whether tax calculations that do not represent property owned by that person (such as "Assessable Income" of a Head Entity or a MEC[353] subsidiary that was not actually owned/controlled by the HE or MEC[354]), Therefore, a DTA[355] would

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[346] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[347] For a contrasting view see Lindgren J judgment at paragraph 52 of Fowler v Commissioner of Taxation [2008] FCA 528 (21 April 2008) where he identified the source with the PSI company whose facts, income and NANE income were not before the Court. Only the liability of the PSI individual was being challenged;

[348] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s94h.html

[349] see s 701-1 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s701.1.html

[350] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[351] "*Taxpayer" in s 6(1)* of Income Tax Assessment Act 1936 "means a person deriving income or deriving profits or gains of a capital nature". The definition of taxpayer was amended by the introduction of the CGT legislation by Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 of 1986 - Sect 3

[352] http://www.treasury.gov.au/Policy-Topics/Taxation/Tax-Treaties/HTML/Income-Tax-Treaties

[353] Income Tax Assessment Act 1997 - Sect 703.55

[354] Industrial Equity Ltd v Blackburn [1977] HCA 59; (1977) 137 CLR 567 (15 November 1977)

[355] http://www.treasury.gov.au/Policy-Topics/Taxation/Tax-Treaties/HTML/Income-Tax-Treaties

struggle with a PSI reconstruction of the PSI income attributed to the PSI individual whilst the Capital Gain property is still owned owned by the PSI entity;

- Taxation Acts can be quite expansionist and robust to not only cover their subject matter, but expand from an income tax to include:
    - Capital Gains Tax assessed as "income";
    - Capital Receipts tax assessed as a Capital Gain/income; and
    - executory contracts "supplies" being assessed as supplies and "non-supplies" deemed to be statutory supplies;
- The Federal Parliament's power to tax and ability to expand the tax base is limited only by the Constitution[356] and by the words of precondition of the enacted legislation imposing the liability;
- Somebody needs to academically review all the Full High Court decisions since the setting up of that Court to review what they (especially the seven member decisions) are saying in relation to:
    - What is income and more importantly what actually is not income[357]. The High Court appears to be focusing more under 1997[358] Act on the "word" income[359] rather than "ordinary income" and not on "statutory" income[360]. For example, we know that not all receipts by a taxpayer are assessable as income even where the businessperson is conducting a business in relation to that receipt, now wholly owns such receipt but has not yet earned the amount to have it characterised as income derived. We know that the ITAA assessed income from property since

[356] For Power see Commonwealth of Australia Constitution Act - SECT 51(ii) Legislative powers of the Parliament http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s51.html

[357] For example in the 1929 decision Thomson v Deputy Federal Commissioner of Taxation [1929] HCA 18; (1929) 43 CLR 360 (6 September 1929) income did not include an increment to capital value Knox C.J., Gavan Duffy, Rich and Dixon JJ. decided that "*We think the transaction by reason of which the sum of £1,440 was received by the appellant was neither more nor less than the conversion into money of part of her capital, and therefore was not income*."

[358] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[359] Commissioner of Taxation v Stone [2005] HCA 21; (2005) 222 CLR 289; (2005) 215 ALR 61; (2005) 79 ALJR 956 (26 April 2005); Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[360] An exception would be in Commissioner of Taxation v Anstis [2010] HCA 40 (11 November 2010)

1915[361]. So what meaning do you give the word "income", "ordinary" and "statutory" income. Does it mean "in come" or "come in";

- the track of thought that mere ownership of property designated by Parliament to be income is included as assessable income and what this track of thought does to assessing "non-owners";
- What is a "supply[362]" for GST purposes – namely does the taxpayer need to own the goods before supply and whether it needs to own or be entitled to the consideration (especially for the "services");
- Whether the "benefit[363]" in Fringe Benefits Tax needs to be owned or previously owned by the employer. Does the property need to be transferred to the employer or is s 6-5(4)[364] of ITAA 1997 "dealt with" property so included in the definition of a benefit[365]. How does one

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[361] **1915 Act** Knox C.J. in Thomas v Federal Commissioner of Taxation [1923] HCA 43; (1923) 33 CLR 256 (21 September 1923) stated: "*The questions for the decision of this Court are (1) whether on the facts stated the value of the said 7,000 shares allotted and issued to the appellant is assessable to income tax under the Income Tax Act 1915-1918; (2) if so, whether the said value is assessable as "income from personal exertion" or as "income from property.*"
By sec. 10 of the *Income Tax Assessment Act 1915-1918* income tax is chargeable on the taxable income derived directly or indirectly by any taxpayer from sources within Australia. The Act contains no definition of "income," but by sec. 3 "income from personal exertion" is defined as meaning "income derived from sources in Australia consisting of earnings, salary, wages, commission, fees, bonuses, pensions, superannuation allowances, retiring allowances and gratuities not paid in a lump sum, allowances received in the capacity of employee, and the proceeds of any business carried on by the taxpayer either alone or as a partner with any other person, and any income from any property where the income forms part of the emoluments of any office or employment of profit held by the individual" and "income derived from property" as meaning "all income derived from sources in Australia and not derived from personal exertion."
1922 Act - Starke J. stated in Victoria Park Racing & Recreation Grounds Co Ltd v Federal Commissioner of Taxation [1934] HCA 65; (1934) 52 CLR 9 (20 December 1934) "Admittedly, apart from this section, the income in question here would have fallen within the description of income from personal exertion, for it is the proceeds of a business carried on by the appellant. (See *Income Tax Assessment Act 1922-1934*, sec. 4, "Income from personal exertion.") But the object of sec. 5 of the Act No. 24 of 1931 is to enlarge the definition of "income from property" which under the *Income Tax Assessment Act 1922-1934*, sec. 4, means "all income not derived from personal exertion." "Income from personal exertion" does not include interest, unless the taxpayer's principal business consists of lending money, and does not include rents and dividends (*Income Tax Assessment Act 1922-1934*, sec. 4)."
1930 Act - Starke J. in Texas Company (Australasia) Ltd v Federal Commissioner of Taxation [1940] HCA 9; (1940) 63 CLR 382 (8 April 1940) "Further tax on income from property or special property tax, as it is commonly called. The tax was originally imposed in 1930 by the Act 1930, No. 61, sec. 7A, and may be found substantially re-enacted in the Act 1934 No. 31, sec. 5—"In addition to any income tax payable under the preceding provisions of this Act, there shall be payable upon the taxable income derived by any person—(a) from property; (b) by way of interest, dividends, rents or royalties, whether derived from personal exertion or from property; and (c) in the course of carrying on a business, where the income is of such a class that, if derived otherwise than in the course of carrying on a business, it would be income from property, a further income tax of" a certain percentage "of that taxable income."

[362] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[363] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[364] Income Tax Assessment Act 1997 - Sect 6.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[365] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

create a benefit for the employee, if one does not own or previously own the non-property or right?

- Whether the Double Tax Treaties[366] only apply to the owner of the property or consideration and they do not allocate taxation liabilities/ powers and credit relief to a "non-owner" (such as discretionary beneficiaries prior to appointment) of any particular country;
- Who is liable as a "you[367]", taxpayer or "entity" and where that person must actually own the property at the taxing time to be liable;
- When the liability arises especially in relation to group calculations or year end calculations of liability[368], so that actual owners can be compared as to whether the owners falls within the words of the legislation as compared with "introduced" non-owners such as discretionary beneficiaries;
- Whether the General Anti-Avoidance provisions[369] actually only apply to the actually liable "you[370]", taxpayer or "entity[371]" and where that person must actually own the property at the taxing time (or even be previously be the owner as contrasted to being an expected future owner) to be liable and not to a Head Entity or Group

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[366] http://www.treasury.gov.au/Policy-Topics/Taxation/Tax-Treaties/HTML/Income-Tax-Treaties

[367] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[368] Commissioner of Taxation v Sara Lee Household & Body Care [2000] HCA 35; 201 CLR 520; 172 ALR 346; 74 ALJR 1094 (15 June 2000);
1936 Act - McTiernan J in Bell v Federal Commissioner of Taxation [1953] HCA 99; (1953) 87 CLR 548 (8 May 1953) The sum did not fall within any category of "income from personal exertion" which is defined in s. 6(1) of the Act, and it was therefore within the definition, which is in this sub-section, of "income from property ".
1997 Act – No definition of either "income from personal exertion" or "income from property ", but the majority in Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007) (being Gummow ACJ, Hayne, Heydon And Crennan JJ.) decided "In particular, on the listing date, 19 February 2001, when the taxpayer's sell-back rights were granted by SGL to Custodial "for the absolute benefit" of the taxpayer, as stated in the Sell Back Right Deed Poll, there was a derivation of income by her represented by the market value of her rights of $514."

[369] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html
GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html
FBT Fringe Benefits Tax Assessment Act 1986 - Sect 67 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s67.html

[370] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[371] See s 950-100 of ITAA 1997 and A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 pp 26 to 28

Representative[372] that merely reported as required by statute the income or supply[373];
- any decisions demonstrating the bread and limitations of the Federal Parliament under the Constitution;
- Decisions where the High Court say that the assessment can be easily defeated[374] and when the High Court advises that one is only dealing with future property[375]!

We are raising not only liability issues, but focusing on timing issues when the liability is created and contrasting such with year-end calculations that have been decided to give rise to taxation liabilities which are different to liabilities calculated under the timing rules as to who was the owner at the time of or the relevant time of the taxation event[376].

OBJECTIVES

All tax legislation has objectives in addition to merely raising revenue. Each tax system attempts to focus on raising money in a particular way to finance Government.

The objective of this paper is to allow:

- The assessment or self-assessment to correspond to the facts (both legal and equitable) and argue that tax legislation will struggle to alter/adjust the facts to achieve its purposes and alert taxpayers as to when the facts do not satisfy the preconditions to primary tax liability. We recognise the unanimous quote in Cornell of six High Court Justices[377]. The objective of the paper is to assist

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[372] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[373] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[374] Gleeson CJ, Gummow And Crennan JJ in Raftland Pty Ltd as trustee of the Raftland Trust v Commissioner of Taxation [2008] HCA 21 (22 May 2008) stated: "*A wider and less carefully directed argument might have threatened the assessments themselves.*"

[375] Shepherd v Federal Commissioner of Taxation [1965] HCA 70; (1965) 113 CLR 385 (17 December 1965)
Norman v Federal Commissioner of Taxation [1963] HCA 21; (1963) 109 CLR 9 (25 July 1963)

[376] Federal Commissioner of Taxation v Galland [1986] HCA 83; (1986) 162 CLR 408 (16 December 1986)

[377] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920) "Question 2 of the special case is as follows: "Whether (if the Commissioner is of opinion that a company has not distributed to its shareholders a reasonable proportion of its taxable income) the whole of the taxable income of the company or only a reasonable proportion thereof is to be deemed to have been distributed." On this question it is unnecessary to say more than that in our opinion it is clear on the words of the sub-section construed literally that, when the Commissioner is of opinion that less than a fair proportion of the profits have been distributed, the whole amount of profit which would otherwise have been taxable income of the company is to be deemed to have been distributed to the shareholders. This question should therefore be answered: The whole of the taxable income of the company."

when the taxation issue go to appeal[378] to ensure that the facts of the appeal pertain exclusively to the non-owner of the assessed amount, so if a Head Entity is appealing the inclusion of a subsidiary's income or application of the GAAR[379] provisions against the Head Entity for the exclusion of the "tax benefit" of the subsidiary from the Head Entity's "taxable income", then only the facts of what the Head Entity owns and the Head Entity's participation in any transactions and tax planning are the Head Entity's relevant facts (and the not the inclusion of the subsidiary's facts who affairs are not before the Court and whose facts are only to be noted as irrelevant to the appeal in relation to the person objecting)[380];

- non-owners who have been incorrectly assessed or have been "volunteered" by a tax agent as to return the "GST liability" or "assessable income" to draft a comprehensive objection covering the issues identifying what is settled law so that Constitutional Law issues of Cornell[381] no longer need to be argued and provide them with the tenacity to fight the remaining issue(s)all the way to a Full High Court – as the authors predict that generally nobody will assist or support such non-owners in their interpretation of the taxation legislation,other than reluctantly the Full High Court, but only if the issues are brought to their specific attention as part of the appeal to the High Court. All the High Court will do is quietly listen to the arguments being presented to them. For example, the paper is intended to empower

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[378] Griffith C.J. in Waterhouse v Deputy Federal Commissioner of Land Tax, South Australia [1914] HCA 16; (1914) 17 CLR 665 (24 March 1914) "The fundamental proposition is contrary to the fact, and no argument can be based on it."

[379] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html

[380] S 701-1 attempts to reverse for ITAA purposes only the separate legal personality of the wholly owned subsidiary or MEC subsidiary by attempting under s 701-1 "single entity" rule to treat the Head Entity as including the subsidiary as a single person and the subsidiary property and thus excluded "inter-corporate property", but where such rule does not necessarily apply for GST, FBT or corporate law purposes: Income Tax Assessment Act 1997

[381] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

- the Discretionary Beneficiary[382] or Beneficiary who is not Absolutely Entitled[383] to the asset who never owned anything (legally or beneficially) prior to appointment to an amount or property that does not represent the property previously owned by another (such as by a trustee) to contest the liability to taxation[384]. We would recommend that the discretionary beneficiary execute a review of Gartside[385] based decisions to show that the discretionary beneficiary never owns the property prior to any appointments by the discretionary trustee of the property, income or gain to the discretionary beneficiary and the s101[386] deeming is incomplete as such deemed income has no "source" other than being merely owned;
- persons subsequently appointed to amounts arising of either income or capital gains from property, gains, profits to identify them as separate and subsequent property that are actually subsequent acquisitions and not interests in the earlier property, profits or gains. Therefore, a person appointed by a person to the income of an employee does not derive that income, but acquires an amount that is analysed and characterised separately from the derivation of employment income by the empoloyee;

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[382] Brennan CJ, Gaudron, McHugh and Gummow JJ in Maguire & Tansey v Makaronis [1997] HCA 23; (1997) 188 CLR 449; (1997) 144 ALR 729; (1997) 71 ALJR 781 (25 June 1997) "Several matters appropriately will be taken into account when there falls for consideration, in an action against a fiduciary arising other than out of breach of trust, the criteria which supply an adequate or sufficient connection between the equitable compensation claimed and the breach of fiduciary duty. First, breach of trust cases present particular characteristics. Whilst the trustee is the archetype of the fiduciary, the trust has distinct characteristics. In particular, where a trust is created by will or settlement in traditional form, the trustee holds title to property on behalf of beneficiaries or for charitable purposes. If the trust be still subsisting, the objective of an action to recover loss upon breach of trust is the restoration of the trust fund. The right of the beneficiaries is to have the trust fund reconstituted and duly administered [60], rather than to recover a specific sum for the sole use and benefit of any beneficiary. Indeed, no one particular beneficiary may have sustained a present and individual loss. This may be so if the trust is a discretionary trust [61] or no interest vests, either in interest or possession, before the termination of a prior interest."

[383] Income Tax Assessment Act 1997 - Sect 106.50 and s 160V of 1936 Act

[384] http://media.dailytelegraph.com.au/files/Rinehart.pdf

[385] For example Kennon v Spry; Spry v Kennon [2008] HCA 56 (3 December 2008) …" 1
Each of the beneficiaries had the right to compel the trustee to consider whether or not to make a distribution to him or her and a right to the proper administration of the Trust**[34]**. In *Gartside v Inland Revenue Commissioners*, Lord Wilberforce put it thus**[35]**:
"No doubt in a certain sense a beneficiary under a discretionary trust has an 'interest': the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion 'fairly' or 'reasonably' or 'properly' that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere spes. But that does not mean that he has an interest which is capable of being taxed by reference to its extent in the trust fund's income: it may be a right, with some degree of concreteness or solidity, one which attracts the protection of a court of equity, yet it may still lack the necessary quality of definable extent which must exist before it can be taxed."

[386] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

- tax advisers to recognise that on a change of ownership of property the taxpayer/you[387]/entity[388] that the Acts that assess property changes, so that the liability falls on the new owner and not the previous owner (or non-owner) and the GAAR[389] provisions apply to that current (or possibly past owner). But the Acts do not apply to the possible future owner. Therefore, property can be owned legally, subject to equitable obligations without providing beneficial interest in the property[390], subsequent acquisition of beneficial interest, legal title with a corresponding beneficial interest (including a fraction of what held legally)[391] and waiting until the beneficial and legal interests merge again;
- Insurers of professional advisory firms to question the insurance underwriting of tax advice and tax lodgements by the incorrect taxpayer, where there are no file notes progressively checked against facts (legal and equitable) and supporting documents and Full High Court decisions that self-assessments are principled and correct;
- Owners of tax calculation computer programmes to prepare researched papers to support the computer programmes calculations:
    - taking into account High Court decisions on timing rules[392] that would question the tax treatment as the timing rules contrast say with year-end calculations, such as under Division 5 and 6 of Part III of 1936 Act;
    - Note when the High Court specifically advise that they are not deciding an issue or both parties to the appeal have assumed something that may be contrary to what the Act actually states. For example in Bamford[393]/ Trust loss cases[394]/ treating unit trusts as

[387] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[388] See s 950-100 of ITAA 1997 and A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 pp 26 to 28

[389] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html
GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html
FBT Fringe Benefits Tax Assessment Act 1986 - Sect 67 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s67.html

[390] Commissioner of Stamp Duties v Livingston [1965] AC, Commissioner of Stamp Duties (Qld) v Livingston [1964] UKPCHCA 2; (1964) 112 CLR 12 (7 October 1964)

[391] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[392] Commissioner of Taxation v Sara Lee Household & Body Care [2000] HCA 35; 201 CLR 520; 172 ALR 346; 74 ALJR 1094 (15 June 2000)

[393] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[394] Vacuum Oil Company Pty Ltd v Wiltshire [1945] HCA 37; (1945) 72 CLR 319 (10 December 1945)

companies[395], Group representatives who do not supply[396]are obvious clashes;

- To recognise that commercially that it is not always important to the commercial interests that the technically correct person is actually assessed as the same amount of (and in many situation less) tax is at issue, so that the issues of ownership of property may not be commercially of interest to the objector[397]. However where the imposition of penalties is involved, then if the Commissioner has stated to the owner of property[398] a notice to not lodge any future tax returns (such as to wholly owned subsidiaries of Head Entities) , then the imposition of penalties on the non-owner may provide the commercial difference that requires the owner to be identified and the non-owner to take the issue of ownership in the objection and appeals.

WHAT THIS PAPER DOES NOT ACCOMPLISH

What is the accumulative knowledge from Full High Courts to date?

What this paper does not accomplish is that monumental extensive review of all High Court decisions since 11 November 1903 to date on assessing provisions that "support" the legislative focus, but where actually the Full High Court decisions do not comply with all the preconditions to primary tax liability for assessment under the specific legislation. We alert readers that actually it may be easier for many to review the Full High Court decisions on FBT and GST since 1986 and 1997 enactments to see if the Full High Court are focussing on the owners of property and refusing to uphold assessments against non-owners or "cagy[399]" in their decisions when upholding assessments against non-owners, such as by saying they do not accept the arguments put before the High Court for adjudication[400].

We attempt to alert that not all tax legislation or High Court decisions appear not to operate on an integrated or coherent basis with:

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[395] Income Tax Assessment Act 1936 - Sect 102T

[396] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[397]Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[398] Industrial Equity Ltd v Blackburn [1977] HCA 59; (1977) 137 CLR 567 (15 November 1977)

[399] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[400] French CJ, Crennan, Kiefel, Gageler and Keane JJ. In Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013) Para 63: For these reasons, we reject Unit Trend's first argument.
Para 64: Unit Trend's second argument, namely that the GST benefit "got" by it from the scheme is attributable solely to its election to apply the margin scheme at the conclusion of sales of the developed products by Blesford and Mooreville, should also be rejected.
Para 66: As to the third argument advanced by Unit Trend, the insertion of sub-s (3) into s 165-5 in 2008 did not affect the meaning of (i.e. the causal connection required by) the phrase "not attributable to" in s 165-5(1)(b).

Adjudication

- Most High Court decisions merely focussing on the issues appealed to the High Court for adjudication and in the case of tax contested liabilities not whether the tax liability was actually correctly imposed (which rarely the issue before the High Court). The issues of appeal are usually more narrowly set;
- Review of the very many High Court decisions upholding that the owner or previous/prior owner of the property being correctly assessed;

Legislation

- The comprehensive review of the legislation validly (i.e Cornell[401]) attempting to move the incidence of taxation from the owner (who is also upheld by the High Court to be the relevant you[402]) to "supportive" persons such as:
  - Head Entity;
  - Group Representative[403];
  - PSI individual

  where ownership still rests or previously rested with a person who actually would have qualified for being the "you[404]", but who as yet not been transferred with the relevant ownership. For example, the subsidiary may have a letter from the Commissioner advising/confirming that the subsidiary no longer needs to lodge a tax return, the GST legislation advises that the "supplier" liable under the GST legislation for taxable supplies[405] is not liable to pay the GST[406], and the PSI entity income is now to be treated as NANE[407] income (but where the PSI entity may still be liable for all CGT liabilities);
- What appears to be a problem that the draftsman of the original and subsequent legislation who drafted the principles of the legislation is not always understood by the draftsman executing remedial legislation or by the ATO[408] reviewer(s) of the amending legislation, so that Parliament enacts legislation with conflicting provisions or principles within the enacted legislation. The best example that the authors submit falls under this category

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[401] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[402] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[403] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[404] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[405] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[406] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.40

[407] Income Tax Assessment Act 1997 - Sect 86.30

[408] https://www.ato.gov.au

would be Part IIIA[409] 1986 drafting of the CGT legislation that pursuant to s 160L[410] assessed changes in ownership of property acquired after 19 September 1985. Then the ATO[411] reviewing draftsman of the proposed legislation enacting the Part IIIA 1986[412] in the CGT legislation appears to have attempted to deal with post 19 September 1985 property that is owned by an entity whose interests/shareholding are pre 20 September 1985 and the pre CGT interests were being disposed of (s 160ZZT[413]). Also the reviewing draftsman has also attempted to address the issue the ownership of pre 20 September 1985 property where "underlying ownership" has changed under s 160ZZS[414], but under the core CGT provision of s 160L[415] only changes in actual ownership can be focussed upon to trigger CGT liabilities. We are not saying that the CGT "grandfathering provisions" are not constitutionally valid, but that s 160L[416] and s 25/6-10 preconditions need to be satisfied as well. The High Court was subsequently needed to adjudicate to uphold the denial of $17million of capital losses accrued from the market value of assets at the date of change in "underlying ownership" to the date of disposal[417];

Administration of the legislation

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[409] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[410] The application of Pt IIIA is governed by s.160L. Sub-section (1) of that section reads:
"Subject to this section, this Part applies in
respect of every disposal on or after 20 September 1985
of an asset, whether situated in Australia or elsewhere,
that -
(a) immediately before the disposal took place, was
owned by -
(i) a person (not being a person in the
capacity of a trustee) who was a resident of
Australia; or
(ii) a person in the capacity of a trustee of
a resident trust estate or of a resident unit
trust; and
(b) was acquired by that person on or after 20
September 1985." As transcribed in Hepples v Federal Commissioner of Taxation [1991] HCA 39; (1991) 102 ALR 497; (1991) 65 ALJR 650 (3 October 1991);

[411] https://www.ato.gov.au

[412] http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[413] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19

[414] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[415] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[416] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[417] Commissioner of Taxation (Cth) v Sun Alliance Investments Pty Ltd (in liquidation) [2005] HCA 70; (2005) 225 CLR 488; (2005) 222 ALR 286; (2005) 80 ALJR 202 (17 November 2005)

- The Act being administered[418] in contravention of the legislation, so that the person who is not the focus of the Act or owner of the relevant property is assessed. The authors assert such include the discretionary beneficiary where that discretionary beneficiary owns no property[419]. The discretionary beneficiary may be appointed to the income or capital gain subsequent to it being accrued or derived, but the discretionary beneficiary never held a beneficial interest[420] in the property that was income or a capital gain.

No full review in this paper has been executed to cover:

1. The income taxation of Head Entities for property owned by subsidiaries (or MEC "subsidiaries[421]");

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[418] Income Tax Assessment Act 1997 - Sect 1.7
A New Tax System (Goods And Services Tax Administration) Act 1999 - Schedule 1
Fringe Benefits Tax Assessment Act 1986 - Sect 3

[419] Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ in Chief Commissioner of Stamp Duties (NSW) v Buckle [1998] HCA 4; 192 CLR 226; 151 ALR 1; 72 ALJR 243 (23 January 1998) at para 37 "In the present case, under the Deed of Settlement as it stood before the Supplemental Deed, no interests in corpus had vested. The Trust Fund was vested in the trustee, impressed with such trusts as were created by or pursuant to the Deed of Settlement. There was no hiatus or gap as to any outstanding beneficial interest in the Trust Fund. The assets comprising the Trust Fund were not impressed with trusts which gave rise to equitable interests therein which were so extensive as to leave the trustee with no more than the bare legal title. The trustee might accurately be described as the owner of those assets [14], but as subjected to the equitable obligations imposed by the Deed of Settlement [15]. The second and third respondents had no vested interests in corpus but they did enjoy rights to due administration of the trusts of the Deed of Settlement which a court of equity would protect [16]."

[420] Heydon J. in Kennon v Spry; Spry v Kennon [2008] HCA 56 (3 December 2008) at para 160 and 161 "*The position of an object of a bare power.* The proposition asserted by Lords Reid and Wilberforce in *Gartside v Inland Revenue Commissioners* [102] was that the object of a bare power of appointment out of assets has no proprietary interest in those assets, but only has a mere expectancy or hope that one day the power will be exercised in that object's favour. In that case it was asserted in an estate duty context. It has been asserted many times and in many contexts. Thus a settlement of an "interest whether vested or contingent" does not capture a payment of money pursuant to a bare power of appointment [103]. The object of a bare power of appointment cannot assign the "rights" the object has [104]. An injunction restraining a defendant from removal of "assets" was not contravened by transactions causing the defendant to cease to be an object of a bare power of appointment [105]. The "interest" of the object of a bare power of appointment did not fall within the following definition of "property" in the *Corporations Act* 2001 (Cth):
"any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action."[106]
The position of a residuary beneficiary of an unadministered estate compared. It is true that the object of a bare power of appointment has "a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity."[107]"

[421] Where we have at least one High Court decision stating that the subsidiary's profits cannot be taken into account in determining the Holding Company's profits without the dividends being declared by the subsidiary: Industrial Equity Ltd v Blackburn [1977] HCA 59; (1977) 137 CLR 567 (15 November 1977);

2. Attributable income[422] owned by another person and whether such attributable income can be "characterised" as income for s 6-5[423], s 6-10[424] or s 25[425] purposes;
3. Year end check calculations that aggregate all equitable interests in property, such as partners interest in partnership income and trustee's and beneficiaries interest in "trust income" and it inclusion in a person's (partner, trustee, beneficiary's) taxable income;
4. Quasi-Governmental reviews of Discretionary Trusts[426]

To cover even such three categories would be a very long paper involving reviewing say the 100 years of full High Court decisions. As authors we suspect the Commissioner does not have the time or even the less inclination to so analyse and then publish and we understand no incorporated[427] accounting firm or incorporated legal firm has undertaken such or have been required by its insurers to do so, even if such knowledge would be central to the provision of professional advice to clients. So the authors are raising in this paper the preconditions to primary tax liability recently re-identified by the Full High Court in the MBI[428] decision and contrasting such MBI decision against their Unit Trend[429] decision and then extrapolating on the evidence of Full High Court decisions that the same fundamental issues exist especially in income tax. In this paper we are not reviewing all the Full High Court decisions on Income, FBT and GST that:

- We know that the High Court will uphold the assessment of the legal owner[430];
- We know that the High Court will uphold the assessment of the beneficial owner, where there is an identifiable legal owner in the judgement[431].

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[422] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[423] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[424] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[425] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[426] http://www.taxboard.gov.au/content/reviews_and_consultations/taxation_of_discretionary_trusts/report/downloads/discretionary_trusts_final_report.pdf

[427] We are sarcastically asserting that commercially individual practitioners will not have time to research taxation issues of interest after meeting all administrative lodgement deadlines etc.

[428] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[429] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[430] GST for example - Commissioner of Taxation v Reliance Carpet Co Pty Limited [2008] HCA 22 (22 May 2008)
FBT for example - Queensland v Commonwealth [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)
Income and Capital gain - South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[431] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

We are not:

- reviewing all GAAR[432] decisions, as we know that there are a number of GAAR decisions where the High Court has refused to apply the GAAR regime in question against a person who did not presently[433] or previously own the relevant property or gain consideration[434];
- analysing why the Full High Court would not undermine the application of the GAAR[435] provisions of the GST Act applying to the non-owner of the supplied property where the ownership issue of the supplies being made were not before it as an issue for its adjudicating, but the ownership issue was quite clearly recognised in the judgement[436];
- following and applying all of the words of the legislation to the Full High Court decisions and its statutory interpretation, but we are confining ourselves to the provisions before the Court and do not necessarily interpret or review the whole of the legislation and interacting legislation[437].

We raise however the issue of the difficulty of characterising property in the non-owner's hands with:

- Characterisation of income derived (as compared with the "income" for tax purposes[438]) in the seven member decision in South Australia v Commonwealth[439] based on the difference between "mere" property owned that was exempt[440] from Federal taxation under the Constitution[441] and where

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[432] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html
GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html
FBT Fringe Benefits Tax Assessment Act 1986 - Sect 67 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s67.html

[433] Deputy Federal Commissioner of Taxation v Purcell [1921] HCA 59; (1921) 29 CLR 464 (12 August 1921)

[434] Federal Commissioner of Taxation v Peabody [1994] HCA 43; (1994) 181 CLR 359; (1994) 123 ALR 451; (1994) 28 ATR 344; (1994) 94 ATC 4663 (28 September 1994)

[435] GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[436] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[437] For example only ss 102A and 102B are adjudicated in Booth v Federal Commissioner of Taxation [1987] HCA 61; (1987) 164 CLR 159 (16 December 1987)

[438] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[439] [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[440] Section 114 of the Constitution precludes the Commonwealth from imposing any tax on property of any kind belonging to a State.

[441] Commonwealth Of Australia Constitution Act http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

income had been "derived[442]" to make it assessable to State Governments of Australia under the revenue provisions, but exempt under the Constitution. The High Court did not explicitly direct its attention to "non-characterised" property that has been identified to be treated as revenue income, but is not characterised such as by being earned or an increment to existing property[443], but did cite Harding's[444] decision with approval. But more importantly South Australian[445] decision reinforces that as a matter of statutory construction all of the preconditions to the legislation needs to be satisfied, including the "derivation" test when applicable;

- Characterisation of FBT in Queensland v Commonwealth[446]. The State of Queensland owned certain property, both real and personal, which it made available to many of its employees in connexion with their employment. In particular, cars owned by the State are used or available for use by its employees, e.g., by being garaged at an employee's place of residence or, even if not so garaged, by being available for an employee's private use. Dwelling houses and other places which are able to be used for accommodation, and are owned by the State, are occupied by employees of the State under lease or licence. The circumstances in which these benefits[447] are provided are such that their use or availability constitutes a fringe benefit[448] within the FBT Assessment Act and that there is a taxable value of car fringe benefits and of housing fringe benefits respectively within the meaning of the Assessment Act[449].
    - Gibbs CJ concluded that "...it seems to me to be very clear that the Acts operate to tax the State by reason of and by reference to the use

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[442] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992) Mason C.J., Deane, Toohey and Gaudron JJ. (Dawson J concurring) at para 24
Brennan and McHugh JJ found no distinction between taxing revenue gains and capital gains, as both were taxes on property.

[443] Examples of non-characterised property being treated by statute as income would be the extinguishment of shareholders rights on liquidation (or share buy back) that would be ordinarily a "capital" event to be assessed under CGT provisions, but where the legislation treats the revenue profits of the company distributed by a liquidator on behalf of a company as apportioned revenue receipts in the shareholder's hands and only allows capital treatment for the return of contributed share capital even if that particular shareholder had contributed to corporate share capital or not. The capital treatment was only available for sale of shares to third parties if the shares were not a revenue asset or a revenue business asset like trading stock. Similarly the trustee of a superannuation fund receive contributions to the trust fund that are not increments to existing property, but statutorily treated as income but are merely accretions to capital.

[444] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[445] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[446] [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)

[447] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[448] See definition in Fringe Benefits Tax Assessment Act 1986 - Sect 136

[449] Gibbs C.J at para 2

by the State of certain of its property[450]";

- Mason, Brennan and Deane JJ "*This statement expresses what in our opinion is the essence of the immunity conferred by s.114 and what was one of the basic grounds of the decision in the Steel Rails Case. The section protects the property of a State from a tax on the ownership or holding of property but it does not protect the State from a tax on transactions which affect its property, unless the tax can be truly characterized as a tax on the ownership or holding of property. This interpretation gives effect to the popular or common understanding of what is involved in the prohibition of a tax of any kind on property of a State, namely a tax on the ownership or holding of property. And it gives a powerful measure of protection to the financial integrity of a State without preventing the Commonwealth from taxing every form of transaction to which a State is a party. No compelling reason has been advanced for giving the constitutional immunity any wider operation[451]. ... "All these features are matters of machinery and valuation associated with the imposition of a tax on employers. But they do not establish that the tax is imposed on property of the employers. They do not detract from the conclusion that the tax is not in substance a tax on the property of the State[452]."*
- *Wilson J. "It was also submitted that the true character of the tax as a tax on property was exposed by the fact that the value of the fringe benefit is assessed, not by the value that it represents to the employee but by reference to the cost to the employer of providing it. The value of the benefit to the employee is immaterial. This comes about because the value of the property that is made available forms an important component in the formulae provided for the calculation of the value of the benefit. In this connexion it was observed that one of the formulae prescribed by the legislation for calculating the value of a car fringe benefit takes account of the period during which the car is available to the employee for his private use regardless of whether he actually uses it. But I do not think that these considerations are material to the characterization of the tax; they merely reflect the fact that the tax is imposed upon the employer, not the employee. In substance it is a tax on the cost to the employer of providing the benefit*."

EXCLUDED AND SPECIALLY TREATED PROPERTY

Can we learn from cases that exclude a person or property owned?

Income

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[450] Para 21

[451] Para 12 of Mason, Brennan and Deane JJ

[452] Para 16

It may be illuminating reviewing how the Acts treat certain property as outside the tax base.

ITAA "Unearned income" or more accurately "underived income"

Such a term of "unearned income" is misleading, as the High Court have never adjudicated on such. They adjudicated on the meaning of the term "income" and in Arthur Murray [453]concluded that the business income owned outright by the company (and not held under any trust obligations) could not be characterised as "income derived" yet even though the company was under no legal obligation to return the consideration to customers (but in commercial practice did) being the consideration for dancing lessons prepaid before the services of the dancing lessons had been provided. Although the decision can be considered a weak Barwick CJ three man High Court decision, it was reviewed in South Australia v Commonwealth[454] and upheld by all seven members. Two points may be noted that:

- Income especially in s 6-10[455] can also over property that has not been earned and mere uncharacterised property, if Parliament so identifies that the property is to be so included[456];
- Arthur Murray[457] decision (nor South Australia[458]) say that the amount was not income, but only that it had not satisfied one of the preconditions to accessibility, namely the "derivation" precondition in s 25(1)[459]. Such is the same point being made by MBI[460] in the authors' opinion.

Characterisation of "supply" - Reliance Carpets[461]

In Reliance Carpets[462] the Full High Court unanimously upheld the right to collect GST tax on a forfeited deposit, because on signing of the contract there was a supply under contract even though there land in question was never supplied. All the

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[453] Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965)

[454] [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[455] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[456] Federal Commissioner of Taxation v Slater Holdings Ltd [1984] HCA 78; (1984) 156 CLR 447 (29 November 1984)

[457] Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965)

[458] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[459] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[460] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[461] Commissioner of Taxation v Reliance Carpet Co Pty Limited [2008] HCA 22 (22 May 2008)

[462] Commissioner of Taxation v Reliance Carpet Co Pty Limited [2008] HCA 22 (22 May 2008)

preconditions to the GST tax liability for a supply for consideration[463] were satisfied.

PRECONDITIONS TO LEGISLATION

Not all property is assessed, only that that satisfies all the preconditions

The problem we raise in this paper is how do taxing Acts operate (when they clearly operate to impose liabilities on owners (whether legal or beneficial) and where the Full High Court has consistently supported such assessments[464]) against the non-owners of the property being taxed and of the consideration of the transaction – especially where there is a clearly identifiable actual owner to be taxed. In particular we raise the problem of identifying precisely what is meant by the word "income" and more importantly what is not "income" to the person/taxpayer/you[465]/entity[466]. For example:

- not all income and not all supplies and not all benefits are assessable. Then some are made exempt;
- "income" can mean attribution of one person's income to another by statute[467], increments to existing property, uncharacterised property that Parliament has identified to be assessed as income, CGT statutorily calculated gains

but we assert ownership or previous ownership is the precondition that binds each of these categories together. The problem applies to both the Assessing provisions and the GAAR[468] provisions. Then how do the non-owners satisfy the additional criteria of liability? For "ordinary income" how would Parliament draft its legislation to assess a person reporting income on a "Cash Basis" when it will never own the amount being assessed? Very rarely does Parliament tax property, without adding extra preconditions to the primary tax liability, so that the property tax[469] becomes an Income tax, Fringe Benefits Tax or Value Added Tax/GST Tax and not merely a tax on all property owned or a tax on one person for all or some of the property owned by

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[463] see para 32 to 42 http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2008/22.html

[464] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[465] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[466] See s 950-100 of ITAA 1997 and A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 pp 26 to 28

[467] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[468] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html
GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html
FBT Fringe Benefits Tax Assessment Act 1986 - Sect 67 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s67.html

[469] ITAA: South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)
GST: Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)
FBT: Queensland v Commonwealth [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)

others. Cornell[470] stands for the right of Parliament to attribute amounts that can be "income", merely because Parliament decrees it so. But that category of income lacks any ownership preconditions and many words of precondition are unlikely to apply to it as words of precondition are difficult to apply to what is not owned or may not even exist.

Full High Court decisions only decide issues that are brought before them[471]. But in their decisions they often have to "tick off" off on fundamental preconditions to primary tax liability to arrive at their decision. The authors assert that ownership of the property being assessed is one of the preconditions to primary tax liability being imposed by statute on that person. This paper does not to attempt to answer all the Australian riddles of taxation, because such would require analysis of all of every one of the full High Court decisions since 1903[472]. But we do say in the hierarchy of importance are the decisions where all seven members sat – especially where they are unanimous on what they decide. But it normally is a Constitutional[473] issue before all seven members sit on a taxation issue. What we observe that most High Court judges are not "tax experts" and their Honours all too often only have a rudimentary and probably only personal experience of having to pay taxes. But they do have a legal training and experience in statutory interpretation. We surmise that they would be loathe to undermine[474] Parliaments legislation to finance Government, especially during periods of national stress, such as William Pitt's income tax acts and the first Federal Income Tax Assessment Act to finance Australia's contribution to World War1[475].

ASSUMPTIONS BEHIND THIS PAPER

Listing assumptions may expose base issues, such as ownership

This paper has a number of assumptions behind it, namely:

- we assume that there is no Constitutional[476] limit on Federal Parliament's powers other than the Constitution. So does even the subject matter of "income" need to exist? Do the words of the Act need to apply to anyone? If

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[470] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[471] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[472] Dalgarno v Hannah [1903] HCA 1; (1903) 1 CLR 1 (11 November 1903)

[473] Commonwealth of Australia Constitution Act http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[474] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[475] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[476] Commonwealth of Australia Constitution Act http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

so what limitations do the words “you”, “income”, “derive”, “source”, ‘supply’, “benefit” etc. put a limitation on the power to tax as enacted?

- the ITAA, GST and FBT Acts have a core central legal meaning for the words “income”, “supply” and “benefit” and such is not an economic meaning;
- one will make more progress understanding the limitations of the three Acts, if one analyses backwards to find not only the historical routes but also the “building block” basis for these Acts and we assert such included “ownership” of property;
- Federal Parliament can select the criteria to impose taxation;
- The subject matter of all tax Acts is not created by the tax statute[477]. But even Cornell[478] challenges that assumption with upholding attributable amounts;
- The words of criteria imposing a tax liability will include “common law[479]” and “equity law” meanings, but Parliament can define[480] the meaning of terms and can deem[481] in legislation. In other words, the preconditions will generally be found in terms outside the legislation;
- Taxation Acts are merely statutory impositions[482] where the taxpayer is provided no services for the property extracted from it. Parliament has supremacy in law making;
- Parliament is imposing its own rules to get its own way. Parliament does not need to “give a rats arse[483]” about anyone else, so long as its legislation technically works or the cost of any one challenging it is prohibitively

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[477] A H Slater QC paper “*The Income Tax Assessment Acts: Statutes in Senescence?*” Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p11

[478] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920) “And the proposition that the Legislature "must take things as it finds them, according to State law, and tax or not tax them accordingly" was made in *Morgan's Case*[5] and directly met by the decision in that case and also in the *National Trustees Co. Case*[6]. As was said by *Isaacs* J. in *Morgan's Case*[7], "the Commonwealth Parliament ... cannot be limited by any artificial creations or restrictions which the varying policies of State Legislatures may devise." The fundamental fact, in the present case, is that the shareholders of the Company are the "real and only masters" of the undistributed income in the possession of the Company.”

[479] See also A H Slater QC paper “*The Income Tax Assessment Acts: Statutes in Senescence?*” Justice Graham Hill Memorial Lecture: Session 1 30 National Convention of Taxation Institute, National Division, 18-20 March 2015 p 4 first paragraph

[480] For example Fringe Benefits Tax Assessment Act 1986 - Sect 136

[481] See for example A H Slater QC paper “*The Income Tax Assessment Acts: Statutes in Senescence?*” Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 20 “Deeming provisions in the Assessment Acts”

[482] See A H Slater QC paper “*The Income Tax Assessment Acts: Statutes in Senescence?*” Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 4 final paragraph

[483] http://uncyclopedia.wikia.com/wiki/Rat's_ass

expensive[484];

- The Taxing Acts of the Federal Parliament often contain a number of undefined terms or words such as: (1) Income; (2) Supply[485]; (3) Benefit[486], even when the term is "inclusively" defined;
- That the person being assessed must itself satisfy the criteria for being liable to the taxation. If that conclusion were not correct, it would mean that the preconditions to the liability under legislation would need to be clearly identified and who satisfies those preconditions. Then the legislation would need to clearly say who is liable under the enactment. But if the legislation used a broadly or widely defined term, such as "you[487]", we assume that the "you[488]" will need to be owner of the property and only income in owner's hands and only "supplied" by owner or only service consideration owned by the supplier[489];
- Taxation Acts have to work within legal structures, so that the words of the assessing Acts work within the interpretation by the High Court;
- One can progress understand the building blocks of the taxing Acts from reviewing the full High Court decisions on the Acts and drawing the conclusions to be extracted from them to date. The authors' conclusions can be reviewed by others who need to professional advice - whether Revenue Officers or professional tax advisers and academics encouraging students;
- All taxing Acts come with a history and preconditions to the triggering of any liabilities. These preconditions can be explicit as well as implied and both need to be interpreted by the final Court of Appeal as to the meaning of the preconditions to the legislation;
- Some of the common law and equity law terms are still developing, such as the words "income", "absolutely entitled[490];
- In the authors opinion the High Court are generally loath to "strike down",

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[484] The authors would suggest that the Personal Services Income legislation would be an example of legislation that would challenge the financial resources of most contractors as the quantum of tax is not worth the cost of appealing to the Full High Court that Parliament had technically failed in moving the incidence of taxation of income from the PSI entity to the PSI individual when the PSI entity actually derived the income and there is no statutory identifier between the two;

[485] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[486] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[487] Income Tax Assessment Act 1997 - Sect 4.5 for "you"
Income Tax Assessment Act 1997 - Sect 960.100 for "entity"

[488] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[489] See the facts in Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[490] See the discussion of the rule in *Saunders v Vautier* [1841] EngR 629; (1841) 4 Beav 115 [49 ER 282]; affd (1841) Cr and Ph 240 [41 ER 482] of beneficiaries' entitlement to terminate trust where *sui juris* and together absolutely entitled in CPT Custodian Pty Ltd v Commissioner of State Revenue [2005] HCA 53; (2005) 224 CLR 98; (2005) 221 ALR 196; (2005) 79 ALJR 1724 (28 September 2005)

undermine or even not support taxation legislation that finances the Nation and eventually pays their judicial salaries[491]. The High Court appears to be reluctant to deal with issues that have not been directly raised with them for adjudication by parties before the High Court. Therefore, if the taxpayer does not raise the issue or the facts that the appellant is actually not the taxpayer that the legislation focuses on, then the High Court may well not address the issue;

- the incorporated fictitious person including the incorporated company is recognised as a "taxpayer[492]" for taxation legislation. Tax legislation often assumes that States and Countries (which are actually large groups of humanoid[493] persons) are separate entities;
- The courts role is to merely adjudicate on the issues[494] brought before it for adjudication and provide reasons and not necessarily (which may or may not be implied):
    - Confirm the correctness of the assessment;
    - Review the correctness of the assessment by reviewing all specialist and Central[495], Core[496] provisions or even definitions of the relevant Act(s);
    - Reconcile all cases law within the area of theoretical dispute.
- There will invariably be an issue of what are the identifiers that prevent one person being assessed on another's "income", "supply[497]" and "benefit[498]" where there is also attribution;
- In the trust provisions of Division 6 of Part III of ITAA s 95[499] the "net

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[491] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[492] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[493] http://en.wikipedia.org/wiki/Humanoid

[494] For example see paras 1 to 4 of Mason C.J., Deane, Toohey and Gaudron JJ. joint judgement in South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[495] Chapter 2--The basic rules PART 2-1--The Central Provisions of A New Tax System (Goods And Services Tax) Act 1999

[496] Income Tax Assessment Act 1997 - Sect 2.5

[497] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[498] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[499] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

income" definition[500] is only calling for the identification of the trustee's income (also income because of the trustee's higher beneficial interest) and the beneficiary's income and not combining where the beneficiary (such as a discretionary beneficiary or beneficiary of an unadministered deceased estate) has no income for the year. We assume that before the beneficiary owns any property (thus excluding the right to be considered to be appointed to an amount) the beneficiary could not be deriving income or deriving passive income, as they own no property and thus there is no or any increment in property (including any beneficial interest) to the existing property to allow the amount appointed to be ever characterised as income. We assume that trust/equity law only applies to property that exists[501] and does not encompass attributed income.

What we assert by s 95 and s 97[502] focussing on the "income of a trust estate" is that they create a fiction in relation to property, whereas the trustee or beneficiaries actually derive that income. This impliedly follows from McNeil's[503] case decision. The subsequent appointment(s) by the trustee during or after year end only results in the creation of property owned being a separate amount from the income or capital gain that arose from the property previously owned by the trustee by the beneficiary, but where the beneficiary is only assessable on an actual cash basis as the discretionary beneficiary or beneficiary of an unadministered estate has not itself direct the trustee to deal with the property for a deemed derivation of income under s 6-5(4)[504]. There may well be no "paid[505] debt" as required by s 101[506] that the beneficiary has any knowledge about. Division 6 and in particular s 97[507] does not support the taxation of a subsequently appointed amount of "income" derived by the

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[500] As enacted in 2015 ***" net income "***, in relation to a trust estate, means the total assessable income of the trust estate calculated under this Act as if the trustee were a taxpayer in respect of that income and were a resident, less all allowable deductions, except deductions under Division 393 of the *Income Tax Assessment Act 1997* (Farm management deposits) and except also, in respect of any beneficiary who has no beneficial interest in the corpus of the trust estate, or in respect of any life tenant, the deductions allowable under Division 36 of the *Income Tax Assessment Act 1997* in respect of such of the tax losses of previous years as Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010) are required to be met out of corpus. See http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

[501] Shepherd v Federal Commissioner of Taxation [1965] HCA 70; (1965) 113 CLR 385 (17 December 1965)
Norman v Federal Commissioner of Taxation [1963] HCA 21; (1963) 109 CLR 9 (25 July 1963)

[502] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s97.html

[503] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[504] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[505] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

[506] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

[507] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s97.html

trustee to which the beneficiary has no present entitlement[508] to income prior to the subsequent appointment of income by the trustee (but possibly not by the appointor[509]) under the discretionary trust[510] deeds powers of appointment. Subsequently appointed amounts are not the beneficial interests in income derived by trustee, but are separate property being "net amounts" appointed. Subsequently appointed amounts need to be analysed separately as to whether such falls under the various categories of what the Full High Court have adjudicated to be included as "income" and what Parliament has legislatively prescribed as mere property to be income for ITAA purposes. There is no point aggregating the income of the trustee with the non-income of the discretionary or unadministered estate beneficiary, unless:

  - you wish to allocate income that was the trustee to the person who's income it was not unless, spreading income reduces tax levels or the beneficiaries can better access concessions[511] the trustee cannot or the trustee can only access less effectively; or
  - Parliament wishes to aggregate the income of the individuals so appointed with their other income to tax at progressive tax rates;

- Income Tax is closely aligned to s 160A[512] and s 108-5 definitions of an asset, so that the overlap or double assessing instructions between them can be removed by s 160ZA[513] and s 118-20[514]. The distinction that 5 of the 7 members recognised between "income derived" and "capital gains" in South

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[508] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s97.html

[509] Unless the appointed falls with the s 6 definition of a "trustee" under ITAA 1936

[510] Treasury describes discretionary trusts in the following manner: "*A discretionary trust can offer more legal protection to business owners than a partnership or sole trader. Further, a trust with a corporate trustee offers business owners similar legal protection to a company but offers tax advantages, such as greater flexibility in distributions and access to the 50 per cent capital gains tax concession when an asset appreciates and is then sold. A company must distribute dividends in proportion to the size of holdings, a trustee of a discretionary trust has complete discretion about the size of distributions to beneficiaries of a trust. This allows the tax position of beneficiaries to be taken into account in making distributions to beneficiaries of trusts. In addition, the growth in the number of companies and trusts may reflect the increasing sophistication of business structures, where individual businesses involve a number of companies and/or trusts. One example is where a trust will have a corporate beneficiary that acts as a 'bucket company'. In this instance, income is either distributed and held, or made presently entitled. If income is made presently entitled, there must be a reciprocal Division 7A-compliant loan arrangement, which enables the trust to avoid distributions to individuals in high marginal tax brackets. The Board of Tax has reviewed the operation of the tax law as it relates to some business structures often involving trusts, in particular the extraction and retention of profits from private companies and provided advice to Government.*"

"Re:Think Tax discussion paper Better tax system, better Australia" AGPS March 2015 pp 107 -108 http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf

[511] See Cridland v Federal Commissioner of Taxation [1977] HCA 61; (1977) 140 CLR 330 (30 November 1977)

[512] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[513] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[514] Income Tax Assessment Act 1997 - Sect 118.20

Australia[515] was a distinguishment between "derivation" and mere ownership. So where Parliament in the revenue provisions attempts to assess with property being owned and CGT legislation does not apply, one should stop to think whether the "income" that Parliament is attempting to focus on is actually taxable;

- that there is no assumption that the justices individually or collectively of the Full High Court understand the various Tax Acts. They merely need to adjudicate on the basis of the facts, grounds of appeal, legislation, and cases and arguments presented to them. We suspect that none of them actually read the Tax legislation from cover to cover, with all interaction legislation - such as the Acts Interpretation Act. We assert that even the specialist, being the Commissioner of Taxation, would not waste his intelligence doing so.

We however reject:

- Australian Federal Treasury's 2015[516] conclusion that the "*Australia's tax system, particularly its income tax system, is based on an architecture that reflects the economy and environment prevailing at the time the system was introduced, including the transactions common at that time. Changes to the system have been built on these historical foundations and have tried to make this architecture fit new and innovative ways of doing business. For example, rather than a general income tax that captures all realised gains and then carves out intended exceptions and concessions, Australia's income tax law is based on a narrower concept of income. This was construed by the courts as embracing the Court of Chancery trust law understanding of 'income of a trust', to which income beneficiaries are entitled, and distinguished from the 'capital of a trust', to which any 'remainderman' is entitled. The persistence of distinctions like this, as well as the additional complexity it generates, illustrates the difficulty of a system designed for previous generations but operating in a modern context*." We assume that all the three taxes are based on ownership of property principles, where not all property owned is assessed but only property that can be characterised as income or identified by Parliament to be included as "income[517]" are so assessed under Income Tax Legislation. Taxable supplies[518] are assessed under GST and not all property. Only benefits[519] supplied by the employer to employee are assessed under FBT, unless PAYG on employee

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[515] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[516] Tax discussion paper Better tax system, better Australia" AGPS March 2015 p 173 http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf

[517] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[518] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[519] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

remuneration was to be withheld[520]. Although we have not researched the history[521], because this paper focuses on what we can learn from Full High Court decisions (including the history of taxation that the Court records[522]), income tax is likely to be development or earlier property taxes[523] by broadening the tax base but still including 5% of the annual value of property owned by the taxpayer[524] which is a tax on mere property owned;

- Slater's[525] assumption based on 1958 decision in favour of 1998 Full High Court decision interpreting Federal Legislation that "*The court cannot treat the legislation as meaningless, even if it appears to proceed on a false assumption. "It is not within the competence of the court to hold that a section in an Act of Parliament is void for uncertainty. Whatever the difficulties of construction may be, the Court is bound to give some meaning to the section and [cannot] hold that an Act of the legislature is to be regarded as a nullity because of the uncertainty of the language used*."[526]. The majority judgement [527] of the High Court in *Blue Sky Inc v Australian Broadcasting Authority*[528] stated at paras 69 to 71 under the Subheading "*Conflicting statutory provisions should be reconciled so far as is possible*

  ➢ *The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute [45]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"[46]. In Commissioner for Railways (NSW) v Agalianos [47], Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed [48].*

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[520] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "fringe benefit "

[521] http://archive.treasury.gov.au/documents/1156/HTML/docshell.asp?URL=01_Brief_History.asp

[522] See for example Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[523] ITAA: South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)
GST: Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)
FBT: Queensland v Commonwealth [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)

[524] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[525] A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 40

[526] Slater reference *Scott v Moses* (1958) 75 WN(NSW) 101, 102.

[527] McHugh, Gummow, Kirby and Hayne JJ

[528] Project Blue Sky v ABA [1998] HCA 28; 194 CLR 355; 153 ALR 490; 72 ALJR 841 (28 April 1998)

- *A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals [49]. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions [50]. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other"[51]. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.*

- *Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision [52]. In The Commonwealth v Baume [53] Griffith CJ cited R v Berchet [54] to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".*

  The Chief Justice[529] stated at para 41 *"The purpose of construing the text of a statute is to ascertain therefrom the intention of the enacting Parliament. When the validity of a purported exercise of a statutory power is in question, the intention of the Parliament determines the scope of a power as well as the consequences of non-compliance with a provision prescribing what must be done or what must occur before a power may be exercised. If the purported exercise of the power is outside the ambit of the power or if the power has been purportedly exercised without compliance with a condition on which the power depends, the purported exercise is invalid. If there has been non-compliance with a provision which does not affect the ambit or existence of the power, the purported exercise of the power is valid. To say that a purported exercise of a power is valid is to say that it has the legal effect which the Parliament intended an exercise of the power to have."*

  Where Core[530] Provisions exist to an Act, such as s 6-5[531] and s 6-10[532] of ITAA 1997, do those provisions need to also be satisfied? The High Court

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[529] Brennan CJ

[530] Income Tax Assessment Act 1997 - Sect 2.5

[531] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[532] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

decision in MBI[533] confirmed that all preconditions to the GST liability had been so satisfied.

- Slater's[534] assumption that "*The Income Tax Assessment Acts, however, are framed on the assumption that there are no impediments to the beneficiaries' claims on trust assets[535]. In the principal provisions dealing with the taxation of trustees and beneficiaries (Division 6 of Part III of the 1936 Act) liability to tax turns on whether beneficiaries are "presently entitled" to a share of trust income, an expression which "directs attention to the processes in trust administration by which the share is identified and entitlement established.*"[536] The assumption may or may not be correct in relation to Division 6 of Part III of the 1936 Act in relation to cases where the issue of the trustee's lien[537] was an issue before the High Court, but it would be a 'long bow[538]" to carry across that assumption to the Core[539] Assessing provisions of Division 6 of he 1997[540] Act without examining case law under s 25[541], s 6-5[542] and s 6-10[543]. The Full High Court decision in Bamford[544] is correct on the very narrow issue raised for adjudication and what the Full High Court decided, but does not adjudicate on the facts and the narrow provisions (especially the absence of the Core [545]Provisions) that were and

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[533] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[534] A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015

[535] Certainly not stated or enacted.

[536] Slater reference *Bamford v FC of T* (2010) 240 CLR 481, 506 [39]

[537] The issue of the trustee's lien keeps being mentioned such as in French CJ at para 38 in and … at para 232 in Korda v Australian Executor Trustees (SA) Limited [2015] HCA 6 (4 March 2015) *"Octavo Investments Pty Ltd v Knight* [1979] HCA 61; (1979) 144 CLR 360 at 367 per Stephen, Mason, Aickin and Wilson JJ; [1979] HCA 61; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 245–246 [47]; [1998] HCA 4; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* [2005] HCA 53; (2005) 224 CLR 98 at 120–121 [50]; [2005] HCA 53; *Trustee Act* 1936 (SA), s 35(2)." at para 232 "[1901] AC 118 at 123-125. See also *Trautwein v Richardson* [1946] ALR 129 at 134-135; *Marginson v Ian Potter & Co* [1976] HCA 35; (1976) 136 CLR 161 at 175-176; [1976] HCA 35; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 244 [42]; [1998] HCA 4; *Jessup v Queensland Housing Commission* [2001] QCA 312; [2002] 2 Qd R 270 at 275 [14]."

[538] **draw the longbow,** to exaggerate in telling stories; overstate something

[539] Income Tax Assessment Act 1997 - Sect 2.5

[540] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[541] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[542] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[543] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[544] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[545] Income Tax Assessment Act 1997 - Sect 2.5

were not before the Court and also in relation to the facts not brought to its attention. Slater is correct to point out that the High Court has dealt with the beneficial interests of the beneficiary where the trustee has a valid lien[546] in the context of Division 6 of ITAA 1936 s 97[547]. The 2007 McNeil[548] decision brings into question whether the preconditions of the Core[549] Provisions need to be satisfied as well as Division 6 to assess the beneficiary. We as authors consider that McNeil's[550] decision stands for is the proposition that any of the Core Provisions can assess independently of the specialist provisions so long as all the Core Provisions preconditions are satisfied. We deal with Bamford decision[551] below under "Difficult Decisions of the High Court". But both decisions need to be integrated into the learning as to who is liable to be assessed for income, Division 6 is enacted in the 1936 Act and the Core[552] Provision of Division 6 that assess taxpayers are found in the 1997[553] Act;

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[546] The issue of the trustee's lien keeps being mentioned such as in French CJ at para 38 in and … at para 232 in Korda v Australian Executor Trustees (SA) Limited [2015] HCA 6 (4 March 2015) *"Octavo Investments Pty Ltd v Knight* [1979] HCA 61; (1979) 144 CLR 360 at 367 per Stephen, Mason, Aickin and Wilson JJ; [1979] HCA 61; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 245–246 [47]; [1998] HCA 4; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* [2005] HCA 53; (2005) 224 CLR 98 at 120–121 [50]; [2005] HCA 53; *Trustee Act* 1936 (SA), s 35(2)." at para 232 "[1901] AC 118 at 123-125. See also *Trautwein v Richardson* [1946] ALR 129 at 134-135; *Marginson v Ian Potter & Co* [1976] HCA 35; (1976) 136 CLR 161 at 175-176; [1976] HCA 35; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 244 [42]; [1998] HCA 4; *Jessup v Queensland Housing Commission* [2001] QCA 312; [2002] 2 Qd R 270 at 275 [14]."

[547] See Para 39 of Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010) *"Further, the phrase "presently entitled to a share of the income" directs attention to the processes in trust administration by which the share is identified and entitlement established. The relevant operation of those principles, supported by a review of the authorities, was described as follows by Bowen CJ, Deane and Fitzgerald JJ in Federal Commissioner of Taxation v Totledge Pty Ltd **[22]**. Their Honours said:*
"A beneficiary under a trust who is entitled to income will ordinarily only be entitled to receive actual payment of the appropriate share of surplus or distributable income: the trustee will be entitled and obliged to meet revenue outgoings from income before distributing to a life tenant or other beneficiary entitled to income. Indeed, circumstances may well exist in which a trustee is entitled and obliged to devote the whole of gross income in paying revenue expenses with the consequence that the beneficiary entitled to income may have no entitlement to receive any payment at all. This does not, however, mean that a life tenant or other beneficiary entitled to income in a trust estate has no beneficial interest in the gross income as it is derived. He is entitled to receive an account of it from the trustee and to be paid his share of what remains of it after payment of, or provision for, the trustee's proper costs, expenses and outgoings."" But the reference at para 8 of Harmer v Federal Commissioner of Taxation [1991] HCA 51; (1991) 173 CLR 264 (12 December 1991) can be read down to what the parties to the case agreed to.

[548] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[549] Income Tax Assessment Act 1997 - Sect 2.5

[550] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[551] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[552] Income Tax Assessment Act 1997 - Sect 2.5

[553] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

- Slater's[554] and Federal Treasury[555] propositions that "*More fundamentally, the difficulties have their roots in what Professor Parsons described as the "congenital defects" in an income tax law which borrowed its "analytical stock" from trust law rather than commerce, and so finds itself fixed with preconceptions about income as a "flow*."
  As French CJ, Gummow, Hayne, Heydon And Crennan JJ in Bamford[556] at para 17 stated: "*The fundamental misconception that there is no relevant difference between income comprising rental money and income comprising the profits of a trading business, and the difficulties of applying a tax system incorporating 21st century business complexities to a relationship whose founding principles were laid down in the 18th century, will continue until some genuine effort is made to respond to the complaint of Hill J repeated by the High Court in Bamford[557]."*
  In the authors' opinion the major problem arises from attempting under s 95[558] calculation of "net income of a trust estate to aggregate both the persons who have beneficial interests in income with persons who have no beneficial interest in the income derived or accrued, but who are subsequently appointed to net amounts that were appointable under the discretionary trust deed from income or from capital gains. Although all may be classified as beneficiaries, only a beneficial owner owns property and a discretionary beneficiary only has a hope or expectation that the trustee will exercise its discretion to appoint property for its benefit under separate trust obligations to the discretionary trust deed. But the appointed amount is separate created property that needs separate analysis as to determine its tax liability. Income Tax in England has been around since Napoleon and William the Pitt[559];
- ITAA 1997[560] and impliedly GST and FBT Acts necessarily assume that the taxpayer should be in a position to pay the tax out of income etc. The Act merely requires the ownership of relevant property, such as trading debts

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[554] A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 36

[555] "Re:Think Tax discussion paper Better tax system, better Australia AGPS March 2015 Chapter 10: Complexity and administration http://bettertax.gov.au/files/2015/03/10_Complexity-and-admin-of-tax-system.pdf

[556] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[557] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010) para 17

[558] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

[559] http://webarchive.nationalarchives.gov.uk/+/http://www.hmrc.gov.uk/history/taxhis1.htm

[560] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

created before cash received. McNeil's[561] deemed derivation under s 6-5(4)[562] prior to receipt of cash and GST taxable transactions before receipt of cash are examples. Harding's[563] assessment on ownership of mere property is classical support that ITAA is a tax on property[564] without necessarily the receipt of the cash to support the payment of the tax[565]. The Act may impliedly assume that the taxpayer will have the property resources to finance the tax.

MBI[566] PROPERTIES PTY LTD DECISION

The Full High Court "sign off" that all preconditions of the legislation applying to the current owner were satisfied

On 3 December 2014 the Full High Court (consisting of five justice who handed down a joint unanimous decision who were the same justices as unanimously decided "Unit Trend[567]" decision except Hayne J replaces Renan) handed down its decision in Commissioner of Taxation v MBI Properties Pty Ltd[568]. We as authors want to contrast the decision especially against:

- The GST decision of *Commissioner of Taxation v Unit Trend Services Pty Ltd*[569] under the GAAR[570] legislation of the GST Act;
- The early Federal Income Tax decision of *Harding v Federal Commissioner of Taxation* [571] where the concept that merely legislatively focused on uncharacterised property can be designated as income for purposes of revenue

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[561] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[562] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[563] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[564] ITAA: South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)
GST: Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)
FBT: Queensland v Commonwealth [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)

[565] See also Asprey, K (Chairman), Lloyd, J, Parsons, R and Wood, K 1975, Taxation Review Committee — Full Report (The Asprey Review), AGPS, Canberra, paragraphs 7.11 and 7.42 to 7.57

[566] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[567] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[568] [2014] HCA 49 (3 December 2014)

[569] [2013] HCA 16 (1 May 2013)

[570] GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[571] [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

income under an Income Tax Assessment Act[572]. Such identified property would not generally be identified by accountants as income[573];

- The early decision of the full High Court in *Bohemians Club v Acting Federal Commissioner of Taxation*[574] where the Acting Commissioner assessed the Club being an "association" of individuals as a deemed "company" for taxation persons where the deemed company owned no property whilst the individual member retained the interest in the unexpended contributions at year end that were being assessed to the deemed company as "income". In the Full High Court of four members [575] in Bohemian's[576] decision the majority concluded that "*A man's income consists of moneys derived from sources outside of himself. Contributions made by a person for expenditure in his business or otherwise for his own benefit cannot be regarded as his income, unless the Legislature expressly so declares*." The authors conclude that only the contributor owned any property to be assessed and not the deemed tax personality of a company[577]. The authors note the similarities to the Unit

[572] See also Asprey, K (Chairman), Lloyd, J, Parsons, R and Wood, K 1975, Taxation Review Committee — Full Report (The Asprey Review), AGPS, Canberra, paragraphs 7.11 and 7.42 to 7.57

[573] Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965) South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[574] [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918)

[575]Being Griffith C.J., Barton, Powers and Rich JJ

[576] Bohemians Club v Acting Federal Commissioner of Taxation [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918)

[577] Treasury describes mutuality in the following manner: "Membership organisations not prescribed as income tax exempt may utilise the mutuality principle. Under the mutuality principle, where a group of individuals join together to contribute to a common fund, created and controlled by all of them for a common purpose, any surplus created in the fund from the individual contributions or dealings between the members of the fund is not considered to be income for tax purposes. For a mutual organisation, income received from transactions with their members is tax exempt. A range of licensed clubs and societies, co-operatives, strata title bodies corporate and other associations utilise the mutuality principle.
Tax discussion paper Better tax system, better Australia" AGPS March 2015 p 126 http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf

Trend[578] decision where the person assessed was the Group Representative[579] who owned none of the property subject to the GST tax[580];

- The early decision of *Purcell*[581] where the Full High Court refused to uphold a GAAR assessment on the legal owner of the property where the taxpayer conveyed two thirds of the beneficial interest to fixed and identifiable beneficiaries, where the beneficiaries owned the equitable interests. The inference is that with ownership the identity of the taxpayer changes for both the assessing and GAAR provisions;
- The seven justices decision in *South Australia v Commonwealth*[582] which distinguished the concept of "income derived " from a "capital gain" where the owner held both legal interests and beneficial interests in the various items of property, but where the Full High Court did not need to adjudicate how the Capital Gain entered into assessable income through s 25[583] (to be aggregated with other income) with its precondition word of "income" needing to be satisfied under a Central[584] Provision analysis of the ITAA 1936[585].

In the MBI[586] decision the Full High Court make it clear that MBI satisfied all the preconditions to liability (even though the liability was not primary on the supply[587] of Goods or Services, but on acquisition) and especially satisfied the preconditions to an adjustment subsequent to acquiring the property post the "supply of a going

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[578] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[579] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[580] Unit Trend is similar when one thinks about it to the High Court decision in *Bohemians Club v Acting Federal Commissioner of Taxation* the Commissioner attempted to assess an association of individuals on their unspent contributions to the Club not at the contributor's level, but at the association level - because the Tax Act of 1915 deemed an association to be a "company", even if it was not incorporated. In both decisions the Bohemian Club and the Unit Trend both parties owned nothing that was being assessed. In Bohemians an unincorporated associations of persons could argue that the property had nothing to do with the unincorporated association and only the members of the association had rights in the property at financial year-end while in Unit Trend no such argument was presented to the High Court.

[581] Deputy Federal Commissioner of Taxation v Purcell [1921] HCA 59; (1921) 29 CLR 464 (12 August 1921)

[582] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[583] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[584] Chapter 2--The basic rules PART 2-1--The Central Provisions of A New Tax System (Goods And Services Tax) Act 1999

[585] See the work of the Late Professor Parson on the "Central Provisions" analysis http://www.austlii.edu.au/au/journals/SydLRev/1987/18.pdf http://setis.library.usyd.edu.au/pubotbin/toccer-new?id=par.p00086.sgml&images=acdp/gifs&data=/usr/ot&tag=law&part=1&division=div1

[586] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[587] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

concern". This contrasts with Unit Trend[588] decision where the issue of satisfying the preconditions of the primary tax liability under the legislation was not before the Court in a situation where the person who did not own the relevant property and did not supply[589] any property and was not necessary the person that the GST legislation focused upon in its General Anti-Avoidance Regime legislation[590] that was being assessed[591]. These were the very same issues that the Income Tax legislation started to deal with 100 years ago with:

- *Bohemians Club v Acting Federal Commissioner of Taxation*[592]
- *Purcell*[593].

The issues in MBI decision[594]

The joint judgment summarized the issues of the appeal as:

- *Whether MBI, as purchaser of the reversionary estate in the leased apartments, made a "supply" (as defined in the GST Act) to MML as tenant during the currency of each lease after completion of the purchase.*
- *Whether, if MBI did make a relevant supply to MML, there was any "price" for the supply for the purpose of calculating an increasing adjustment under s 135-5(2).*

In our paper we do not discuss in any detail the reasons for holding MBI liable, but focus on the core principles of the GST legislation that the High Court identified and contrast those focused principles with the Full High Court decision in *Commissioner of Taxation v Unit Trend Services Pty Ltd*595. Was ownership by MBI[596] and by Unit Trend a precondition for the Full High Court upholding the MBI assessments and their merely dismissing the Unit Trends (as a taxpayer's arguments) as Unit Trend had not argued ownership?

MBI PRECONDITIONS TO PRIMARY TAX LIABILITY

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[588] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[589] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[590]GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[591] French CJ, Crennan, Kiefel, Gageler And Keane JJ advised that they were focusing on Division 165 which contains the anti-avoidance provisions of the GST Act

[592] [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918)

[593] Deputy Federal Commissioner of Taxation v Purcell [1921] HCA 59; (1921) 29 CLR 464 (12 August 1921)

[594] http://www.hcourt.gov.au/cases/case_s90-2014

595 [2013] HCA 16 (1 May 2013)

[596] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

The joint decision states:

> *The general rule of liability depends upon the concept of "taxable supply" in s 9-5, which uses each of the three preceding terms. That section provides in the relevant part that "[y]ou make a taxable supply if ... you make the supply for consideration ... and ... the supply is made in the course or furtherance of an enterprise that you carry on". The section adds the important qualification that "the supply is not a taxable supply to the extent that it is GST-free or input taxed".*
> *The general rule of liability is to be found in s 9-40: "[y]ou must pay the GST payable on any taxable supply that you make". The amount of GST so payable is set, by s 9-70, at "10% of the value of the taxable supply". The value of a taxable supply is set, by s 9-75, at ten elevenths of the "price", which the same section goes on to define. The relevant effect of that definition is that, where "the consideration for the supply" is confined to consideration expressed as an amount of money, the price is that amount. According to the general "attribution rule" in s 29-5, save where accounting occurs on a cash basis, "GST payable by you on a taxable supply" is attributable to the tax period in which any invoice is issued in relation to the supply or, in the absence of an invoice, in which any of the consideration is received for the supply.*

The obvious point raised by the authors, is if you[597] do not own property you are not the actual provider of services, how does one "supply[598]"? How does the non-owner (and which non-owner) satisfy the additional preconditions of "consideration" or furtherance of "enterprise" or in MBI[599] decision how does the non-owner satisfy the requirements of deliverance of everything for the "supply of a going concern"?

The full High Court states:

> *The third relevant special rule is in s 38-325. It provides that one of the forms of supply that is ordinarily GST-free is "[t]he supply of a going concern". The expression "supply of a going concern" is defined in that section to mean a supply under an arrangement under which the supplier supplies to the recipient "all of the things that are necessary for the continued operation of an enterprise" which the supplier carries on or will carry on until the day of the supply. As a GST-free supply, no GST is payable on the supply of a going concern, and an entitlement for an input tax credit on anything acquired to make the supply is not affected. The acquisition by MBI of the lessor's rights*

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[597] ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[598] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[599] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

under the leases over the three residential apartments which it acquired was the supply to it of a going concern.

The Full High Court decided

> *MBI's[600] intended supply of residential premises by way of lease to MML was for a price: the rent to be paid to MBI by MML in observance of MML's continuing obligation under the apartment lease. That is so whether or not that rent can be said also to have been payable in connection with South Steyne's grant of the apartment lease to MML.*

Therefore, the Full High Court had overruled the Full Federal Court decision that MBI had merely made a continuation of the existing supply by the previous owner of the property and there was no fresh "supply" by MBI[601]. The point being raised by authors is the very one raised by the Commissioner in his Decision Impact Statement[602] that at para 37 of the High Court MBI[603] decision that

> *"In observing and continuing to observe the express or implied covenant of quiet enjoyment under the lease, the lessor is appropriately characterised, for the purposes of the GST Act, as engaging in an "activity" done "on a regular or continuous basis, in the form of a lease". The result is that, whether or not the lessor might also be engaged in some other form of enterprise, the lessor makes the supply of use and occupation of the leased premises in the course of the lessor carrying on an enterprise as defined in s 9-20(1)(c)."*

The authors' point is that only the owner of the property and only the owner of the consideration for the lease can provide the necessary "activity" done.

Therefore:
- if owners of property liable, then preconditions can be easily satisfied;
- if anAct attempts to assess non-owners, then it is easy for Act to deem one attribute or precondition to be satisfied - but complexity sets in when deeming is required to satisfy two or more preconditions that need to be satisfied.

The authors found it illuminating when the Full High Court recognised that all preconditions to the specialist provision liability needed to be met. They stated in their penultimate paragraph:

> *The conditions for the operation of s 135-5 were met, and the Commissioner was correct to assess MBI to an increasing adjustment under that section.*

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[600] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[601] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[602] S90/2014 http://law.ato.gov.au/atolaw/view.htm?DocID=LIT/ICD/S90-2014-2/00001

[603] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

MBI's appeal from the disallowance of its objection to that assessment should have been dismissed.

The MBI decision reminds us that under GST, there is no focal provision through which all assessable income or adjustable amounts must pass - unlike s 6-5[604] and s 6-10[605] of ITAA 1997.

MATRIX ANALYSIS

Decision	**Possibilities**	**Unanimous five member High Court decision**
Justices deciding **MBI** – French CJ, Hayne, Kiefel Gageler And Keane JJ. **Unit Trend** - French CJ, Crennan, Kiefel, Gageler And Keane JJ	Unanimous joint decisions v independent decisions	Joint unanimous decision.
Taxpayer/you		

[604] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[605] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

Was MBI a “You” an “an entity” for GST legislation purposes?	GST legislation can follow either: ▪ the person making the supply of property; or ▪ the person receiving the consideration – such as supply of services (held to making leasing supplies); or ▪ the “entity” as defined, such as “group representative” who reports and pays tax to the Commissioner on behalf of the group; ▪ recipient owner of the supply of a going concern”	In contrast to Unit Trend decision the issue of the taxpayer was always implicitly before the High Court and they only decided on the issues brought before them. At para 3 the Court unanimously state: *Under the GST Act, an entity is liable to pay GST on any "taxable supply", and is entitled to an input tax credit on any "creditable acquisition". For each tax period applicable to the entity, amounts of GST are set off against amounts of input tax credits to produce a net amount, which may then be subject to adjustments. The net amount, as adjusted, is the amount which the entity must pay to the Commonwealth, or which the Commonwealth must pay to the entity, in respect of the period.* In contrast to MBI decision, Unit Trend was not the supplier or recipient of any transfer of property “as a going concern” and merely reported GST transaction as Group Representative and as MBI decision could not personally satisfy the preconditions of the “going concern legislation”.

Did the GST Act focus on the concept of a “taxable supply”?	*The general rule of liability depends upon the concept of "taxable supply" in s 9-5, which uses each of the three preceding terms. That section provides in the relevant part that "[y]our make a taxable supply if ... you make the supply for consideration ... and ... the supply is made in the course or furtherance of an enterprise that you carry on". The section adds the important qualification that "the supply is not a taxable supply to the extent that it is GST-free or input taxed". The general rule of liability is to be found in s 9-40: "[y]ou must pay the GST payable on any taxable supply that you make".*	In MBI the High Court unanimously decides “*The third relevant special rule is in s 38-325. It provides that one of the forms of supply that is ordinarily GST-free is "[t]he supply of a going concern". The expression "supply of a going concern" is defined in that section to mean a supply under an arrangement under which the supplier supplies to the recipient "all of the things that are necessary for the continued operation of an enterprise" which the supplier carries on or will carry on until the day of the supply. As a GST-free supply, no GST is payable on the supply of a going concern, and an entitlement for an input tax credit on anything acquired to make the supply is not affected. The acquisition by MBI of the lessor's rights under the leases over the three residential apartments which it acquired was the supply to it of a going concern.* In Unit Trend the issue of how GST Act operated in relation to conflicting instructions not before the High Court.

Did the Group Representative provisions prevail over the Central Charging provisions of GST Act?	Not an issue before the High Court in MBI	The issue how GST Act operated in relation to conflicting instructions, not before the High Court. But in each decision we have four common justices and both MBI and Unit Trend decisions that were unanimous joint judgements.
Ownership		
Did MBI own any property subject to the assessments?	South Steyne previously owned ownership of the land and three lots/units until ownership was transferred to MBI. In contrast the ownership of the land or ownership of the consideration involved in the transfers of land was never with Unit Trend.	The High Court decision in MBI does not assume that one can track the Group representative who was • not an owner; • not a supplier, nor • the owner of any consideration once the Group Representative has been unanimously elected to that role. In MBI the Full High Court note that "*As recorded by the primary judge and as noted in the Full Court in South Steyne, there was "no dispute between the parties that the purchase of the reversionary interest in the apartments by MBI effected a 'supply' by MBI in favour of MML"[18]. The dispute between the parties was as to the characterisation of that supply."*
Accounting treatment		

Accounting treatment	The GST accounts appeared to be based on MBI was the taxpayer and not on any "group" basis. No other accounts would be relevant to the High Court decision.	The High Court decision does assume that one can tracks MBI and only MBI acquired everything to carry on the business.
Income tax	In the authors' opinion MBI would be liable to pay "income tax" on the rental income less allowable deductions	Income tax liabilities mot an issue before the High Court. But GST Act operates in harmony with the facts and ownership principles.
CGT	In the authors' opinion MBI would be liable to pay "income tax" on the net gain • being the capital gain (if any) on the reversionary estate; • the exploitation of the reversionary estate from leasing under s 104-55 with that CGT liability reduced pursuant s 118-20.	CGT tax liabilities not an issue before the High Court. But GST Act operates in harmony with the facts and ownership principles.

CONTRASTING UNIT TREND[606] DECISION

Unit Trend satisfied non of the Central[607] assessing preconditions

[606] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[607] For example:
A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.5
A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.40

The problem with the "Unit Trend decision is that Unit Trend could not satisfy any of the preconditions to liability mentioned in the MBI[608] unanimous decision by the full High Court – where all but one of the five bench decision were the same justices! This is similar when one thinks about it to the High Court decision in *Bohemians Club v Acting Federal Commissioner of Taxation*[609] where the Commissioner attempted to assess an association of individuals on their unspent contributions to the Club not at the contributor's level, but at the association level, because the Tax Act of 1915[610] deemed an association to be a "company", even if it was not incorporated. In both decisions the Bohemian[611] Club and the Unit Trend[612] both parties owned nothing that was being assessed. In Bohemians an unincorporated associations of persons could argue that the property had nothing to do with the unincorporated association and only the members of the association had rights in the property at financial year-end while in Unit Trend no such argument was presented to the High Court.The Unit Trend decision can be compared with Cornell[613], where the Full High Court unanimously decided that attributable income is Constitutional; and part of a valid enactment.

In the Bohemian[614] decision the High Court do not uphold the assessment. In "Unit Trend[615]" the ownership issue was not before the High Court as an issue in dispute. Therefore, the High Court did not accept Unit Trends arguments presented to it. But the Unit Trend decision raises by implications what are the tax liabilities of a person who satisfies not one of the preconditions of the legislation imposing the liability or GAAR[616], but only has elected to report the tax liabilities on behalf of a group. At a minimum there is conflicting instruction in the legislation between the Basic Rules[617] of GST and the Group Provisions[618]. None of the transactions involved Unit Trend!

The Facts

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[608] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[609] [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918)

[610] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[611] Bohemians Club v Acting Federal Commissioner of Taxation [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918)

[612] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[613] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[614] Bohemians Club v Acting Federal Commissioner of Taxation [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918)

[615] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[616] GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[617] Chapter 2--The basic rules A New Tax System (Goods And Services Tax) Act 1999

[618] Division 48--GST groups A New Tax System (Goods And Services Tax) Act 1999

According to the full High Court judgement of five judges the facts as reported unanimously were:

Unit Trend is the representative member of a GST group of companies [619], which included Simnat Pty Ltd ("Simnat"), Blesford Pty Ltd ("Blesford") and Mooreville Investments Pty Ltd ("Mooreville"). Each of those companies was a wholly owned subsidiary of Raptis Group Limited ("Raptis").
By a contract completed on 20 April 1999, Simnat purchased a parcel of land at Surfers Paradise on the Gold Coast for $30 million. Simnat obtained development approval from the Gold Coast City Council to construct three high-rise towers containing residential apartments on the land. These towers are referred to as "Tower I", "Tower II" and "Tower III".
On 31 July 2001 Simnat engaged another Raptis company, Rapcivic Contractors Pty Ltd ("Rapcivic"), to construct Tower I. Simnat sold units in Tower I to members of the public. The "margin scheme" under Div. 75 of the GST Act [620] was applied to those sales by business activity statements ("BAS") lodged as the sales progressed.
By a contract dated 1 July 2002, Simnat engaged Rapcivic to construct Tower II. Simnat began selling units in Tower II off the plan. On 13 December 2002, a survey plan was registered. It subdivided the original block so that the land on which Towers II and III were to be constructed was subdivided into separate lots with separate titles.
On 14 April 2004 a contract was executed for the sale of Tower II by Simnat to Blesford ("the Tower II contract"). This sale was agreed to be the supply by Simnat of a "going concern"[621]. The sale was completed on 7 May 2004. At this time, the construction of Tower II was at an advanced stage (construction was completed in June 2004) and Simnat was the nominated vendor of 230 of the 289 apartments in Tower II.
The Tower II contract provided for the price to be determined by an independent valuer [622]. It was subsequently fixed at $149.8 million. By the Tower II contract, Simnat assigned to Blesford all of its right, title and interest in each unit contract in Tower II [623]. The benefit of the building contract for Tower II was also assigned by Simnat to Blesford.
By a contract dated 29 January 2003, Simnat engaged Rapcivic to construct Tower III. Simnat began selling units in Tower III off the plan. On 15 April 2004 (the day after the Tower II contract) a contract for the sale of Tower III by Simnat to Mooreville ("the Tower III contract") was executed. Once again, the sale was agreed to be the supply by Simnat of a "going concern". The sale was completed on 23

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619 Approved by the Commissioner for that purpose under s 48-5 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth).

620 Settlements (supplies) made prior to 17 March 2005 were governed by Div 75 as it stood prior to the commencement of the *Tax Laws Amendment (2005 Measures No 2) Act* 2005 (Cth), and settlements on or after 17 March 2005 were governed by Div 75 as amended.

621 Special Condition 3.1 of the Tower II contract.

622 Special Condition 17.1 of the Tower II contract.

623 Special Condition 6.1 of the Tower II contract.

November 2004. At the time of transfer, Tower III was at an advanced stage of construction and Simnat was named as the vendor of 142 of the 241 units.
The Tower III contract also provided for the price to be determined by an independent valuer. It was subsequently fixed at $109.5 million. The Tower III contract also provided for an assignment to Mooreville of all contracts for sale of units in the building that Simnat had entered into. The benefit of the building contract for Tower III was also assigned by Simnat to Mooreville.
Blesford and Mooreville completed the construction of Towers II and III and continued marketing and selling the remaining apartments. Following completion of Towers II and III, Blesford and Mooreville settled all sales of units in the respective Towers (including contracts entered into by Simnat as well as contracts which they had entered into with end buyers).
The margin scheme was applied to the sales to the end buyers. Unit Trend chose to apply the margin scheme on the basis that the price paid by Blesford and Mooreville to Simnat was the relevant consideration for the purpose of determining the margin upon which GST would be determined. Unit Trend, as the group's representative entity, reported GST payable on sales of units in Towers II and III on that basis in its monthly BAS returns commencing in May 2004.
The Commissioner issued a declaration to Unit Trend under s 165-40(a)[624] of the GST Act negating a total GST benefit in excess of $21 million. Following an unsuccessful objection by Unit Trend, Unit Trend applied to the Tribunal for a review of the Commissioner's decisions.

Separation of the actual facts from the reconstruction of facts by GST Act

The authors distinguish between the "actual facts" based on the acceptance of an incorporated person as a taxpayer and the integration of the "tax facts" as adopted by the taxpayer, the Commissioner, the AAT[625] and the Federal Court[626] and as presented to the full High Court.

Actual facts assuming that an incorporated company is a separate legal personality for taxation purposes

Unit Trend Services Pty Ltd, as the possible but unlikely "you[627]" for GST purposes, had nothing to do with the ownership of the property supplied or the consideration received or receivable on any changes in ownership. Unit Trend Services Pty Ltd appears to be only the person who had itself elected under s 48-5[628] by then group

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[624] http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.40.html

[625] 2009/5952-5955

[626] Unit Trend Services Pty Ltd v Commissioner of Taxation [2012] FCAFC 112 (17 August 2012)

[627] Ss 3.5, 195-1 A New Tax System (Goods and Services Tax) Act 1999

[628] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.5
http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.5.html

companies to be the group representative member[629] of a GST group[630] of companies. Unit Trend appears not even to be a holding company of the GST group.

There is no discussion by the High Court of whether:

- A "you[631]" for GST s 9-1[632] and s 195-1[633] purposes, includes the representative of a GST group; or
- The GAAR[634] provides a tax benefit were obtainable by the representative member of a GST group of companies as compared with the person making the actual taxable supplies[635]. But the appeal to the High Court assumed such, was so as that issue was not before them.

The facts make it clear that the

- supply[636];
- taxable supply[637]

were made by the owners of the land and building and not by Unit Trend.

These issues were also not before the full High Court. The case is decided on the basis that the Unit Trend was the relevant GST entity for Division 48[638] and Division 165[639] GAAR[640] purposes. Division 9 was not overridden as its operation applied to the group members that made the actual supplies,

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[629] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[630] S 48-5 A New Tax System (Goods and Services Tax) Act 1999

[631] ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[632] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9-1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.1.html

[633] http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s195.1.html

[634]GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[635] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[636] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[637] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[638] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[639] A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[640] GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

The full High court summarized the facts of the tax scheme as found by the AAT as:
(*a) a group of companies that engage in property development (at least including companies A and B);*
(b) company A owns or buys land proposed for development, and undertakes the development to a point where the development has substantially progressed, and the overall value of the development is considerably higher than the price A paid for the land;
(c) company A sells the partially completed development to company B at market value. The timing of the sale is to occur at a time when the market value is significantly higher than the price A paid for the land;
(d) the sale by A to B is to be free of GST (either because it is a sale of a going concern, or because A and B are within a registered GST group under Division 48);
(e) company B completes the development, and sells to end buyers. Any sales made by A to end buyers would be honoured and completed by B;
(f) upon transfer to end buyers, company B would choose to apply the margin scheme in respect of its liability for GST (calculated based upon consideration B provided to A)."

But where the authors recognise that Unit Trend Services Pty Ltd was not either company A or B nor even itself accused of participating in the scheme identified!

Taxation law facts

The authors identify the taxation law facts as:

- Unit Trend was the representative member of a GST group of companies [641] applied[642] the "margin scheme[643]" under Div 75 of the GST Act [644] was applied to those sales by business activity statements ("BAS") lodged as the sales progressed. Margin schemes are applied by “yous[645][646]”, if on a * taxable supply

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641 Approved by the Commissioner for that purpose under s 48-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

642 Unit Trend chose to apply the margin scheme.

643 A New Tax System (Goods And Services Tax) Act 1999 - Sect 75.1

644 Settlements (supplies) made prior to 17 March 2005 were governed by Div 75 as it stood prior to the commencement of the *Tax Laws Amendment (2005 Measures No 2) Act 2005* (Cth), and settlements on or after 17 March 2005 were governed by Div 75 as amended.

645 ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

646 Division 75 and in particular 75-1 and s 75-5.

of * real property that you[647] make and the * recipient of the supply have agreed in writing that the margin scheme is to apply. However, Unit Trend did not own any of the property being sold or enter into any contracts with the third party purchases of units in "Tower I", "Tower II" and "Tower III" and therefore itself could not supply[648] anything. Unit Trend role as a separate legal personality is more like the "accountant" or reporting agent chosen and accepted as such by the Commissioner of Taxation. Whether the GST legislation applies to a "you[649]" as compared with a "Group Representative[650]" was not raised in the High Court appeal;

- Unit Trend, as the group's representative entity, reported GST payable on sales of units in Towers II and III on that basis in its monthly BAS returns commencing in May 2004;
- The Commissioner issued a declaration to Unit Trend under s 165-40(a) of the GST Act negating a total GST benefit in excess of $21 million. Following an unsuccessful objection by Unit Trend, Unit Trend applied to the Tribunal for a review of the Commissioner's decisions;
- The GST GAAR Division 165 [651]under s 165-1(1) focuses on "an entity (the ***avoider***) gets or got a *GST benefit from a *scheme"
- ***Entity*** means according to s 184-1 any of the following:

  (a) an individual;
  (b) a body corporate;
  (c) a corporation sole;
  (d) …
  (e) …
  (f) any other unincorporated association or body of persons;
  (g) …
  (h) …

Note: The term ***entity*** is used in a number of different but related senses. It covers all kinds of legal persons. It also covers groups of legal persons, and other things, that in practice are treated as having a separate identity in the same way as a legal person does.

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[647] ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[648] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[649] ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[650] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[651] New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

Assumptions

The authors identify the following assumptions that make up or are embedded in the full High Court decision, namely:

- the High Court accepts that each incorporated company is a separate legal person which is capable of owning property[652];
- The liability to GST can fall on either the s 9-40 "you[653]" making a taxable supply[654] or the Division 48[655] group representative[656], but s 48-40(1)(b) excludes the actual supplier when a group representative has been appointed;
- the GAAR Division 165[657] could fall on either the s 9-40 "you[658]" making a taxable supply[659] or the Division 48 group representative[660]. As the GAAR operates at the "entity" level which is the same "level" as the person who "supplies" in s 48-40(1), then there is an issue whether Unit Trend was liable under Division 165 of the GAAR legislation;

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[652] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920) "In this case, as in that, the shareholder is not entitled either at law or in equity to obtain for himself, except in accordance with the law of the State and the regulations of the company, any portion of the subject matter dealt with, but in this case, as in that, the Commonwealth Act in no way affects or purports to affect the rights or liabilities of the company and the shareholders *inter se* under State law. In both cases the whole body of shareholders had power, by taking a proper course of action (*e.g.*, by bringing into operation art. 155), to insist on the property in question being actually distributed among them, and it was this circumstance which in *Morgan's Case* was held to give rise to the right of the Commonwealth Parliament to impose taxation on the shareholders in respect of the property of the company."

[653] ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[654] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[655] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[656] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[657] New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[658] ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[659] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[660] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

- the Division GST "benefit" obtained can be either obtained by the s 9-40 "you" making a taxable supply[661] or the Division 48 group representative[662]. But s 165-5(1)(a) operates at the "entity" level which s 48-40(1)[663] sates is the supplier and not the group representative;
- the contractual world and property law was not following the "tax group" entities with the intermediate sales by Simnat to Blesford and Mooreville;
- The uplift from the sales by Simnat to Blesford and Mooreville upon the intermediate cost base is to be taken into account in the application of the Division 75 margin[664] scheme, when Division in s 75-5 operates at the "you" level. There appears to be no discussion of s 75-5(3)(c) exclusion of the margin scheme to inter group sales;
- There is no constitutional impediment to drafting the Group Provisions[665].

All three arguments put up by Unit Trend[666] in the High Court decision assumed that Unit Trend Services Pty Ltd as the group representative[667] was the relevant taxpayer/ you[668] or Group Representative. According s 48-1 companies within a 90% owned group, and in some cases other entities (such as non-profit bodies), can form a GST group. One member of the group then deals with all the GST liabilities and entitlements (except for GST on most taxable importations) of the group, and (in most cases) intra-group transactions are excluded from the GST. This assumption that Unit Trend is the relevant "you[669]" is now questioned by the following High Court decisions:

- Commissioner of Taxation v Reliance Carpet Co Pty Limited [2008] HCA 22 (22 May 2008)[670];

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[661] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[662] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[663] http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.40.html

[664] A New Tax System (Goods And Services Tax) Act 1999 - Sect 75.1

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[666] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[667] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[668] ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[669] ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[670] http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2008/22.html

- Commissioner of Taxation v Qantas Airways Ltd [2012] HCA 41 (2 October 2012)[671] (where again the Group Representative provisions[672] were not before the High Court as an issue);
- MBI[673] decision.

Of the seven members of the High Court five sat and handed down a single unanimous judgment in Unit Trend[674] in the names of French CJ, Crennan, Kiefel, Gageler and Keane JJ. There was only one change in justices for BMI.

The Issue(s) before the Court – Unit Trend[675]

The Commissioner argued that *"the decision of the majority in the Full Court does not "best achieve the purpose or object" of Div 165[29], in that the purpose of s 165-5(1)(b) was to prevent the anti-avoidance provisions in Div 165 applying to a person merely by reason of the exercise of a right to make a choice expressly provided for by the GST Act [30]. Because the word "scheme" is defined by the GST Act in wide terms, it can readily encompass the making of a choice expressly provided for by the GST Act. Accordingly, s 165-5(1)(b) is intended to make Div 165 inapplicable where the GST benefit is produced by an individual statutory choice, taken discretely [31], but only in such a case.*

The Commissioner also argues that a mere contributory causal connection with a statutory choice is not sufficient to remove a scheme from Div 165. The Commissioner says that there must be a connection between the statutory choice and the GST benefit which is closer than that which is represented by an affirmative answer to a "but for" test. Rather, there must be a relationship of proximate or immediate cause and effect between the making of a choice expressly provided for by the GST Act and the getting of the GST benefit [32]. This argument draws upon the view of Dowsett J that there must be a "direct link" between the GST benefit and the choice [33]."

Unanimous five-member decision – French CJ, Crennan, Kiefel, Gageler And Keane JJ.

Under[676] the scheme found by the Tribunal[677], the amount of GST payable by Unit Trend is smaller than it would be without the scheme because of the intermediate

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[671] http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2012/41.html

[672] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[673] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[674] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[675] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[676] Austlii para 48

[677] *Unit Trend Services Pty Ltd v Commissioner of Taxation* [2010] AATA 497.

sales by Simnat to Blesford and Mooreville. The GST benefit got from the scheme, and which Div 165 is being invoked to negate, is the benefit obtained as a result of the intermediate sales by Simnat to Blesford and Mooreville; the GST benefits associated with the choices to effect the sales as intra-group sales of a going concern are not in issue.

Considerations[678] of relatively recent legal history lend support to the view that it is the absence of such an entitlement, which justifies inclusion of that GST benefit within the scope of the anti-avoidance provisions of Div 165[679]. It has long been recognised in Australia that the tension between general anti-avoidance provisions[680] and specific provisions allowing the taxpayer a choice, which if exercised will yield the taxpayer a benefit, is to be resolved in favour of the specific provisions [681]. Section 165-5(1)(b) may readily be seen to exhibit the same intent as was ascribed to s 260 of the Income Tax Assessment Act 1936 (Cth) by Dixon CJ, Kitto and Taylor JJ in W P Keighery Pty Ltd v Federal Commissioner of Taxation [682], namely, "to protect the general provisions of the Act from frustration, and not to deny to taxpayers any right of choice between alternatives which the Act itself lays open to them."

It[683] is tolerably clear from the legislative history of s 165-5(1)(b) that its purpose was to ensure that those GST benefits got from a scheme, but not attributable to the making of a statutory choice, are not immunised against the possible operation of the general anti-avoidance effect of Div 165[684]. In its original form in the A New Tax System (Goods and Services Tax) Bill 1998 ("the GST Bill"), Div 165 did not contain what would become s 165-5(1)(b). The provision was subsequently included as an amendment to the GST Bill. The Supplementary Explanatory Memorandum tabled in the Senate in support of the amendments to the GST Bill ("the SEM") included, at par 1.118, the following explanation of the mischief at which s 165-5(1)(b) was directed:

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678 Austlii para 52

679 GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

680 ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html
GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html
FBT Fringe Benefits Tax Assessment Act 1986 - Sect 67 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s67.html

681 See W P Keighery Pty Ltd v Federal Commissioner of Taxation [1957] HCA 2; (1957) 100 CLR 66 at 92; [1957] HCA 2.

682 [1957] HCA 2; (1957) 100 CLR 66 at 92.

683 Austlii para 53

684 GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

> *"Queries have been made about the scope of the current Division 165[685]. It has been suggested that the Division may have unintended effects and may apply to transactions not intended to defeat GST law. In particular, it has been suggested that the exercise of an explicit option under the GST law may trigger the anti-avoidance provisions."*

…

*The[686] upshot of this analysis (**contained in the judgement[687] rather this précis**) is that s 165-5(1)(a) and (b) require a GST benefit got from a scheme to be subject to scrutiny by reference to the other criteria in s 165-5 if the getting of the benefit referred to in s 165-5(1)(a) is not an entitlement the source of which is the making of a choice expressly authorised by another provision of the GST Act.*

That[688] being so, reference to the undisputed facts shows that the GST benefit in question was not attributable to the making of a statutory choice provided by the GST Act.
As[689] we have said, the relevant GST benefit is not that to which Unit Trend was entitled by reason of intra-group sales or sales of a going concern. By reason of the statutory choices of the Raptis companies to become members of a GST group, and the agreements to transfer Towers II and III as going concerns, there was no GST payable on the intra-group transfers of those Towers. But the GST benefit in question was not attributable to those choices. The GST benefit got from the scheme reflected the amount agreed to be paid to Simnat as the consideration for the transfer of Towers II and III, which in turn reflected the increase in the value of the properties by reason of the work done upon them. That GST benefit was not something to which Unit Trend was entitled as a matter of the exercise of any statutory choice. It was what the majority in the Full Court characterised as "a commercial election or choice" involved in the transfer of the properties to Blesford and Mooreville in accordance with the scheme after the substantial increase in the value of the properties. This brought about the uplift in the intermediate cost base from which the GST benefit was got [[690]].

In relation to the three arguments against the GAAR assessments put before the High Court by Unit Trend the High Court adjudicated:

1. **First argument**

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685 New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1
http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

686 Austlii para 56

687 Para 56 Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

688 Austlii para 57

689 Austlii para 58

690 *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 76 [200]-[201].

Unit Trend's[691] first argument is that s 165-5(1)(b) proceeds on the footing that a scheme which confers a GST benefit may be removed from the scope of Div 165 of the GST Act by a statutorily authorised choice which is but one element or step in a scheme which has generated the GST benefit.

The full Court unanimously decided:

> "*The[692] choice made by Blesford and Mooreville under s 48-5[693] of the GST Act to become members of the GST group, and the agreements for the supply of Towers II and III as going concerns made between Simnat and Blesford and between Simnat and Mooreville respectively, as provided for by s 38-325(1)(c) of the GST Act, were choices that resulted in no GST being payable on the supplies by Simnat to Blesford and Mooreville. They were not choices and agreements by reference to which the GST Act operated to confer the GST benefit, which the Tribunal identified as having been got by Unit Trend, being a reduction in the GST payable on supplies to end buyers.*
> *The choice made by Blesford and Mooreville under s 75-5 of the GST Act to apply the margin scheme in respect of supplies to end buyers was the same choice as would have been made, albeit by Simnat, without the scheme.*
> *For[694] these reasons, we reject Unit Trend's first argument."*

2. Second argument

Unit[695] Trend's second argument namely that the GST benefit "got" by it from the scheme is attributable solely to its election to apply the margin[696] scheme at the conclusion of sales of the developed products by Blesford and Mooreville, should also be rejected. This argument is framed in terms of when the GST benefit "arose". To frame the question in this way is to divert attention from the real issue, which is concerned with the GST benefit "got" from the scheme. That scheme included all the steps identified by the Tribunal.

It is important to bear in mind that s 165-5(1)(b) is concerned with the actual GST benefit which has been "got" from the scheme. By virtue of s 165-10(1)(a), that benefit is a matter of monetary value got from the scheme, rather than of legal forms or the timing of the getting of the benefit. The actual GST benefit in question here cannot be identified as a matter of monetary value without recognising the decisive effect of the

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[691] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[692] Austlii para 61

[693] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.5
http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.5.html

[694] Austlii para 63

[695] Austlii para 64

[696] A New Tax System (Goods And Services Tax) Act 1999 - Sect 75.1

uplift from the sales by Simnat to Blesford and Mooreville upon the intermediate cost base. As the Tribunal explained [46]:

> *"The GST benefit here is attributable to the use of the higher amount as the consideration for the acquisition used in the calculation of the margin under the margin scheme rules. This higher amount is not the product of the election to adopt the margin scheme but is a result of the transfers of Tower II and Tower III and the consideration agreed to be paid for them. We take the view that a development group, such as Raptis, which acquires land in respect of which no input tax credits are available, will always sell the developed product under the margin scheme if the end purchasers, such as those who purchased from Raptis, would not be able to enjoy any benefit of input tax credits. Accordingly, we consider that the margin scheme would have been applied to any sales of completed apartments in the development in any event. Thus the GST benefit arises not out of any election or choice but from the effect of the transfers of Tower II and Tower III."*

3. Third argument

Unit[697] Trend's third argument advanced that by the insertion of sub-s (3) into s 165-5 in 2008 did not affect the meaning of (i.e. the causal connection required by) the phrase "not attributable to" in s 165-5(1)(b). In applying s 165-5, whether or not the case falls within s 165-5(1)(b) must be addressed before addressing s 165-5(3). It is only if the GST benefit is attributable to a statutory choice that one then addresses whether it was the purpose of the scheme to create the occasion for the exercise of that choice [47].

The[698] insertion of s 165-5(3) in Div 165 cannot be regarded as an acknowledgement by the Parliament that, without it, Div 165 would not have encompassed a situation such as that of present concern. Section 165-5(3) ensures the application of Div 165 to the case where the scheme was entered into for the purpose of generating the statutory choice relied upon by the avoider. Section 165-5(1)(b) may apply without the need to invoke s 165-5(3) where the statutory choice arises as a step in a scheme. There may be cases where the avoider has not manipulated circumstances to confect the occasion for the making of a statutory choice, but nevertheless the GST benefit can be seen to be not attributable to that choice. Having regard to the Tribunal's findings as to the terms of the scheme here in question, this is such a case. On those findings, which were not challenged on the appeal to the Full Court or in this Court, it is clear that s 165-5(3) was not necessary to bring this GST benefit within Div 165.

Summary of High Court decisions

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[697] Austlii para 66

[698] Austlii para 67

The full Court state that *"The[699] question agitated by the application is whether GST benefits obtained by the respondent, Unit Trend Services Pty Ltd ("Unit Trend"), are not attributable to the making of a choice, election, application or agreement (collectively "a choice") that is expressly provided for by the GST Act."*

The High Court are not required to decide whether Unit Trend Services Pty Ltd obtained such benefits, but merely decide on the arguments presented to them whether they accept the arguments. This conclusion is re-enforced by the immediately subsequent statement *"The reasons set out the material provisions of the GST Act, the facts of the case, which are not in controversy, the reasons of the Tribunal and the Full Court in summary, followed by discussion of the arguments raised by the parties in this Court."*

In relation to each argument the Court unanimously decide:

- For[700] these reasons, we reject Unit Trend's[701] first argument;
- Unit[702] Trend's second argument, namely … should also be rejected;
- As[703] to the third argument advanced by Unit Trend … On those findings, which were not challenged on the appeal to the Full Court or in this Court, it is clear that s 165-5(3) was not necessary to bring this GST benefit within Div 165.

The consequences of not arguing in the objection, during the appeals and the lack of arguments that Unit Trend Services Pty Ltd was not:

- The owner of the property;
- The owner of the consideration;
- The supplier;
- on the first appearance of the facts even actually participated in the scheme

is that there are possible inchoate consequences for the persons professional advising or professionally servicing Unit Trend Services Pty Ltd which are discussed in the authors' conclusions below.

The High Court appear to willing to allow cases to be decided solely on the issues presented to them[704] for adjudication, so presumably they never become participants in any dispute and can been seen to be impartial adjudicators of issues put before them. The High Court appear to supportive of the application of the broad and vague

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[699] Austlii para 1

[700] Austlii para 63

[701] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[702] Austlii para 64

[703] Austlii para 66 and 67

[704] for another example Commissioner of Taxation v Commercial Nominees of Australia Limited [2001] HCA 33; (2001) 179 ALR 655; (2001) 75 ALJR 1172 (31 May 2001);

instructions of the GAAR[705] legislation in Division 165[706] override of specific legislation, whenever the Commissioner turns to the High Court and Division 165 preconditions are not disputed by the taxpayer. The Court knows from its experience with s 260 of the ITAA 1936[707] Act of the consequences whenever the High Court is accused of not supporting the intent of Parliament in its legislation by interpreting the statutory instructions. Therefore, in the authors' opinion the taxpayer needs not only to self-assess, but appreciate all the implications of the fiscal legislation, limitations imposed on the taxpayer appealing to the courts by not explicitly raising issue within the statutory time limit and the need to "hammer home" the salient points at all stages of its appeal. But merely setting out the facts and supporting documents should have alerted anyone to the fact that Unit Trend was not involved in any transaction or even any planning of transactions. Unit Trend appears to have been the "dumb" accountant[708] reporting group transactions and not a taxpayer.

Decision	**Possibilities**	**Unanimous five member High Court decision**
Taxpayer/you		
Was the Group Representative a "You" or "an entity" for GST legislation purposes?	GST legislation can follow either: ▪ the person making the supply of property; or ▪ the person receiving the consideration – such as supply of services; or ▪ the "entity" as defined such as "group representative" who reports and pays tax to the Commissioner on behalf of the group.	Issue never came before the High Court and they only decided on the issues brought before them. By contrast in the MBI decision the High Court specifically address the satisfaction of the preconditions of the legislation.

[705]GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[706] New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[707] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[708]

Did the GST Act in Division 48 focus on the Group Representative or Group as a separate personality?	The Act could possibly be operating at level of liability being triggered by one person, but the Act can then focus fiscal liability on an another in certain circumstances.	The issue how GST Act operated in relation to conflicting instructions not before the High Court.
Did the Group Representative provisions prevail over the Basic Rules and provisions of GST Act?	Chapters 1 and 2 of the GST Act contain the Basic Rules and provisions. Although Division 48 makes it clear in s 48-40(1) (a) that the Representative member is liable, nothing in s 9-40 mentions the override of a Basic Provision by a Special Rule.	The issue how GST Act operated in relation to conflicting instructions not before the High Court.
Taxpayer/You for GAAR		

S 165-5 operates in relation to the entity/ avoider who gets a benefit.	The GST GAAR legislation can follow either: 1. the person making the supply of property; or 2. the person receiving the consideration – such as supply of services; or 3. the "entity" possibly defined as defined such as "group representative" who reports and pays tax to the Commissioner on behalf of the group. However, the s 184-1 "entity" is vaguely defined, but in s 48-40(1) it focuses on the person who makes the taxable supply so presumably excluding possibility 3 above.	The High Court decision presumes that one can track the Group Representative who was not a supplier or entitled to any consideration. But that assumption was not tested by Unit Trend's appeal.
Ownership		
Did the Group Representative own any property subject to the assessments?	Ownership of the land and units being developed was owned by Simnat until ownership was transferred to another group company and then the other group company developed and sold the property. Ownership of the land or ownership of the consideration was never with Unit Trend.	The High Court decision presumes that one can track the Group representative who was not an owner, not a supplier nor the owner of any consideration once the Group Representative has been unanimously elected to that role.

The facts and facts on ownership	Were Unit Trend facts and what Unit Trend owned and transferred before the Court or were the facts muddled by other person's facts and property not owned by Unit Trend before the Court	An issue never addressed.
Accounting treatment		
Accounting treatment	The GST accounts appeared to be based on a "group" basis. No other accounts would be relevant to the High Court decision, if they were reviewing on the group basis. The accounts for the profits of each owner would be statutorily important: see IEL v Blackburn.	The High Court decision presumes that one can track the Group Representative as a person who reported to the Commissioner on all obligations of the group and was primarily liable for each member's GST liabilities. Doubts are expressed by the High Court in relation to GAAR and its Division 165.
CGT liability	Unit Trend would NOT be liable to pay "income tax" on the net gain the capital gain (if any) on the units transferred, because: • no unit was ever owned by Unit Trend; • Unit Trend could never qualify as a Head Entity.	Neither "ownership" nor CGT liability issues were before the High Court.

Income tax Liability	Unit Trend would NOT be liable to pay "income tax" on any ordinary income gain or statutory income gain on the units transferred, because: • no unit was ever owned by Unit Trend; • Unit Trend could never qualify as a Head Entity.	Neither "ownership" nor income liability issues were before the High Court.
Interpreting tax legislation		
Unfettered right to tax – Re Barger	The authors put forward that although Parliaments right to tax is only limited by the Constitution, it is in fact limited by the choice of the subject matter of the tax and the preconditions contained in the legislation. Capital Gains Tax assesses assets as defined owned by a person and not assets not so owned.	According to the authors the issue of any limitations on the rights to tax based on preconditions to liability were not before the High Court. Possibly such issues were of no commercial interests to the objector.

Read the legislation as a whole - Project Blue Sky Inc v Australian Broadcasting Authority	The authors put forward the proposition one needs to read the preconditions to liability in the Basic Rules in Chapter 2 of GST Act and the Group Provisions of Division 48 and need to make both enacted legislation operate. Such means in the authors' opinion the preconditions are accumulative and Division 48 does not exclude the preconditions of the Basic Rules.	According to the authors the issue of reading both Division 48 together with the Basic Rules were not before the High Court.

The madness the High Court finds itself in

One cannot fail to appreciate that of all the financial controllers, tax advisers, lawyers and Queens Counsels that advised Unit Trend Services Pty Ltd that not one of them presumably noticed that Unit Trend Services Pty Ltd did not:

- Own the property;
- Own the sale consideration;
- Enter into any transactions;
- Entitled to input tax credits, as it never acquired any property[709];
- On the evidence presented in the full High Court judgment and AAT decision participate in any scheme as compared merely reporting to the Commissioner in calculating the Group's tax and then pay the liability.

Section 48-40 attempts to make the Group representative[710] liable. Subsection (1) states:

> *GST that is payable on any * taxable supply an entity makes and that is attributable to a tax period during which the entity is a * member of a * GST group:*
> *(a) is payable by the * representative member; and*
> *(b) is not payable by the entity that made it (unless the entity is the representative member).*

[709] s 7-1(2)

[710] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

Cornell[711] infers such drafting is Constitutionally valid, but leaves what preconditions to impose a GST liability open. Such s 48-40 drafting contrasts with the s 9-40 general statement that "*You must pay the GST payable on any * taxable supply that you make*." Section 48-40 on a strict reading of what it says merely states the actual tax is payable by the representative, but the actual liability to be taxed is with the person making the taxable supply[712] and the s 9-40 "you[713]" who must pay the tax but the payment must be forwarded to the Commissioner by the Group Representative[714]. The problem is that Parliament has enacted both provisions and one attempts to interpret the both provisions to make them both act sensibly. However, reconciliation of the conflicting instructions and s 9-40 was not before the High Court for adjudication.

Although on can read prima facie that the GST legislation is generally interpreted so that it moves the GST liability from the supplier to the reporting person. The next two issues are:

- To whom does the GAAR[715] of Division 165[716] apply to – the Group Representative[717] or the you that made the supply[718]; and
- who is liable for any penalties?

Division 165[719] focuses on the term "entity" in s 165-1(a), s 165-15(1) and the person entitled to make a choice mentioned in s 165-1(b) and the entity that gets the tax benefit.

Therefore, in the authors' opinion one must examine for Division 165 purposes:

- on whom the GST liability falls – the entity;

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[711]Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[712] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[713] ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[714] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[715]GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[716] New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[717] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[718] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[719] New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

- where it falls on the Group Representative[720], whether it has been involved in a scheme or made a choice at the supplier level or at the group level or both;
- where it falls on the Group Representative whether another entity that is a member of a group has been involved in a scheme or made a choice;
- whether the Group Representative is obtaining a tax benefit or whether the benefit is specific to a member of the group.

The problem is very similar to the problems that equitable interests in property create for income tax. Division 5 and 6 of Part III of 1936[721] require all equitable interest holders in partnerships and trusts to put a year-end tax return showing the groups income and how it is shared amongst all equitable interest holders. Division 6 and s 96 attempts to provided that the trustee can only be assessed in accordance with s 96. But McNeil's[722] case decides and the South Australia v Commonwealth[723] demonstrates that the prima facie tax liability falls on the beneficial owner of the income under s 25[724] of 1936[725] Act and therefore s 6-5[726] of the 1997 Act when the all of the preconditions are satisfied. The unresolved issue is how the beneficial owner is assessed under s 6-10[727] of ITAA of 1997 Act for statutory income, such as attributable income, when it is not the beneficial owner of the relevant property. How would Act operate, if Cornell[728] was the beneficial owner of the shares and not the registered shareholder? In this scenario Cornell; would be neither a member or shareholder to to satisfy the preconditions of s 16(2)[729] of ITAA 1915.

In an environment where the GST legislation accepts the fictitious legal personality of an incorporated person and that GST legislation applies to it[730], the full High Court

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[720] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[721] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[722] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[723] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[724] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[725] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[726] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[727] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[728] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[729] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[730] Commissioner of Taxation v Reliance Carpet Co Pty Limited [2008] HCA 22 (22 May 2008)

unanimously decided in not answering the question as to who is liable to tax or to whom the GAAR[731] Division 165[732] applies:

- in relation to the Unit Trend's first argument "*The[733] choice made by Blesford and Mooreville under s 75-5 of the GST Act to apply the margin scheme in respect of supplies to end buyers was the same choice as would have been made, albeit by Simnat, without the scheme.*
  For these reasons, we reject Unit Trend's first argument." [734]
- in relation to the Unit Trend's second argument "*The actual GST benefit in question here cannot be identified as a matter of monetary value without recognising the decisive effect of the uplift from the sales by Simnat to Blesford and Mooreville upon the intermediate cost base.*"[735];
- in relation to the Unit Trend's third argument "*It is only if the GST benefit is attributable to a statutory choice that one then addresses whether it was the purpose of the scheme to create the occasion for the exercise of that choice **[47]**[736]*."

The problem is if:

- Division 165[737] only applies to the person who makes supplies or taxable supplies[738];
- Division 48[739] is only a reporting division that needs to be complied so that the Commissioner has not have to deal with a multitude of taxpayers, then doubts will exist that the GAAR[740] division applies to it as compared with the person focussed upon in the substantive provisions such as s 9-40. A conflict exists as s 48-40(1)(b) clearly states that the actual supplier does not need to pay the GST. In the

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[731] GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[732]New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[733] Austlii para 62

[734] – The authors note that the choices were being made by specific suppliers of the taxable supply

[735] – Therefore the authors note that the focus was on the specific suppliers of the taxable supply as it was their costs that were being focused upon not the cost to the Group

[736] - The authors note that therefore the choices were being made by specific suppliers of the taxable supply

[737] New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[738] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[739] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[740]GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

ITAA 1936[741] there are year-end[742] reporting provisions and divisions to deal with the problem that the Commissioner does not know who owns the equitable interests in partnership and trust property. Cases such as Galland[743] uphold the need to comply with their wording, but other cases such as McNeil[744] state that the Core[745] Provision liability of s 25[746] of 1936[747] and s 6-5[748] of 1997 Act also need to be complied with. According to the authors, both sets of rules are effective and need to interpreted. But McNeil[749] infers if Specific Legislation does apply or not, then only the Core Provisions are relevant, unless the Specific legislation broadens the Core Provision, such as in s 101[750] of ITAA 1936;

- The penalties being levied focus on the "you[751]" or the person who makes supplies or taxable supplies[752];
- There is a difference in taxation liabilities, because the tax adviser does not appreciate whom the Act applies to and then a question of negligence may arise. Where the objection sets out and limits the person rights on appeal, then a lack of knowledge as to who GST law applies and what triggers liabilities becomes important. But the authors do not see any signs of the accounting or legal firms slowly and incrementally putting down the guiding principles that they should follow when advising clients and advising clients who are getting into difficulties in relation to specific legislation or in relation to all the legislation they need to principally focus on. Even the professional publishers are so focused on a "production" schedules or reporting every announcement, enactment and AAT decision and court decision that they do not plan for an analysis as to "What is this all this about?" They are even weaker at identifying the five and seven member

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741 http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

742 For example see 22 to 46 in Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

743 Federal Commissioner of Taxation v Galland [1986] HCA 83; (1986) 162 CLR 408 (16 December 1986)

744 Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007

745 Income Tax Assessment Act 1997 - Sect 2.5

746 http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

747 http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

748 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

749 Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007

750 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

751 ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

752 A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

decisions and putting down the accumulated learning of the adjudicators to date for the subscribers to tax publications appreciate. The tax publisher's are better in regurgitating what the Commissioner produced rather,than putting down what are the major full High Court decisions on the tax schemes that they report on or on the general law of the property being taxed or even reconciling the principles behind the interacting tax systems. Tax publishers do not focus on the fundamental tasks that each accounting and legal firm find difficult to research and address for each client so that commercially important and technically important issues are highlighted for the subscribers or readers;

- MBI[753] decision is support for the proposition that all preconditions to a taxation liability by the relevant person have to be satisfied, then satisfying some but not all prevents the liability falling on that person. But the non-taxpayer must list in its objection each precondition that is not satisfied - including ownership and fight all issues all the way to the Full High Court - see Cornell[754].

Verification of conclusions

The authors "verify" their conclusions in 2015 by concluding:

Facts and acceptance of the facts

Does the imposition of tax "line" up with the facts or the facts as accepted previously or during the dispute by the taxpayer? Unit Trend Services Pty Ltd accepted its role as representative of a group, but not as an association of persons who were treated as a group but Unit Trend appears to have accepted its liabilities to represent the group that it had nominated and that Unit Trend did not own the property nor was it a legal personality separate from the group members. Section 48-40 then excludes the member of the group from being liable to the GST, but the Tax Administration Act 1953 imposes joint and several liability on each member of the group without that person triggering the preconditions to the tax. Thus the Unit Trend decision contrasts with the Bohemian[755] Club decision. But if GST, GST and FBT are all merely property taxes[756], confusion reigns, as the GST Group Representative[757] does not need

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[753] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[754] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[755] Bohemians Club v Acting Federal Commissioner of Taxation [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918)

[756] ITAA: South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)
GST: Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)
FBT: Queensland v Commonwealth [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)

[757] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

to be the same person as the Head Entity for Tax Consolidation[758] or the employer for FBT. The calculation of tax liabilities are based on property law facts and actual costs and not mere calculations executed irrespective of property law factual situations. The major problem in relation to "uncertainty" is the ignoring of intra group transactions, where membership of group is only based on 90% common ownership. However, the GST grouping Division 48[759] appear to contrast with s 701 Tax Consolidation to treat to a group of wholly owned companies as a "single entity", where only the Head Entity has so elected (and not the subsidiary) in contrast to:

- The existence of property in the form of shares in subsidiaries and loans between wholly owned companies as property;
- the "push down" of share and loan costs into the tax consolidation cost base;
- corporate law position that each subsidiary is a separate legal personality: Industrial Equity Limited v Blackburn[760];
- The only clear instructions in the Tax Consolidation Legislation provides instructions to ignore inter corporate property by treating the subsidiary as part of the Head Entity[761] for ITAA purposes and assess the Head Entity, but not the

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[758] Australia has developed complex rules for the taxation of consolidated groups and for the taxation of certain financial arrangements. These regimes were designed, in part, to reduce compliance costs for businesses by better aligning the tax system with how large businesses operate in practice (that is, as groups of companies). The regimes also aimed to ensure that tax outcomes reflect the commercial substance of the financial arrangements that they undertake. However, the consolidation and TOFA rules are contained within a very large and complex set of legislation, rulings and ATO guidance material which create their own uncertainties and complexities. "Re:Think Tax discussion paper Better tax system, better Australia AGPS March 2015. P 97. http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf

The authors express doubt on the correctness of Treasury statements as the Full High Court has upheld for Corporate Law principles the distinct separate legal existence of each incorporated company (Industrial Equity Ltd v Blackburn [1977] HCA 59; (1977) 137 CLR 567 (15 November 1977)) and the fact case law has always assessed the individual separate legal personality of each company under s 25 of 1936 Act, but the issue has not yet been addressed under ss 6-5 and s 6-10 of 1997 Act.

[759] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[760] Industrial Equity Ltd v Blackburn [1977] HCA 59; (1977) 137 CLR 567 (15 November 1977)

[761] Income Tax Assessment Act 1997 - Sect 701.1(1)

Head Entity on Subsidiary and MEC income[762]. Treasury in Re:Think express a different opinion[763].

Section 48-10 says that representative member pays the liability and not the member, but then advises that each member is jointly and severally liable under the Taxation Administration Act. By contrast, under tax consolidation Head Entity is only assessable under s 6-5[764] and s 6-10[765], especially pursuant to s 6-10[766] (as the subsidiary's income cannot be income to ordinary concepts), if its preconditions to primary tax liability can be satisfied.
The GST GAAR[767] operates in relation to the entity that is the avoider and obtains the benefit, but where it is not clear whether the avoider was the owner of the property, the Group representative[768] or the member of the Group that is jointly and severally liable under the Tax administration Act, unless you include ownership test as the basis of the GST tax.

CGT

The authors note that:

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[762] Income Tax Assessment Act 1997 - Sect 701.1(2) and (3) "Head Entity" versus the "You" that also covers the single non-tax consolidated Subsidiary(ies) and Head Entities that are assessed under Income Tax Assessment Act 1997 - Sect 6.5 and s 6-10 using the very same wording to assess the consolidated Head Entity.

[763] Australia has developed complex rules for the taxation of consolidated groups and for the taxation of certain financial arrangements. These regimes were designed, in part, to reduce compliance costs for businesses by better aligning the tax system with how large businesses operate in practice (that is, as groups of companies). The regimes also aimed to ensure that tax outcomes reflect the commercial substance of the financial arrangements that they undertake. However, the consolidation and TOFA rules are contained within a very large and complex set of legislation, rulings and ATO guidance material which create their own uncertainties and complexities. "Re:Think Tax discussion paper Better tax system, better Australia AGPS March 2015. P 97. http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf

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[764] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[765] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[766] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html
Section 6-10 must be the most un-litigated provision in ITAA1997, but critical for assessing statutory amounts not owned. See Fowler v Commissioner of Taxation [2008] FCA 528 (21 April 2008)

[767]GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[768] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

- That the transfers of land were a s 160A[769] and s 108-5[770] asset owned by Simnat Pty Ltd and then by Blesford Pty Ltd and Mooreville Investments Pty Ltd. CGT liabilities and income tax liabilities would followed each change of ownership;
- Any reduction of any CGT tax liabilities for income liabilities by the prevention of double taxation under s 160ZA(4)[771] of 1936 Act or s 118-20 of 1997[772] Act would have prevent double taxation under both assessing provisions. There is a technical problem applying the prevention of double tax to tax consolidation situation where the Head Entity is not the same person as the "You";
- the appointment of a group representative[773] does not explicitly override s 9-40 instructions for the owner who makes a supply[774] to be liable for GST liabilities. The two sets of instructions are not explicitly exclusive;

General

The authors note that:

- the taxpayer and the Commissioner chose which provisions of legislation that were to be adjudicated by the High Court and which ones were not to be presented to the High Court;
- Following and reconciling conflicting instructions enacted by Parliamentary instructions favours making sense of the provisions, so in the authors' opinion and GST Act imposes tax on the supplier of goods and services and the "representative member" merely reports or represents, and then pays the tax liability to the Commissioner not as a primary liability, but as an administrative liability as stipulated by s 48-40;
- Therefore, in the authors' opinion no liability would be imposed on the Bohemian[775] Club under the GST legislation, if GST so existed in 1915[776]. Bohemian Club did not own the contributions as a separate legal person to trigger any GST liability.

Decision impact statement

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[769] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[770] Income Tax Assessment Act 1997 - Sect 108.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s108.5.html

[771] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[772] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[773] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[774] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[775] Bohemians Club v Acting Federal Commissioner of Taxation [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918)

[776] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

The Commissioner issued his draft impact statement (DIS) on 26 June 2013. The DIS reflects the same factual confusion as to who was liable to pay the tax. The ATO[777] advised in brief that:

> Unit Trend Services Pty Ltd (Unit Trend) was the representative member of a GST group. At all relevant times, this GST group included Simnat Pty Ltd (Simnat), Blesford Pty Ltd ("Blesford") and Mooreville Investments Pty Ltd (Mooreville).
> When construction of each of Towers II and III was almost complete, Simnat sold the towers for their market value as GST-free going concerns to Blesford and Mooreville respectively. Blesford and Mooreville completed construction of the towers and sold the completed residential units to home buyers and investors.
> Blesford and Mooreville applied the margin scheme for the purposes of working out their GST liability on the sale of each of the completed residential units and calculated the margin for those sales with reference to the market value consideration that they had provided for their acquisition of the respective towers.
> The Commissioner made a declaration in relation to Unit Trend under Division 165 of the GST Act to negate the GST benefit obtained on sales of completed residential units in Towers II and III. The GST benefit was the difference between GST payable under the margin scheme on the sale of the completed units by Blesford and Mooreville compared to GST that would have been payable under the margin scheme if Simnat had completed the towers and sold completed units to home buyers and investors.

Issues decided by the Court

The Court concluded at [58] that the GST benefit that Unit Trend got from the scheme was not something that Unit Trend was entitled to as a matter of any statutory choice. Rather, it was the transfer of the towers to Blesford and Mooreville at market value under the scheme at a time when there had been a substantial increase in the value of the properties. It was this which brought about an uplift in the intermediate cost base on which Blesford's and Mooreville's margin was determined and which gave rise to the GST benefit that Unit Trend got from the scheme.

ATO[778] view of Decision

At [60], the High Court confirmed that an identified GST benefit is not attributable to the making of a choice by an entity if: (a) the GST Act or another relevant law does not operate to confer the identified GST benefit by

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[777] https://www.ato.gov.au

[778] https://www.ato.gov.au

> reference to that choice; or (b) the choice made in fact as part of the scheme would have been made in any event without the scheme. Reference to a choice that would have been made in any event without the scheme is consistent with the Commissioner's submission that the GST benefit that Unit Trend got from the scheme was not attributable to the choice to apply the margin scheme. The declaration made in this case sought to negate the GST benefit that Unit Trend got from the scheme because sales of residential units were made by Blesford and Mooreville respectively under the margin scheme, rather than by Simnat under the margin scheme.
>
> ***Relevance to Part IVA of the Income Tax Assessment Act 1936***
>
> Part IVA includes a provision that is similar in important respects to paragraph 165-5(1)(b). Relevantly, subparagraph 177C(2)(a)(i) precludes the operation of Part IVA if the tax benefit obtained by a taxpayer in connection with a scheme *'is attributable to the making of* [*a*] *choice ... expressly provided for by'* the income tax legislation.

The Commissioner claimed in his Decision Impact Statement that "The issue before the High Court was whether a declaration under Division 165[779] operated to negate the GST benefit that Unit Trend got from the scheme, because the GST benefit obtained by Unit Trend was 'not attributable to' the making of a choice, election, application or agreement that was expressly provided for by the GST Act."

The Full High Court by contrast reject Unit Trends first[780], second[781] and third[782] arguments. Their Honours according to the authors actually do not say that Unit Trend actually got any benefit. As the AAT stated and the High Court quoted[783]:

> "The GST benefit here is attributable to the use of the higher amount as the consideration for the acquisition used in the calculation of the margin under the margin scheme rules. This higher amount is not the product of the election to adopt the margin scheme but is a result of the transfers of Tower II and Tower III and the consideration agreed to be paid for them. We take the view that a development group, such as Raptis, which acquires land in respect of which no input tax credits are available, will always sell the developed product under the margin scheme if the end purchasers, such as those who purchased

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[779] New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1
http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[780] Austlii para 63;

[781] Austlii para 64;

[782] Austlii para 66;

[783] Austlii para 65;

from Raptis, would not be able to enjoy any benefit of input tax credits. Accordingly, we consider that the margin scheme would have been applied to any sales of completed apartments in the development in any event. Thus the GST benefit arises not out of any election or choice but from the effect of the transfers of Tower II and Tower III."

Authors' conclusions

The main "big picture" conclusion is that:

- the basic rules provisions are located in Division 9 and that they focus on a "you[784]";
- the GST Group provisions exist in Division 48 that focus on a "group representative[785]";
- the GAAR[786] provisions exist in Division 165[787] that focus on an "entity";
- all these provisions need to be reviewed as to how they interact to determining of the provisions so that they can be harmonised or compartmentalised. Even the Full High Court in Unit Trend quote from their decision in Project Blue Sky[788] by quoting: "*The context and purpose of a provision are important to its proper construction because, as the plurality said in Project Blue Sky Inc v Australian Broadcasting Authority* ***[40]****, '[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute' ... That is, statutory construction requires deciding what is the legal meaning of the relevant provision 'by reference to the language of the instrument viewed as a whole'* ***[41]****, and 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'* ***[42]***." (*Emphasis of French CJ and Hayne J*). The fundamental issues of ownership were not before the High Court, so the High Court merely dismissed the taxpayer's arguments.
  Such review of the ownership preconditions to the GST legislation may well limit Division 48[789] to an administrative reporting provision leaving the Basic Rules to

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[784] ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[785] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[786] GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[787] New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[788] Project Blue Sky v ABA [1998] HCA 28; 194 CLR 355; 153 ALR 490; 72 ALJR 841 (28 April 1998)

[789] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

apply to the relevant "you[790]", who was not Unit Trend". Under s 14ZU of the Taxation Administration Act 1953 requires one to state in it, fully and in detail, the grounds that the person relies on within the time limit since 1 July 2012 (until 1 July 2018) of a max of 4 years and 1 day[791] and within 60 days of a GST decision being served[792];

- The "fog of tax" is partially caused by complex legislation where taxpayers are required to self-assess and object within short time limits and limit their grounds where limitations on taxpayers should be confined to the facts that are within the taxpayer's knowledge and not complex interactive legislation that Parliament incessantly[793] amends;
- where taxation is the statutory exaction of property with non-reciprocal supply of anything else by the Government for the delivery of property (money) to the Government, then identifying exactly who is liable, why they are liable and when they are liable is important to the successful imposition of the tax;
- the Commissioner's impact statement of the full High Court Decision reflect the ongoing confusion as to who GST applies to that is highlighted by the Unit Trend decision, namely:
    - to the owner of the property being the supplied – namely the "you[794]";
    - representative member of a GST group, where it was never an owner of any of the property being supplied - the "entity" to which the GAAR[795] legislation applied;
    - such being highlighted that under the ITAA 1936 GAAR[796] there was only the s 177A[797] "taxpayer" that applied to both the assessing provisions and the GAAR provisions of Part IVA;
- the High Court when not presented a choice in assessing an artificial tax entity[798] or the owners of property hinted that there were problems associated with their decision, but merely focussed on the issues before it. The High Court never said

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[790] ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[791] https://www.ato.gov.au/General/Correct-a-mistake-or-dispute-a-decision/Dispute-(object-to)-an-ATO-decision/Decisions-you-can-object-to,-and-time-limits/#GST_decisions

[792] Taxation Administration Act 1953 - Sect 14ZW(1)(bh)

[793] http://bettertax.gov.au/files/2015/03/10_Complexity-and-admin-of-tax-system.pdf

[794] ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[795] GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[796] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html

[797] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html

[798] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.40

that GAAR[799] applied to Unit Trend, only that it dismissed its arguments;

- Gibbs C.J., Wilson, Deane and Dawson JJ in MacCormick[800] indicated that the assessment in Waterhouse[801] purported to impose a land tax upon a person in respect of land which he did not own and so required that person to satisfy the taxation liability of another;
- because Parliament cannot express itself clearly, taxpayers are faced with a barrage of legislation with implications and interactions not clear or obvious to taxpayers. It would not be obvious that when a Group Representative[802] elects to represent a group that they are exposed to GAAR[803] or impose joint and several liability on all group members for any unpaid GST tax under the Tax Administration Act only when the Commissioner has made the s 165-40 declaration[804];
- The Full High Court unanimous decision is tacit support for Government legislation that the an appointed representative for a group can be made liable for both primary and GAAR[805] taxes, if they elect to become the Group Representative[806]. But the election has exceptions: s 84-40. This group reporting is similar to what Division 5[807] (Partnerships) and Division 6[808] (Trusts) of Part III of ITAA 1936[809] do for equitable interests in property, where the group may not be

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[799]GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[800] MacCormick v Federal Commissioner of Taxation [1984] HCA 20; (1984) 158 CLR 622 (10 April 1984)

[801] Waterhouse v Deputy Federal Commissioner of Land Tax, South Australia [1914] HCA 16; (1914) 17 CLR 665 (24 March 1914)

[802] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[803]GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[804] A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.40

[805]ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html
GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html
FBT Fringe Benefits Tax Assessment Act 1986 - Sect 67 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s67.html GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[806] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[807] see for example Federal Commissioner of Taxation v Galland [1986] HCA 83; (1986) 162 CLR 408 (16 December 1986)

[808] Federal Commissioner of Taxation v Prestige Motors Pty Ltd [1994] HCA 39; (1994) 181 CLR 1; (1994) 64 ALJR 634; (1994) 94 ATC 4570; (1994) 28 ATR 336; (1994) 123 ALR 306 (7 September 1994)

[809] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

known to the Commissioner but on a year-end[810] basis for income tax. But the group issue was not an issue before the Court as both parties were happy that the legislation applied at a group level;

- the problem of taxing another person when the "triggering event" is triggered by another person who owns the property and/or consideration may be solved by allowing the other person to elect to become the actual taxpayer - even though that person is not the person who suffered the taxing event. This however leaves the problem of the unsecured creditor of the Group Representative[811] being swamped by taxation liabilities incurred by other legal personalities, unless the Group Representative is a sole purpose company without any non-ATO[812] creditors. The sole purpose company ensures no oppressive behaviour by Parliament. The next problem with a Group Representative taxpayer is how does one terminates the election when the acceptance of the Group Representative status becomes inappropriate, such as swamping the unsecured creditors without winding up the company (see 48-75) or triggering a failure of the 90% membership rule. But the Group Representative legislation contrasts with Parliaments attempts in the ITAA 1997[813] legislation to move the tax liability from the wholly owned subsidiary to the Head Entity, without the subsidiary's consent or from the PSI entity to the PSI individual without the PSI individual's consent;
- if section 444-90 in Schedule 1 to the Taxation Administration Act 1953 does successfully imposes on each member of the group joint and several liability, then there is no nexus between the trigger event and the person being made liable other than for the member that owned the property;
- s 48-45 allows the Group representative[814] to claim the input tax credit and person acquiring or importing is not entitled to claim;
- the right to Tax the Group Representative[815] under Division 48[816] and s 48-10 is stronger than under Tax Consolidation to tax the Head Entity on the subsidiary's income. Section 701-1[817] only attempts to make wholly owned subsidiaries to be

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[810] For example see 22 to 46 in Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[811] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[812] https://www.ato.gov.au

[813] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[814] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[815] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[816] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[817] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s701.1.html

taken part of the group. The assessing provisions are still s 6-5[818] and s 6-10[819] which still apply to separate legal incorporated personalities and there is no group charging provision. But McNeil's case is support for the proposition only s 6-5 and s 6-10 preconditions need to be satisfied.;

- the problem of imposing GAAR[820] provisions like Division 165[821] on the "Group Representative[822]" rather than the persons who took part or participated in the scheme are:
    - you "shoot" the elected messenger, rather than the participants;
    - the negation of the benefit is attributed to the messenger/Group Representative and not the legal personalities who entered into the scheme especially when the Group Representative has been liquidated or left the group of companies. The possible purchaser of such a company should be loathe to acquire such a legal personality, but may not be aware of its past tax role, if the Group Representative returns are not provided to the purchaser of the company;
    - The Commissioner's s 165-40 declarations to negate the avoider's benefit operate at the Group Representative level.

  The uncertainty as to whom the GAAAR applies to should be clarified.
- why Unit Trend did not dispute the assessments based on GAAR[823] legislation applied to it mystifies the authors as it was the transfer of the towers to Blesford and Mooreville by Simnat at market value under the scheme at a time when there had been a substantial increase in the value of the properties that gave rise to the application of the GAAR legislation. Unit Trend itself had done nothing other than underreport the GST liabilities;
- historically since 1915[824] the taxpayer has been both the person who owns the property and the person liable to the tax. So when the legislation is not clear or vague as to who is the taxpayer/you or relevant entity (such as who is the "you" under ITAA 1997[825]) one needs to not only identify who owns the property, whether there is a person that only the ITAA deems/asserts to exist such as a Self Managed Superannuation Funds (SMS), who owns beneficially and who is charged to tax. It would assist the understanding of the taxation Acts, if the owner

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[818] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[819] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[820]GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[821] New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[822] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[823] GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[824] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[825] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

of the property was the relevant person and then made clear whether the beneficial or legal owner was the person being focussed on;

- in the authors' opinion GST group provisions can be upheld by the High Court, because it is based on the fact that the Group Representative[826] elects and acts as a representative. But the Group Representative is most unlikely to satisfy any other precondition of the legislation, whilst it does not own the GST taxable supply. By contrast, Tax Consolidation in ITAA 1997[827] only allows the Head Entity to elect to consolidate and then without further legislative instructions attempts for income and CGT purposes to reverse the treatment of certain wholly owned incorporated persons to be separate legal entities. The mere fact that ownership of the subsidiaries' property is not owned by the Head Entity and s 6-10[828] is also needed to assess the income and capital gain where the Act focuses on the "you[829]" and not the "Head Entity". Section 6-10[830] is also needed to assess Capital gains of owners of property! The s 701-1[831] "single entity" concept creates uncertainty that the GST Group provisions largely avoid;
- confusion arises whether Unit Trend was able to claim the s 75-5 "margin scheme" treatment as the concessional treatment applies to a "you[832]" that makes a taxable supply[833] and not necessarily to a Group Representative[834] that merely reports a GST taxable supply[835]. Section 75-5 focuses on the "you[836]" making the supply[837] and making the relevant agreement. Section 48-40 makes the tax payable by the representative member for taxable supplies. A better conclusion is

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[826] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[827] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[828] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[829]

[830] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[831] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s701.1.html

[832] ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[833] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[834] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[835] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[836] ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1 A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[837] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

that the vendors made the claim on the Margin[838] Scheme and Unit Trend reported it. The problem is that in Federal Commissioner of Taxation v Suttons Motors (Chullora) Wholesale Pty Ltd [1985] HCA 44; (1985) 157 CLR 277 (11 July 1985) where the majority of the full High Court upheld the entitlement to a statutory deduction for a non-owner of property, where all the preconditions of the legislation had been met by that specific non-owner but where the minority concluded as the taxpayer was not the owner it was not entitled to the concession;

- the tax benefit under the GAAR[839] was the ability to report less GST liability and it is uncertain whether Unit Trend would have the funds itself to pay any of the GST liabilities as it appears that it received none of the consideration for the sales. The three people who could have "got" the GST benefit were:
    - Simnat as the original owner of the property who was actually selling to third party customers under the margin[840] scheme, but who transferred the land being developed to Blesford and Mooreville;
    - the actual vendors of the land/units being Blesford and Mooreville who claimed the higher costs to apply to the margin scheme;
    - Unit Trend being the Group Representative[841];
    - the Holding company of the at least 90% owned group of companies who commercially benefited from the expectation of higher dividend distributions from its subsidiaries.

  The Full High Court at paragraphs 58 and 65 finds that benefit "got" reflected the amount agreed to be paid to the vendor Simnat by Blesford and Mooreville. The full High Court merely says that the uplift in the intermediate cost base from which the GST benefit was got. The full High Court merely rejects the taxpayer's arguments.

  Paragraph 48 says that AAT found Unit Trend got the benefit. The Full High Court merely states at paragraph 67 that the AAT facts were not challenged on appeal. The High Court focussed on the issues before it;
- the interaction between triggering provisions, concessional provisions, liability provisions make the application of the legislation tortuous to follow but it appears that the full High Court had no difficulties tacitly upholding it;
- Unlike Bohemians Club v Acting Federal Commissioner of Taxation[842] the taxpayer in "Unit Trend" elected to become group representative[843] and thus allowed a person who did not own either the property supplied or the consideration payable to become the relevant taxpayer in the sense that it was

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[838] A New Tax System (Goods And Services Tax) Act 1999 - Sect 75.1

[839] GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[840] A New Tax System (Goods And Services Tax) Act 1999 - Sect 75.1

[841] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[842] [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918)

[843] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

legally liable to pay and the owner who supplied was not, but no other preconditions to the legislation was satisfied;

- the taxpayer did not argue that it was not the relevant Division 165[844] entity in order to avoid any penalties imposed;
- It is illogical having focused on the owner of the goods and the supplier of the goods who is carrying on a business/enterprise to expand tax base to include non-owners (and which non-owner) as primarily liable who did not meet the criteria of the Central[845] Provisions[846]. Once one starts assessing non-owners (and which non-owner) how do you identify who you want to tax and why? Unit Trend was only identified under Roy Morgan[847] principles, because it agreed to represent the group and no identification that it actually supplied any goods as part of its enterprise or even received or be entitled to the consideration.

ILLUSTRATION OF THE PROBLEM

Only a comedian would assess a non-owner of the property

Anthony John Hancock (the late Australian comedian) settled his daughter with shares in Comedians Mega Pty Ltd that he owned. Comedians Mega Pty Ltd wisely invested its funds in an Australian Celebrity business that hit the jackpot financially. The daughter as trustee had no beneficial interest in the shares, but during her period as trustee received more than a "half an hour" worth of financial growth. The daughter was obliged under the trust deed to vest all of the shares in Comedians Mega Pty Ltd in the three grandchildren of Anthony when the youngest turned 25. On the youngest 25 birthdays all three grandchildren became absolutely entitled[848] to one third each of the shares in Comedians Mega Pty Ltd and all accumulated income of the trust estate to date,if the daughter as trustee had no lien over trust assets.
The daughter as trustee reportedly refused to vest and deferred vestment date against the three grandchildren wishes, because she claimed that the CGT liability was payable by the children and they would have no cash to pay the CGT liability. The grandchildren would be bankrupted by her actions as trustee!

The authors consider that the example is no joke. If the price of jokes declined from their 2013 high to their 2015 low, then the CGT liability would be very low. But the only relevant owner to be liable would be the daughter as trustee, not her children, if ownership provision prevail. But are the children absolutely entitled whilst the trustee

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[844] New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1
http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html

[845] Chapter 2--The basic rules PART 2-1--The Central Provisions of A New Tax System (Goods And Services Tax) Act 1999

[846] http://www.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s5.5.html

[847] Roy Morgan Research Pty Ltd v Commissioner of Taxation [2011] HCA 35 (28 September 2011)

http://media.dailytelegraph.com.au/files/Rinehart.pdf

faces inchoate CGT liabilities for the period she owned the shares in Comedians Mega Pty Ltd?

One would normally assume that the appointment of a trustee[849] would be a new CGT taxing event, except for the wording of s 104-10(2) Note[850]. Can the new trustee dispute any assessment based on ownership of the trust property prior to becoming the new trustee, because the trust was not a deemed tax entity that actually owned any s 108-5 property for the CGT legislation to apply to? Could the Commissioner make the new trustee liable for all the CGT liabilities for the trust estate and then could the trustee appoint and pay pursuant to s 101? Presumably not where the trust is a fixed trust.

ANALYSIS OF SOME DIFFICULT FULL HIGH COURT DECISIONS

We suspect that some seemingly difficult High Court decisions need to be analysed, but we do recommend that "ownership of the property involved" be identified and executed to appreciate the decisions.

We choose:

- Harding[851]; (three being Isaacs, Gavan Duffy and Rich JJ also adjudicating on Cornell[852])
- Cornell[853]; (three being Isaacs, Gavan Duffy and Rich JJ also adjudicating on Harding[854])
- Gulland[855];
- Bamford[856]

HARDING'S CASE

Harding's[857] Case and its judicial approval in

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[849] http://www.theguardian.com/business/2015/may/28/gina-rineharts-daughter-bianca-made-trustee-of-familys-4bn-trust-fund

[850] Income Tax Assessment Act 1997 - Sect 104.10

[851] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[852] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[853] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[854] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[855] Federal Commissioner of Taxation v Gulland ("Three Doctors case") [1985] HCA 83; (1985) 160 CLR 55 (18 December 1985)

[856] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[857] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

- South Australia[858]
- Resch[859]
- Austin[860]

is central to this paper's concept. The Full Australian High Court provided judicial support that the ITAA could not only make not only what businessmen considered "income" to be the subject matter of the tax, but also any uncharacterised property owned by a person so that:

- William Pitt[861] could levy income tax on 5% of the value of property and tax it as income to finance wars against Napoleon;
- "*The income of any person shall include" (inter alia) "five per centum of the capital value of land and improvements thereon owned and used or used rent free by the taxpayer for the purpose of residence or enjoyment and not for the purpose of profit or gain*[862]." Therefore, retirement pensions could be assessed on the amount drawn down from the allocated fund pension and not limited to

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[858] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[859] Resch v Federal Commissioner of Taxation [1942] HCA 2; (1942) 66 CLR 198 (4 February 1942)

Starke J "I*ncome is as large a word as can be used to denote a person's receipts (Re Huggins; Ex parte Huggins [21]); it signifies that which comes in. An "Act to impose a tax upon incomes" is not less general in scope; it must be liberally construed, and include everything which by reasonable understanding might fairly be regarded as income. Of course, Parliament cannot by any definition or provision that it may adopt contravene the provisions of the Constitution. But I am by no means convinced that the Parliament cannot under cover of an income tax anything that comes into a taxpayer without regard to the characteristics or attributes of capital and income in the works of economists or in the decisions of the courts. It is enough, however, for present purposes to say that the Parliament possesses power, without infringing the provisions of sec. 55 of the Constitution, to bring to charge in an income-tax Act all profits and gains accruing to a taxpayer, without distinguishing whether the profit or gain should be regarded as a receipt on capital or on income or revenue account".*

Dixon J *"The subject of the income tax has not been regarded as income in the restricted sense which contrasts gains of the nature of income with capital gains, or actual receipts with increases of assets or wealth. The subject has rather been regarded as the substantial gains of persons or enterprises considered over intervals of time and ascertained or estimated by standards appearing sufficiently just, but nevertheless practical and sometimes concerned with avoidance or evasion more than with accuracy or precision of estimation. To include the annual value of the taxpayer's residence owned by him or used rent free and to fix it at five per cent of the capital value has not been considered to introduce a new subject (Harding's Case [39]). To treat part of the undistributed profits earned during the current year as part of the assessable income of the shareholder imports no new subject (Cornell's Case [40]—cf. Kellow-Falkiner Pty. Ltd. v. Federal Commissioner of Taxation [41]), nor does it to substitute, in the case of a foreign-controlled business, for taxable income ordinarily calculated a percentage of gross receipts fixed by the discretionary judgment of the Commissioner (British Imperial Oil Cases [42])*."

[860] Gleeson CJ Para 196
"*In Resch, Dixon J had said that the practice, among other bodies, of colonial legislatures might serve as a guide in the determination of whether a provision of a given kind was to be regarded as falling within a particular subject-matter **[241]**. With that in mind, New South Wales referred to the distinct treatment in colonial taxing legislation of income on the one hand and gifts and settlements on the other. What, however, perhaps is of more significance for present purposes is the wide scope, given by the Court in Harding **[242]**, with re*ference to the long history in imperial and colonial legislation, to "income" as a subject of taxation."

[861] https://www.gov.uk/government/history/past-prime-ministers/william-pitt

[862] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

the amount beneficially earned during the year and reported by the trustee as an increment of beneficial interests to existing property held by the trustee;

- Retirement amounts paid by trustees or employers that were not earned could be property to be taxed as designated property subject to tax as income;
- Amounts paid by the liquidator on winding up of a company that would normally merely be a capital extinguishment of the shareholder's rights can be statutorily apportioned according to a statutory formula between capital and income amounts and so taxed in that manner pursuant to s 47[863].

The reason why Harding's[864] case is important is if Parliament can successfully assess mere property owned by a person[865] as a revenue income amount and derivation tests apply and are upheld, then it is very difficult for Parliament (especially when it has not clearly so intentioned) for the word "income" to cover amounts both:

- not so owned legally or beneficially by that person; and
- not derived according the South Australia[866] "derivation" review by the Full High Court.

So Parliament could in Part IIIA[867] of the 1936 Act make it perfectly clear that the net capital gains of the year of property owned by that person can be included as income to be assessed under s 25[868] and included amongst that person's taxable income. But what the High Court has refrained from "signing off" prior to Bamford on is the inclusion of net capital gains in the net capital gain in s 95[869] net income rather in the owner of the property's assessable income as all the 1986 Part IIIA[870] legislative provisions of s 160C[871], s 160ZO[872], s 160AX[873], s 160AY[874], s 160AZ[875] and s 6

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[863] Income Tax Assessment Act 1936 - Sect 47

[864] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[865] See also Asprey, K (Chairman), Lloyd, J, Parsons, R and Wood, K 1975, Taxation Review Committee — Full Report (The Asprey Review), AGPS, Canberra, paragraphs 7.11 and 7.42 to 7.57

[866] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[867] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19

[868] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[869] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

[870] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[871] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[872] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[873] http://law.ato.gov.au/atolaw/view.htm?DocID=RPC%2F19360027%2F160AX-repealed-1&PiT=99991231235958

[874] http://law.ato.gov.au/atolaw/view.htm?DocID=RPC%2F19360027%2F160AY-repealed-1&PiT=99991231235958

[875] http://law.ato.gov.au/atolaw/view.htm?DocID=RPC%2F19360027%2F160AZ-repealed-1&PiT=99991231235958

definition of "taxpayer" required the net capital gain to be directly included in the person's assessable income and such is basically confirmed in Sun Alliance[876] and this Sun case is discussed further below. The net capital gain was not revenue income for Division 6 of Part III of 1936.

But what is not so clear is the correct inclusion of a Capital Gain in Division 6 Part III of 1936 ITAA, but the Full High Court said that there were sufficient instruction in the to include the capital gain in the Division 6 "net income" and s 97[877] distribution, but where the authors disagree is the result that the owner who owned the CGT asset at the s 104-10 timing date for CGT is not assessed on the capital gain and all the discretion beneficiaries who owned CGT gain. "Smoke and Mirrors[878]" is not as bad as the "Fog of Tax".

CORNELL[879]

In the Cornell[880] decision by 6 unanimous justices (three being Isaacs, Gavan Duffy and Rich JJ also adjudicating on Harding[881]) of the Full High Court upheld the right of the Federal Parliament to allow the Commissioner to exercise his discretion deem the undistributed profits of the incorporated company to be deemed to be income of the shareholders. Under sec. 16 (2) of the *Income Tax Assessment Act 1915-1918*[882], and the whole sum of £12,663 has been treated by him as if it had been distributed among the shareholders in proportion to their interests in the paid-up capital of the Company. The Full High Court rejected the main contentions that "that sec. 16 (2) of the *Income Tax Assessment Act* was beyond the power of the Commonwealth Parliament.". The unanimous decision approved "*As was said by Isaacs J. in Morgan's Case[7], "the Commonwealth Parliament ... cannot be limited by any artificial creations or restrictions which the varying policies of State Legislatures may devise." The fundamental fact, in the present case, is that the shareholders of the Company are the "real and only masters" of the undistributed income in the possession of the Company."*

The authors note that Linter Textiles[883] decision held that the company is the

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[876] Commissioner of Taxation (Cth) v Sun Alliance Investments Pty Ltd (in liquidation) [2005] HCA 70; (2005) 225 CLR 488; (2005) 222 ALR 286; (2005) 80 ALJR 202 (17 November 2005)

[877] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s97.html

[878] http://dictionary.cambridge.org/dictionary/british/smoke-and-mirrors

[879] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[880] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[881] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[882] http://www.comlaw.gov.au/Details/C1915A00034

[883] Commissioner of Taxation v Linter Textiles Australia Ltd (In Liquidation) [2005] HCA 20; (2005) 220 CLR 592; (2005) 215 ALR 1; (2005) 79 ALJR 913 (26 April 2005)

beneficial owner of the accumulated profits/property of the company.

The Full High Court were however not required by the appellant to adjudicate on s 10 of the 1915[884] Act test of "derivation directly or indirectly" and "source" tests and the "uncertainty" of the quantum amount to be assessed as "income" as the quantum was only so included after the Commissioner had exercised his discretion. The assessing s 10 is not raised or adjudicated by the High Court. Therefore, the Full High did not address the problem of the undistributed profits/income were actually the company's and only deemed by the exercise of the Commissioner discretion to be income of the shareholder. But under s 10 like many other taxing Acts states that not all income was assessable as certain other preconditions need also to be met. That is the issue raised by MBI[885] decision. Also as s 16(2) is limited to members and shareholders, how does the provision assessable the beneficial owner of the deemed amount? Therefore the Act really needs a provision that directly includes the deemed amount into assessable income and preferably denies the actual owner to be assessed.

But we do not that when the seven members of the Full High Court reviewed the distinction between income derived and Capital gains in South Australia[886] they do not mention Cornell [887]as the deemed income had obviously not been derived.
We therefore conclude that the Full High Court has "signed off" that Parliament can deem one person's income to be another's, but the problem is that the actual income is still owned by the owner of the property and not all property is assessed under the ITAA – only the person who derives s 6-5[888] ordinary income and if the majority in Esquire Nominees[889] concluded only if that person itself has a source to that income. We note in Tax Consolidation[890] there is no deeming and in PSI there is no specific identification of the person[891] deemed to be liable. Then if the word "income" excludes uncertain amounts, the exercise of the Commissioner's discretion in a subsequent year introduces uncertainty in both relation to timing and as to quantum[892]. But we are uncertain as authors as whether such a judicial rule applies to deemed amounts.

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[884] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[885] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[886] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[887] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[888] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[889] Esquire Nominees Ltd v Federal Commissioner of Taxation [1973] HCA 67; (1973) 129 CLR 177 (24 September 1973)

[890] Income Tax Assessment Act 1997 - Sect 701.1

[891] Income Tax Assessment Act 1997 - Sect 84.5

[892] Fullagar J in Ballarat Brewing Co Ltd v Federal Commissioner of Taxation [1951] HCA 35; (1951) 82 CLR 364 (3 July 1951)
Hill, Heerey & Gyles J in Full Federal Court in BHP Billiton Petroleum (Bass Strait) Pty Ltd v Commissioner of Taxation [2002] FCAFC 433 (20 December 2002)

Dixon J in Resch[893] considered that "To treat part of the undistributed profits earned during the current year as part of the assessable income of the shareholder imports no new subject…"

Cornell's[894] sins (of taxation)

Cornell[895] had much to complain about being assessed on attributed income being the reported profits of the company (where it is unknown whether a cash dividend could be financed) as a reputedly minority shareholder of an incorporated company. Cornell could not necessarily access the corporate funds to pay his taxes. He would also be liable on 5% of the value of his home (if he owned a home): see Harding[896] below.

But his major "sin" during the years of crisis of the WW1 was to challenge the constitutional[897] right of Parliament to impose "income tax" not only corporate profits, but also accumulated corporate profits undistributed to shareholders but attributed subsequently by the Commissioner. His major basis of objecting the attributed income was to argue that it was unconstitutional[898] and that therefore the whole of ITAA 1915[899] was to be struck down as unconstitutional. The problem that the authors can identify that was lurking in the background was that ITAA 1915[900] was one of the Federal Acts enacted to finance WW1. Such a challenge was a challenge to the whole fabric of the Federal Nation's war effort. The decision was decided in 1920 whilst the trauma of WW1 was real.

The six-man High Court were resolute that the challenge should be dismissed. But the decision is lopsided in a more peaceful 2015 environment. Section 16(2) attempted to assess not on the value of the shares (see Harding[901]), but on property that he did not yet own and may never own. Creditors of the company are entitled to be paid out of accumulated profits. But the authors note that the Full High Court may have not actually adjudicated on the easier to focus on issue being the lack of ownership of the

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[893] Resch v Federal Commissioner of Taxation [1942] HCA 2; (1942) 66 CLR 198 (4 February 1942)

[894] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[895]Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[896] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[897] Commonwealth Of Australia Constitution Act http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[898] Commonwealth of Australia Constitution Act http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/index.html#s1

[899] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[900] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[901] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

attributed amount by Cornell[902] issue to deliberately leave the lack of ownership issue open to a different High Court. The unanimous decision only refers to "ownership" in relation to Morgan's[903] case. All the Full High Court concluded is that Cornell[904] has a real interest in the accumulated profits of the incorporated company. The judgement never makes it explicitly clear that whether the non-ownership was specifically raised by Cornell as an objector and whether the High Court was adjudicating on that issue as compared with the subject matter of "income".

Cornell[905] may be better revisited by arguing or considering the following "float Bubbles":

- The Full High Court in Cornell did not "lift a finger" to help a distress taxpayer who brought genuine grievances and issues to its court on attributable income not owned by a minority shareholder of a company;
- The Cornell decision was to later reek havoc with expectancies other than shareholders, but with Discretionary Beneficiaries who could be presently entitled income appointed invariably under back dated minutes dated 30 June distributing to Discretionary Beneficiaries on 30 June;
- Cornell decision leaves totally unanalysed and open as to what is is the meaning of the word "income". The enactment of the CGT legislation in 1986[906] defies such by implication. If the word "income extends beyond the definition of s 160A[907] asset (as amended 1992) and s108-5[908] then its meaning needs to be made clear and un-ambigious, as one is leaving property law behind as a basis for taxation;
- The income was not derived under s 10 as Parliament had chosen only to tax derivers;
- The attributable income[909] had no source external to or the ITAA legislation to allow it to be assessed under s 10, as the funds hat represented undistributed profits of the company were still owned by the company and the only source

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[902] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[903] Morgan v Deputy Federal Commissioner of Land Tax (NSW) [1912] HCA 88; (1912) 15 CLR 661 (19 December 1912)

[904] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[905] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[906] http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[907] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[908] Income Tax Assessment Act 1997 - Sect 108.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s108.5.html

[909] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

for attributed income could be the statute and the ITAA 1915[910] did not specifically address the issue of lack of source as source follows ownership. Without a source Parliament had chosen not to tax such income;

- In relation to the amounts being assessed he was not a taxpayer under s 3 and therefore s 10 did not authorize the imposition of tax for the attributed amount;
- Where attributation or relief from attributation is at the Commissioner ‘s discretion of the Commissioner there is uncertainty and this uncertainty prevents such being characterized as income. This rule may be limited to judicial income such as realization of trading debts where discounts such as discounts for prompt payment are offered and taken;
- The attribution of the undistributed profits did not under s 16(2) diminish the company’s tax liabilities and there may be a principle that two people may not be taxed in relation to the very same income. The Assessment Act is therefore more likely on examination of its preconditions to apply to the owner of the undistributed profits
- The unanimous statement “The fundamental fact, in the present case, is that the shareholders of the Company are the "real and only masters" of the undistributed income in the possession of the Company” may need to be reviewed in the light of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ in Linter Textiles[911] that “*The purpose of the statutory liquidation scheme is to ensure that the assets of the company are applied in favour of those who have the real interest in the liquidation. However, it does not follow that the shares held by that company cease to be "beneficially owned" by the company.’ McHugh J concluded that “I have not been persuaded, however, that liquidation, of itself, deprives the company in liquidation of the beneficial holding of its shares. They are available for the purposes of its winding up.*” Kirby J disagreed;
- In 2015 that only the amending Act could just possibly be struck down by s 55[912], so leaving the Core[913] Provisions of 1997 Act to operate and allow the unchallenged financing of the Federal Nation. One allows the High Court to say that the Act is valid, where the imposition of the tax has nothing to do with the person objecting, because he or she is not an owner of any property being assessed. The High Court can more liberally say one amending Act introduces more than “one subject of taxation”, so that the High Court is not faced with a “Do or Die” situation in relation to the whole of Federal Parliament’s Act. The High Court do not have the problem of actually running the impossible country. But one needs to appreciate and research the implications of the Air

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[910] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[911] Commissioner of Taxation v Linter Textiles Australia Ltd (In Liquidation) [2005] HCA 20; (2005) 220 CLR 592; (2005) 215 ALR 1; (2005) 79 ALJR 913 (26 April 2005)

[912] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[913] Income Tax Assessment Act 1997 - Sect 2.5

Calenodie[914] decision;

- Extending income beyond CGT's property and consideration is Prima Facie another tax, since the enactment of CGT legislation in 1986[915]. The two concepts of assessing a person on what they do not own and on what they own is pretty good basis for determining whether there is more than one subject of taxation;
- Some positive statutory interpretation of giving s 55[916] meaning. But the authors are not Constitutional Lawyers and the 1 June 2015 deadline[917] means these thought bubbles need to be left to another day;
- All the different version of what is income judicially, what is statutory income, all Federal Treasury concepts of income, all legislative versions of income or attributable or deemed income or income without deeming leaves some checking to be executed against High Court decision. Best the authors have come across is s 84-5[918] with its seven mentions of what could be "income" where all it saying another person's income is your income;
- For issues not identified by objector – For example the High Court decision focuses on word "income" rather than "ownership";
- Not explicitly adjudicated ownership as compared with real interests of shareholders of company and who are the real masters of the company when the shareholder is a minority shareholder;
- The authors notice how many GAAR[919] decisions such as Purcell[920], Cridland[921] and Peabody[922] also hint that application of the Act against a taxpayer who does not own the property subject to the GAAR legislation is not the person to whom the Act applies;

The authors raise the possibility of a new Full High Court faced with less under war stress may be more likely to strike down an amending Act rather primary Act such as

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[914] Air Caledonie International v Commonwealth [1988] HCA 61; (1988) 165 CLR 462 (24 November 1988)

[915] http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[916] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[917] http://bettertax.gov.au/publications/discussion-paper/

[918] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s84.5.html

[919] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html
GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html
FBT Fringe Benefits Tax Assessment Act 1986 - Sect 67 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s67.html

[920] Deputy Federal Commissioner of Taxation v Purcell [1921] HCA 59; (1921) 29 CLR 464 (12 August 1921)

[921] Cridland v Federal Commissioner of Taxation [1977] HCA 61; (1977) 140 CLR 330 (30 November 1977)

[922] Federal Commissioner of Taxation v Peabody [1994] HCA 43; (1994) 181 CLR 359; (1994) 123 ALR 451; (1994) 28 ATR 344; (1994) 94 ATC 4663 (28 September 1994)

ITAA 1997[923] as unconstitutional[924]. The problem is what interpretation one puts on the s 55[925] prohibition "Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only". Where has the prohibition upheld? But such research is far to much for the deadline.

So the Commissioner and the High Court savaged him, because Cornell[926] got close. CGT supported him. The majority (5 justices) South Australia v Clth[927] supports (together Harding[928], Thorogood and Arthur Murray[929]) with Cornell[930] arguments that what distinguishes income derived from Capital Gains is that income needs to be "derived" to be assessed as income under s 10(1) of ITAA1915[931] and as Cornell assessment was confirmed 6 justices who did not decide on "derivation" precondition there is strong position to say that the assessment were not correct and Cornell was only assessed on "income" that was attributed to him, but not derived (as the property was still owned by the company and therefore did not require to be included in his taxable income. But as this all happened nearly 100 years ago, Cornell [932]may no longer care. But the ability of Parliament to attribute income may not stand up against High Court challenge. In essence, in the authors' opinion the Full High Court will not put a limitation on the word "income" or "come in" until you as objector tells precisely what the limitation is and the Full High Court unanimously agree with the objector. But as the not all income is assessable, because the income must be derived and have a source. But the enactment of the CGT legislation in 1986[933] to broaden the tax base defies the concept that "income" includes what is not owned.

HARDING

Harding decision[934] is a four justice (three being Isaacs, Gavan Duffy and Rich JJ also

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[923] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[924] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[925] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[926] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[927] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[928] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[929] Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965)

[930] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[931] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[932] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[933] http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[934] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

adjudicating on Cornell[935]) decision of 1917 that was affirmed in 1992 in relation to the meaning of "income derived" by five of the seven justices of the Full High Court in South Australia[936] (no dissenting justice on this issue as they did not need to address the issue). We have no electronic record available of the case stated by the Chief Justice of NSW to the High Court. Section 14(e) of the ITAA 1915[937] stated "*The income of any person shall include" (inter alia) "five per centum of the capital value of land and improvements thereon owned and used or used rent free by the taxpayer for the purpose of residence or enjoyment and not for the purpose of profit or gain.[938]".* The taxpayer objected to the inclusion of the 5% as it was not income or possibly not income as ordinarily understood. Harding in essence argued that inherently the use of a man's own land is not "income," in the sense in which that word is popularly understood; that the taxing Act itself does not purport to tax anything, but "income," that is, as popularly understood; and that the incorporation of the Assessment Act in the Taxing Act does not really carry the matter further. Harding argued that the Assessment Act by definition makes taxable only "income derived from personal exertion" and "income derived from property," and leaves these two expressions, which exhaust the area of taxability, to bear their own natural meaning, and that, taking each word of those expressions in its natural meaning, neither expression comprehends the mere use of land. In relation to s 14(e) Harding argued that "*As to the effect of sec. 14 (e), he says that true it is the section says "the income of any person shall include" such use, but as it does not go on to say this notional income shall be deemed to be "derived" from the land the Legislature has by a blunder, for no other cause could be suggested, stopped short of language which brings such use within the letter of the taxing provision, and so this "income" escapes taxation*."
Barton ACJ and Isaacs J specifically deal with the "derivation" precondition in s 10 of the Act, but as the land was obviously situated within Australia the source test was not specially addressed in detail. Gavan Duffy and Rich JJ judgements only deal with what Barton ACJ described as the real matter being the Constitutional issue of s 55[939] also raised.

In relation to the taxation meaning of the word "income and "derivation" the two justices decided:

Barton ACJ after reviewing the English historical context that "*We see, then, that the income tax legislation of England has preserved throughout the two rules that income tax may be founded on the annual value of lands and houses, and that such annual*

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[935] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[936] Mason C.J., Deane, Toohey and Gaudron JJ. at para 26 and Dawson J at his para 1 in South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[937] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[938] http://www.comlaw.gov.au/Details/C1915A00034

[939] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

value may be assessed upon them, whether let or not, if they are capable of actual occupation of whatever nature, and for whatever purposes they are occupied or enjoyed."

Then in relation to the 1915[940] Act his Honour states

> *"But it is further argued that the Assessment Act itself does not really make the subject of sec. 14 (e) taxable as income, and it must therefore be accounted an additional tax of another kind. After what I have stated it can scarcely be contested that it may be made the subject of income taxation. But the objection is that the Statute has failed to make it income. It is pointed out that "income from personal exertion" or "income derived by any person from personal exertion" is defined in sec. 3, and that " income from property" or "income derived from property" is also defined in the same section; and that nothing is taxable which is not included within one or other of these definitions. The subject of sec. 14 (e) is said not to be so included, because, as it is not in itself income, the provision of sec. 14 that it is included in income amounts to no more than if it were ordained to be "deemed" income, and that therefore the sub-section effects nothing. But it seems to have been overlooked that the definition of income from property is very far-reaching, for its interpretation is that it means all income derived in Australia and not derived from personal exertion. That the subject of sec. 14 (e) is income is, I think, sufficiently shown already. If it is "derived" in Australia, being ex concessis not derived from personal exertion, it must be income from property within the meaning of the Act. Is it then "derived" from its source? Under the English Acts similar income is said to be income "arising from lands &c." or "income arising from ... houses or other buildings." I see no difference between income arising from a source and income derived from a source, at any rate for present purposes, and the two interpretations would carry precisely the same meaning for present purposes if the one word were substituted for the other. In Commissioners of Taxation v. Kirk[5] will be found observations by Lord Davey, speaking for the Judicial Committee, on the words "derived," "arising," or "accruing," which are to the point in this connection. The case arose under the Land and Income Tax Assessment Act of 1895 N.S.W., and, speaking of the terms of sec. 15 of that Act, the learned Lord said: "Their Lordships attach no special meaning to the word derived, which they treat as synonymous with arising or accruing.*"

Isaacs J concluded that:

> *It is plain that Parliament has expressly declared that all income "derived in Australia" shall be taxed within declared limits, which are unnecessary to be considered now. It has declared that all such income shall be divided into two classes, namely, that "derived from personal exertion" and that "derived from property." It defines the first, and in order, as it seems to me, to prevent such*

[940] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

an argument as I am now dealing with from prevailing, it throws all income not within that definition into the other class, whether in natural strictness it might be shown to be derived from property or not. It is manifest, therefore, that the whole argument of the appellant on this branch rests on the word "derived." If "derived" from the land, it is of course derived "in Australia" and "from property."
The word "derived" was considered by the Privy Council in Kirk's Case[6], an income tax case, and their Lordships attached no technical meaning to the word, but considered it in such a connection as equivalent to "arising or accruing." ... "If support were needed for such high authority, it can be found in the use of the word "derived" as recognized by lexicographers. In the Oxford Dictionary, under the word "Derive" (vol. iii., D, p. 229, col. 3, par. 6), the definition includes "to ... get, gain, obtain (a thing from a source)." This exactly touches the present contention. The examples there given show how broadly the word may be used.
Consequently, once concede that the use of the land is "income" within the Statute—that is, something which "comes in"—then, as it must come in from some source in Australia, the word "derived" is apt to express the idea."

His Honour goes onto conclude:

"In one sense a tax in respect of the owner's occupation of his own property is not strictly a tax on "income," that is, where we limit "income" to money actually coming in. Neither is occupation of another person's property rent free in return for services strictly income—it is rather a substitution for income. Nor, strictly speaking, is the occupation of one's premises for the purposes of carrying on a business an outgoing (see Commissioners of Taxation v. Antill[13]). But in a broader sense these things are respectively equivalent to income and expenditure. A man who uses his own house for residence is receiving a benefit analogous to rent from letting the property, or interest upon the money value of the property, and calculable in cash. The employee is also receiving a benefit which can be reduced to money terms; and the third man is putting into the business the equivalent of the rent he could get from letting the property or the interest upon the money value of his land.
...

It is therefore an established fact that for about 100 years—even allowing for the gap between 1816 and 1842—millions of people in the United Kingdom have been familiar with the use of the word "income" for taxation purposes as comprehending the ***use*** *of a person's own land where his possession is convertible into money.*

Judicial decisions, as has been seen, treat the legislation as proceeding not upon an arbitrary, but upon a rational, basis. Australian legislation (South Australia in 1884 and Victoria in 1895) adopted, and the Parliament of all

Australia has now adopted, the same policy as the English Parliament. If other local Parliaments have not gone to the same length, that is a matter of discretion. But looking at the English legislation, as well as contemporary speeches, and the subsequent judicial interpretation of the Acts as evidence of the meaning of the word "income" for legislative purposes, and for the same purpose viewing the adoption of the same comprehensive signification by so large a portion of the Australian people prior to the Commonwealth legislation, the conclusion appears to me inevitable. It is that the word "income" has become embedded in the English language in Australia as well as in England in relation to legislation as being capable of including, if so intended by the Legislature, in an Income Tax Act such a subject matter as is comprised in sec. 14 (e) of the Commonwealth Act of 1915. As to that matter of fact, which I, sitting here as an Australian Judge am called upon to determine, I have no hesitation in so holding."

Gavan Duffy and Rich JJ joint judgement merely deal with the Constitutional[941] grounds of objection.

Subsequent approval by five justices

In South Australia[942] the majority consisting of Mason C.J., Deane, Toohey and Gaudron JJ (Dawson J concurring) said at para 26:

In particular, the courts look to these conceptions, principles and practices in deciding whether income has been "derived" by a taxpayer. "Derived" is the equivalent of "arising" or "accruing", ibid. per Dixon J. at p 157; see Harding v. Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119, per Isaacs J. at p 133, but it does not necessarily mean "actually received", though "ordinarily that is the mode of derivation". Federal Commissioner of Taxation v. Thorogood [1927] HCA 36; (1927) 40 CLR 454, per Isaacs ACJ. at p 458. The ultimate inquiry is to ascertain whether what has taken place, whether it be the earning or the receipt of a sum of money or other benefit or advantage, is "enough by itself to satisfy the general understanding among practical business people of what constitutes a derivation of income", to repeat the comment of Barwick C.J., Kitto and Taylor JJ. in Arthur Murray (N.S.W.) Pty. Ltd. v. Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314, at p 318.

We note that both in 1917 and 1992 the 1915[943] and 1936[944] Acts in question had a definition from "income from property" or "income derived from property", but such

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[941] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[942] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[943] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[944] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

does not so exist under ITAA1997[945] despite s 1-3.

Other cases that cite Harding's[946] decision in relation to "income" and "derivation

We do not alert readers to the Full High Court decisions that cite Harding decision on Constitutional Law issues.

Dixon J in Resch[947] is the only justice that cite's Harding case in relation to what is "income". His Honour states:

> *The subject of the income tax has not been regarded as income in the restricted sense which contrasts gains of the nature of income with capital gains, or actual receipts with increases of assets or wealth. The subject has rather been regarded as the substantial gains of persons or enterprises considered over intervals of time and ascertained or estimated by standards appearing sufficiently just, but nevertheless practical and sometimes concerned with avoidance or evasion more than with accuracy or precision of estimation. To include the annual value of the taxpayer's residence owned by himself or used rent free and to fix it at five per cent of the capital value has not been considered to introduce a new subject (Harding's Case[39]). To treat part of the undistributed profits earned during the current year as part of the assessable income of the shareholder imports no new subject (Cornell's Case[40]—cf. Kellow-Falkiner Pty. Ltd. v. Federal Commissioner of Taxation[41]), nor does it to substitute, in the case of a foreign-controlled business, for taxable income ordinarily calculated a percentage of gross receipts fixed by the discretionary judgment of the Commissioner (British Imperial Oil Cases*[42]).

His Hour also refers to Harding[948] in Carden's[949] case, but that is a decision under State legislation being the *South Australian Taxation Acts 1927-1933.*

In French[950] Taylor J states:

> *Both the word "source" and the word "derived", have been the subject of observation and discussion in our own courts over a long period. A variety of cases has made it clear that the word "derived", in the context in which it is used in s. 23 (q), is not a term of art and that it may be treated as synonymous*

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[945] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[946] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[947] Resch v Federal Commissioner of Taxation [1942] HCA 2; (1942) 66 CLR 198 (4 February 1942)

[948] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[949] Commissioner of Taxes (SA) v Executor Trustee & Agency Company of South Australia Ltd [1938] HCA 69; (1938) 63 CLR 108 (23 December 1938)

[950] Federal Commissioner of Taxation v French [1957] HCA 73; (1957) 98 CLR 398 (18 November 1957)

with "arising" or "accruing". (See for instance, Commissioner of Taxation v Kirk [F58] and per Barton J., in Harding v Federal Commissioner of Taxation, [F59] at p. 131.)

In Austin[951] Gaudron, Gummow and Hayne JJ stated:

> *In Resch, Dixon J had said that the practice, among other bodies, of colonial legislatures might serve as a guide in the determination of whether a provision of a given kind was to be regarded as falling within a particular subject-matter**[241]**. With that in mind, New South Wales referred to the distinct treatment in colonial taxing legislation of income on the one hand and gifts and settlements on the other. What, however, perhaps is of more significance for present purposes is the wide scope, given by the Court in Harding**[242]**, with reference to the long history in imperial and colonial legislation, to "income" as a subject of taxation.*

Authors' conclusions, "thought bubbles[952]" and comments

1. Historically a tax on the value of land was included as "income" for income tax purposes ever since 1799 by UK legislation on the basis of "use[953]" of land. Mere property owned by the taxpayer that was designated by Parliament to be so included was by the force of the legislation so to be included. Barton ACJ and Isaacs J judgements hints that the ITAA 1915[954] did so historically based on property taxes. In this paper we explore the inclusion of deemed and attributed amounts within the tax base and identify the problems of satisfaction of all the preconditions of imposition of the tax liability that was impliedly raised by the MBI[955] decision;
2. There will always clash between instructions not to assess on another's income and attributation of income from another;
3. Under the ITAA 1997[956] there is no definition or division of income into "income from Personal exertion" or income from property that explicitly existed under s 3 of ITAA 1915[957], s 4 of ITAA 1922[958] (and what income

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[951] Austin v The Commonwealth of Australia [2003] HCA 3 (5 February 2003)

[952] http://www.truenorthquest.com/inspired-idiot/idiot-thought-bubble/

[953] see generally Isaacs J judgement in Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[954] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[955] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[956] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[957] http://www.comlaw.gov.au/Details/C1915A00034

[958] http://www.comlaw.gov.au/Details/C1922A00037

includes) and s 6 of ITAA 1936[959]. It only remains in the remnant provisions of s 6 of the ITAA 1936 that is to be read as one with ITAA 1997[960]. But under s 1-3[961] the same meaning in order to express the same idea;

4. The value of a person's property can be included in a person's tax base and such will satisfy the preconditions of "derive" and "source" according to the High Court. Haig Simons[962] concepts of individual's consumption plus net increases in wealth for the taxable year, could be included in the tax base under present legislation. The consumption would be left to the GST legislation. The problem is that once the "word" "income" covers merely owned property that has not been characterised whatsoever, but merely identified by Parliament then you have to stretch one's imagination to say that mere calculations or attributations of what one owns can also be covered by such a single word, such as "income" as nothing "came in". But Parliament being all powerful, one is left with trying to grapple with what this word possibly can mean. Luckily not all income is assessed. It must have a source for residents under s 6-5[963] and s 6-10[964] and be derived for s 6-5 purposes. That is where South Australiav Clth[965] in 1992 showers if not "buckets" derivation doubts with Austin in 2003 adding many justices weight to the deluge of the historical context of the income legislation;
5. It took until 2007 for the Full High Court in McNeil[966] to adjudicate that beneficially owned increments to existing property was income;

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[959] As at date of writing this paper in late April 2015 "***" income from personal exertion*** or ***income derived from personal exertion"*** means income consisting of earnings, salaries, wages, commissions, fees, bonuses, pensions, superannuation allowances, retiring allowances and retiring gratuities, allowances and gratuities received in the capacity of employee or in relation to any services rendered, the proceeds of any business carried on by the taxpayer either alone or as a partner with any other person, any amount received as a bounty or subsidy in carrying on a business, any amount that is included in the assessable income of the taxpayer by reason of section 393-10 of the *Income Tax Assessment Act 1997* , the income from any property where that income forms part of the emoluments of any office or employment of profit held by the taxpayer, and any profit arising from the sale by the taxpayer of any property acquired by the taxpayer for the purpose of profit-making by sale or from the carrying on or carrying out of any profit-making undertaking or scheme, but does not include:

(a) interest, unless the taxpayer's principal business consists of the lending of money, or unless the interest is received in respect of a debt due to the taxpayer for goods supplied or services rendered by the taxpayer in the course of the taxpayer's business; or

(b) rents, dividends or non-share dividends.

" income from property or ***income derived from property"*** means all income not being income from personal exertion.

[960] Income Tax Assessment Act 1997 - Sect 1.3 See for example Commissioner of Taxation v Stone [2005] HCA 21; (2005) 222 CLR 289; (2005) 215 ALR 61; (2005) 79 ALJR 956 (26 April 2005)

[961] Income Tax Assessment Act 1997 - Sect 1.3

[962] in relation to the change in the value of the store of property rights between the beginning and end of the period in question – see http://en.wikipedia.org/wiki/Haig–Simons_income

[963] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[964] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[965] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[966] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

6. Although not explicitly stated in Harding[967] decision "ownership of property" could be the concept that prevents the application of s 55[968]of the Commonwealth of Australia Constitution Act[969] so raising the possibility that amending Acts since 1915 and especially amending Acts since 1997[970] Act fall foul of the "one subject of taxation only[971]" rule. This issue was largely dealt with in Cornell[972] and six justices signed off that there was only one concept of "income" of attributable income[973] for a shareholder in an incorporated company. But to fully explore such a concept would double the length of this paper and cause the missing of the submission deadline of 1 June 2015[974]. The focus of this paper is satisfaction of al the statutory preconditions that were hinted at by MBI[975] decision. By contrast in Unit Trend[976] the non-ownership of anything was repetitively noted by the full High Court, but not an issue for their adjudication so they merely dismissed the taxpayer's points of appeal. Such is similar to Cornell[977] where the satisfaction of the ALL of the preconditions of the legislation was not the issue before the Court;
7. Cornell's case unanimous decision in a joint judgement by six justices blocks one arguing that the Constitution[978] prevents Parliament aggregating property owned and not so owned by the person (especially when they have in substance an interest) in the property, but probably only if one is focussing on the word "Income" and not "ownership";
8. Harding[979] case appears to allow the Federal Government to focus on the appointment and payment of corporate funds at the instructions of a liquidator to characterise the distribution of corporate profits as income in the shareholders' hands under s 47[980]. Such would be statutory recharacterising of

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[967] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[968] http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[969] http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[970] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[971] http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[972] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[973] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[974] http://bettertax.gov.au/publications/discussion-paper/

[975] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[976] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[977] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[978] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[979] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[980] Income Tax Assessment Act 1936 - Sect 47

a capital asset (where it was not a revenue or trading stock asset) extinction consideration into statutory revenue property and mere property, in so far as it reflects corporate paid up capital of the company and - possibly wholly revenue, if there was no existing contributed share capital;

9. The problem of assessing mere legal ownership or beneficial ownership of property, when the person has already been previously assessed or was required to be assessed on the beneficial ownership of property. Although s 6-25 allocates priority to statutory income the overlap is also covered by subsection (1) namely "*However, the amount is included only once in your assessable income for an income year, and is then not included in your assessable income for any other income year*. Therefore, if a retiree person exempt income[981] received is capped it is the actual receipt of the income (which generally is a statistically larger amount than the increments to existing property that are ordinary income during the later years life payments of a "allocated pension") that is being treated as statutory income. But where the property held by the complying superannuation trustee is beneficially owned by the retiree once the vesting time has occurred, then that derivation of income will have already previously occurred[982]. So you have two concepts of what can fall within the word income and when the income is assessed. This is the sort of reversal of the problem of Arthur Murray[983] where beneficial derivation of income can occur before legal ownership. We do not understand if a retiree is the beneficial owner of the funds held in trust why they are not included in your will and distributed in accordance of your will;
10. So the limitations of what income is included in assessable income and what property is assessed is limited by the preconditions of the legislation and the provisions preventing any double or overlap of legislation which is what MBI[984] decision was hinting at;
11. The penultimate paragraph of Isaacs judgement namely "*Therefore the objection that the Income Tax Act 1915 deals with more than one subject matter of taxation fails. But, further, if I were not so clearly satisfied I would still be prepared to hold that the appellant had not satisfied the onus on him of clearly establishing the contrary, so as to invalidate the Act—in other words, he has not clearly demonstrated that Parliament could not reasonably have considered the word "income" as sufficiently comprehensive; and I should have held accordingly that the objection equally failed*." hints that:
    - Parliament does not have to understand the Taxation Acts;

[981] Income Tax Assessment Act 1997 - Sect 301.10

[982] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[983] Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965)

[984] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

- The Treasurer[985] or even Treasury[986] does not have to understand the Act;
- Chris Jordan[987] and all his predecessors do not to need to comprehend one word of the legislation that they are administering[988];

only the person who is objecting to the imposition of the legislation on her and then drafting an objection within the time limits and pursuing the issue all the way to the Full High Court. That lady objector needs to know every word of the legislation and all its legislative interactions and al High Court and other judicial decisions.

GULLAND

For illustration, we as authors chose Federal Commissioner of Taxation v Gulland ("Three Doctors case") [1985] HCA 83; (1985) 160 CLR 55 (18 December 1985) where the Full High Court applied s 260 GAAR provisions to strike down the transfer of the conduct of a medical practice from a partnership of doctors to the trustee of a unit trust. The decision was handed down after the enactment of Part IVA GAAR[989] effective post 27 May 1981.

The three doctors case can be contrasted with the Full High Court decision in Purcell[990] where there was appointment by deed of two interests in 2/3 of the legal title of various property of a farm to two beneficial owners being family members. By contrast, Gulland case was from the point of acquisition of property as fee income:

- not recognising that the patients were not necessarily contracting with the new legal owners of the medical practices ;
- the provider of the consideration may have only met the professional adviser being the doctor and did not know of the existence of the legal person who the doctors wanted the patient to contract with;
- not recognising another incorporated person or two (or more) doctors acting as trustee.

It is not certain that the income was and could only be the doctors, as that the doctor is likely to have been only person the patient had been introduced to provide the services.

Because all the facts (especially from the view point of the payment of fees by

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[985] http://jbh.ministers.treasury.gov.au/media-release/021-2015/

[986] http://bettertax.gov.au/publications/discussion-paper/

[987] https://www.ato.gov.au/About-ATO/About-us/Who-we-are/Our-Executive/

[988] Income Tax Assessment Act 1997 - Sect 1.7
A New Tax System (Goods And Services Tax Administration) Act 1999 - Schedule 1
Fringe Benefits Tax Assessment Act 1986 - Sect 3

[989] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html

[990] Deputy Federal Commissioner of Taxation v Purcell [1921] HCA 59; (1921) 29 CLR 464 (12 August 1921)

patients) are not well set out in the judgement in the High Court decisions the authors assert from the members of the High Court own personal experience as patients of medical practitioners:

- they as patients sought the advice of particular doctor or were recommended by the receptionist of the practice to meet a specific doctor;
- no or little indications in the practice reception room or at the front of the premises indicated that any transactions would be conducted with an incorporated person or a person who was a trustee and the patient would invariably not meet/introduced to such incorporated person or trustee;
- the advice was provided by the specific doctor and the patient would be totally unaware that as a patient that any advice was being provided by an incorporated person or a trustee that was not before the patient in the consulting room;
- the fact that the doctor could be an employee was not been made aware to the patient;
- the bill was being paid by the patient for services rendered by the specific doctor to the patient or say a member of that person's family;
- Where Medicare after 1975 paid the full costs of the visit to the doctor direct to the doctor the patient would not pay the doctor anything, but assign the right to receive remuneration from the Federal Government directly to the doctor and the relevant consideration could even possibly flow directly between the doctor and the Federal Government;
- another person collecting the fee rendered could be a person employed to collect the amount due and not the person who provided the medical services.

Therefore, viewed from a contract viewpoint the consideration for services rendered would likely to be owned by the doctor, and equitable obligations may be imposed on the doctor, if the doctor was in a partnership with another.

Therefore it was all too easy for Gibbs C.J. in Gulland to conclude at para 16: *"Clearly, in the case of Dr Gulland, when the impugned arrangement is annihilated, what is left is the situation in which the taxpayer is in receipt of the income from his practice. In the case of Dr Watson, Peate v. Federal Commissioner of Taxation provides the necessary guidance as to the effect of the annihilation. Whether one takes the approach of the Judicial Committee or that of the High Court in Peate v. Federal Commissioner of Taxation the result is that the inc*ome received by the unit trust should be treated as the income of the five doctors." Gibbs C.J. in Pincus concluded at paras 22 and 23. *"Section 260 renders an arrangement void as against the Commissioner only in so far as it has or purports to have one of the purposes or effects specified in the section. The dissolution of the partnership, in itself, had no such purpose or effect, but it formed an integral part of the arrangement to which s. 260 applied. The other elements of the arrangement, so far as it had the purpose or effect of tax avoidance by the taxpayer, comprised the sale of the assets to Dr Backstrom as trustee, the employment of Dr Pincus by the unit trust and the issue of the units in the unit trust to the family trust. However, when the section took effect, what was left after the annihilation of the arrangement was not the original*

partnership. The four doctors were in fact no longer practising in partnership, and the section does not require or permit fiction to be substituted for fact. The application of s.260 revealed that Drs Pincus and Richardson were practising in association and that Dr Seet was working part time in conjunction with them, although his remuneration for doing so came from the practice at Stafford Heights. It revealed that Dr Pincus in fact received, from the practice of his profession, not only the amount paid to him as "salary" but also the amount of profits distributed by Dr Backstrom as the trustee of the unit trust to Dr Pincus as trustee of the family trust. The conclusion reached by the Federal Court was correct and the appeal should be dismissed."

Brennan J in Pincus stated at para 9: "*In the present cases, the respective taxpayers have continued to carry on their medical practices as they had before the respective arrangements were made. The medical services for which fees are paid are rendered by the individual doctor or doctors engaged in the practice and the gross fees received by the respective unit trusts must be treated as the assessable income of the doctor or doctors engaged in the practice."* Then at para 10 his Honour continues, *"The doctors who were conducting the respective practices with which we are here concerned have continued to conduct them, though the ownership of each practice has passed to the trustees of a unit trust. The circumstances in which those transactions occurred are set out in the judgments of Dawson J. and I need not repeat them. The respective assessments to tax were made on the footing that the gross fees or an appropriate proportion of the gross fees earned in the respective practices are assessable income of the respective taxpayers. That was the correct footing for making the respective assessments."*

Deane J dissenting[991] in Gulland states at para 18 and 19:

"*When one comes to apply the "settled" construction of s.260 to the facts of the present case, the outcome is inevitable. As a matter of legal form, Dr. Gulland was not, at the relevant times, carrying on practice as a sole practitioner. His former practice was carried on by him and Dr. Burke as trustees of the "practice trust". The sole beneficiary of that trust was the trustee of another trust ("the family trust"). Dr. Gulland's medical activities were performed by him in his capacity as an employee of the practice trust. Assessments to tax of the trustees and Dr. Gulland on the basis of the legal structure which Dr. Gulland had chosen to erect would, without the intervention of s.260, reflect "the tax consequences of the course of conduct which the taxpayer has in fact adopted" (per Stephen J. in Mullens, at p.318). Both Dr. Gulland and the practice trust would "become liable for the amount of tax appropriate under the terms of the Assessment Act to the state of affairs obtaining at the date made relevant by that Act for the ascertainment of (their) liability" (Casuarina, at p.81).*

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[991] The authors submit that Deane J is correct in analysing that Dr. Gulland had restructured the legal form of his practice. The authors submit for the facts to be complete to ensure that Dr, Gulland was not deriving/the acquirer of the consideration we actually need to know the terms of the contract with the payer who could be either or a combination of the patient/patient's parents etc. and the Federal Government under Medicare. Who were they contracting with? Does Medicare merely re-imburse the patient, but where the patient often assigns his re-imbursement to the doctor.

That being so, the steps taken to bring about that state of affairs cannot "qualify as action under s.260 to achieve any one of the four purposes or effects described in the section" (ibid). In that regard, it is to be noted that the case is plainly not one in which "the actual transaction into which the parties have entered involves the taxpayer in liability to tax or does not afford the taxpayer some benefit in taxation, such as a deduction, and that transaction is cast into another form" (Mullens, at p.298). The only relevant transactions into which "the parties" entered were those which produced the "state of affairs obtaining at the date made relevant by (the) Act" (Casuarina, at p. 81). Those transactions were real, actual and effective. The plain effect of this Court's more recent decisions, the authority of which the Commissioner has not sought to challenge, is that "effect must be given" to "the legal form and consequence" of those transactions (Slutzkin, at p.319).
19. It follows that those decisions require that the appeal by the Commissioner be dismissed."

BAMFORD[992]

Deemed[993] power to assess non-owners well after the tax transaction by the owners

In the authors' opinion Bamford[994] is a narrow and troubled decision, where the Full High Court (*French CJ, Gummow, Heydon, Hayne and Crennan JJ - being four of the justices that decided McNeil three years earlier in 2007*) were asked to adjudicate on very narrow "tax distribution" legislation issues of s 101[995] deemed income (and not the actual income derived by the trustee and the capital gains accrued to the trustee that were distributed to beneficial owners) and like in Unit Trend the High Court did not adjudicate on an integrated basis of reviewing all facts and provisions as to the correctness of the assessments before them. But adjudicating on the correctness of the assessment is not always before the Court. Examples of the problems with the decision were that their Honours were not asked to look at:

1. who accrued the capital gain under the CGT legislation of ITAA 1197 and it timing rules, the conflicting instructions to include capital gains in s 6-10[996] income rather than transfer such amount to s 95[997] calculation of trust "net income" and then distribute to non-owners who are only deemed[998] to obtain their

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992 Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

993 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

994 Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

995 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

996 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

997http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

998 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

share of the "net income" and then transfer these deemed amounts of assessable income of the non-owners to be included in the s 6-10 instruction to assess statutory income when the conflicting instructions already existed to include the actual owners statutory income in its assessable income;

2. assessing the deemed amount actually owned by the discretionary beneficiaries once they were appointed to the amount once calculated by the trustee for trust accounting purpose and then appointed under the trust deed in accordance with s 101[999] – nee Harding[1000] assessment;
3. assessing the notional (not owned) amount being the uplift from the owned amount to assess on the computed shares in tax "net income" pursuant s 95[1001] and s 97– nee Cornell[1002] assessment;
4. the non-assessing of the trustee pursuant s 25[1003] and ss 96 and s 98 (in relation to "actual" and then "deemed" presently entitled beneficiaries) where there was no beneficiaries who had any beneficial interests in the property assessed as income;
5. assessing income on a net amount of trust income appointed to beneficiaries subsequent to the derivation of the gross income by the trustee and a distribution s 95[1004] "net income" to deemed presently entitled beneficiaries when during the year when income was derived (and had "sources") the discretionary beneficiaries had no interest in trust income or property whatsoever;
6. the history of ITAAs assessing beneficiaries such as:
   - s 14(c) of ITAA 1915[1005] that only assessed beneficial interest in income derived[1006] …;
   - s 31 of ITAA1922[1007] that provided a limited exclusion for the trustee, assessing of the beneficiary on its present entitlement in income, aggregation this with his income derived and any other income derived from a source which according to the authors is the legislative instructions to force all the income through the "Central Provision" of s 13. But subsection 31(4) also deems the trustee appointed amounts to be deemed income, if it is paid to the beneficiary, but the trust income would never encompass such deemed income, so the deemed income paid out is different property to that held by the trustee under the relevant deed and is included in assessable income in

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[999] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

[1000] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[1001] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

[1002] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1003] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[1004] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

[1005] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[1006] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/ http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[1007] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1922371922267/

addition to the actual income of the beneficiary or income of the trust estate. The trustee and its lien is well protected[1008];

- s 95[1009] definition of "net income" (which does not include s 101[1010] deemed income), s 96[1011] exclusion for the trustee and s 101[1012] of ITAA as enacted in 1936. Under s 101[1013] which deems the trustee appointed amounts to be deemed income to be presently entitled if it is paid or applied to the beneficiary, but the trust "net income" would never encompass such deemed income, so the deemed income paid or applied is different property to that originally held by the trustee and is included in the discretionary beneficiary's assessable income in addition to the actual income of the beneficiary or the trustee of the trust estate once it is paid or applied for the beneficiary's benefit. But by then that appointed property would no longer be owned by the trustee, but it may be held by him on fixed trust obligations for the person appointed. Dixon J in Belford[1014] disagrees[1015], in order to avoid double taxation on both mere property and also "trust estate" derived income. The problem is insolvable as Parliament has instructed by deeming assessment on both on (1) the beneficial/present entitlement interests in property held by the trustee and where no beneficiary is presently entitled on the trustee and (2) also in (and in addition) after appointed amounts that are different property from the beneficial interests. Double assessing by ITAA 1922 and 1936. But ITAA has

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[1008] Chief Commissioner of Stamp Duties (NSW) v Buckle [1998] HCA 4; 192 CLR 226; 151 ALR 1; 72 ALJR 243 (23 January 1998)

[1009] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

[1010] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

[1011] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s96.html

[1012] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

[1013] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

[1014] Federal Commissioner of Taxation v Belford [1952] HCA 73; (1952) 88 CLR 589 (19 December 1952)

[1015] *At paras 6 to 7 "The difficulties of making an implication for the avoidance of double taxation are not lessened by s. 97(2), which is directed to dealing with a case where losses of a previous year are taken into account in calculating the income of the trust estate; nor by s. 100, which deals with the case of a beneficiary under legal disability who receives or derives income from more than one trust estate or from a trust estate or some other source and provides for a deduction from the tax of the tax if any paid by the trustee; nor by s. 101, which deals with the distribution of the liability of beneficiaries who receive income pursuant to a discretionary trust. Apart from the insuperable difficulties they disclose in making an implication to adjust the tax so as to avoid double taxation, it may be said that these sections neither throw any light on the solution nor in themselves greatly increase the difficulties. The solution offered by the majority of the Board of Review is to treat Div. 6 as an exclusive statement of the liability of the beneficiary in respect of the income of a trust estate. There would thus be no tax under s. 25 payable independently by the beneficiary in respect of receipts and so no problem would arise concerning double tax. Section 26(b), however, would have little function, except as a preliminary declaration of what is carried out in detail in Div. 6. (at p600)*
There appear to me to be three possible solutions of the difficulty."

Core Provisions through which s 101[1016] amounts need to be tested against the Core Assessing provisions preconditions of s 6-10[1017];

- the appointed amounts under s 101[1018] could never include capital gains for s 108-5[1019] assets, as there is no actual interest in the property held by the trustee only a deemed inclusion of the net calculated amount as assessable income;
- the s 101[1020] appointed amount would prima facie be assessable as income as Harding's[1021] case supports the inclusion of mere property focussed on by the legislation, but in relation to the uplift by s 97[1022] to the extra notional amount included in the discretionary beneficiary's assessable income under "present entitlement" tests Cornell[1023] supports such an assessment as "income", but Cornell[1024] would need to be refought to argue that s 6-10 deemed income needs to also satisfy the "amount", and "source" precondition where the discretionary beneficiary has only an expectancy to be considered and does not own the notional amount uplifted. And as recently as MBI[1025] and McNeil inferred all preconditions to the tax liability needed to be satisfied. Div 6 of Part III of 1936 Act preconditions in McNeil were not an issue, despite their being a "trust estate"! The authors consider that the real issue is "source" of income test in both s 6-5 and s 6-10, as the "source test has to apply presumably uniformly to both owned amounts and non-owned/notional amounts. Parliament has deemed the notional uplift s 97[1026] amount to be "income" and Harding[1027] and Cornell[1028] says that amounts being a mix of actually owned property and notional amounts can be income. Whose income

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[1016] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

[1017] Income Tax Assessment Act 1997 - Sect 6.10

[1018] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

[1019] Income Tax Assessment Act 1997 - Sect 108.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s108.5.html

[1020] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

[1021] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[1022] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s97.html

[1023] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1024] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1025] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[1026] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s97.html

[1027] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[1028] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

has a "source" is structurally important to ITAA 1915[1029], 1922[1030], 1936[1031] and 1997[1032] as non-residents are excluded on their foreign income and Double Tax agreements are based on recognising and allocating source of income. But even income can be deemed to have an Australian source: see for example s 25(2)[1033] of ITAA 1936. See for example Fenwick[1034], United Aircraft[1035], French[1036], Esquire[1037], Spotless[1038] etc. There must be in the authors' opinion grave reservations that notional/statutory income not owned by the discretionary beneficiary can have any external criteria to provide it with a source other than mere ownership of the property. The amounts are not owned to exist. The only single justice decision[1039] we know of who has looked at the issue found the source of the notional/statutory income not with the taxpayer/you[1040], but with another the company that was not even part of the proceedings and whose income was NANE[1041] exempt. Lindgren J was correct that the only source has to be with the owner and not with the PSI individual non-owner, who according to Lindgren had no income with a source. But that is not what his justice adjudicated. The source could in Lindgren's decision not be associated with common "source' criteria, such as "ownership, contract or where services were performed by the appellant. If the "source" test is associated with the expression "*The Legislature in using the word "source" meant, not a legal concept, but something which a practical man would regard as a real source of income. Legal concepts must, of course, enter into the question when we have to consider to whom a given source*

[1029] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[1030] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1922371922267/

[1031] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[1032] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1033] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[1034] James Fenwick & Co Ltd v Federal Commissioner of Taxation [1921] HCA 12; (1921) 29 CLR 164 (18 April 1921)

[1035] Federal Commissioner of Taxation v United Aircraft Corporation [1943] HCA 50; (1943) 68 CLR 525 (6 December 1943)

[1036] Federal Commissioner of Taxation v French [1957] HCA 73; (1957) 98 CLR 398 (18 November 1957) http://law.ato.gov.au/atolaw/view.htm?dbwidetocone=05%3ALRP%3AHigh%20Court%3A1957%3AFederal%20Commissioner%20of%20Taxation%20v.%20French%3A%2301%23Order%3B

[1037] Esquire Nominees Ltd v Federal Commissioner of Taxation [1973] HCA 67; (1973) 129 CLR 177 (24 September 1973)

[1038] Federal Commissioner of Taxation v Spotless Services Ltd [1996] HCA 34; (1996) 186 CLR 404; (1996) 141 ALR 92; (1996) 71 ALJR 81 (3 December 1996)

[1039] Fowler v Commissioner of Taxation [2008] FCA 528 (21 April 2008)

[1040] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[1041] Income Tax Assessment Act 1997 - Sect 86.30

belongs. But the ascertainment of the actual source of a given income is a ***practical, hard matter of fact.***[1042]" then it will only inappropriately apply to non-owned amounts to non-owned amounts, such as attributed amounts.

The Full High Court in Bamford[1043] decision did not look Division 6 as originally enacted in 1936 to look at Division 6 with benefit of it being without all the clutter or all the buttressing. The Court resolved very limited issues. There was no assessment on the trustee on the income it derived and on the capital gains it made as authorised by s 6-5 and s 6-10[1044] and Division 6 - but only on deemed income and notional amounts. McNeil[1045] infers that Division 6 is not an exclusive code for assessing "trust estates".

The appeal was from the Federal Court decision[1046].

Facts

We note that no facts of the ownership of property or more importantly who beneficially owned property, and when, whether such property can be characterised as income or as capital gains property was not before the Administrative Appeals[1047] Tribunal[1048], the Federal Court, or the Full High Court. For example, none of the facts of the beneficiaries are mentioned and what they owned and when. The case facts in the Bamford decisions was a "top down" approach to "push down" to the

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1042 Isaacs, Gavan Duffy and Rich JJ Nathan v Federal Commissioner of Taxation [1918] HCA 45; (1918) 25 CLR 183 (23 August 1918)
Approved by:
Gibbs J in Esquire Nominees Ltd v Federal Commissioner of Taxation [1973] HCA 67; (1973) 129 CLR 177 (24 September 1973)
Barwick C.J in Federal Commissioner of Taxation v Mitchum [1965] HCA 23; (1965) 113 CLR 401 (30 April 1965)

1043 Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

1044 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html
Section 6-10 must be the most un-litigated provision in ITAA1997, but critical for assessing statutory amounts not owned. See Fowler v Commissioner of Taxation [2008] FCA 528 (21 April 2008)

1045 Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

1046 Bamford v Commissioner of Taxation [2009] FCAFC 66 (3 June 2009)

1047 Bamford and P and D Bamford Enterprises Pty Ltd in its capacity as the Trustee of the Bamford Trust and Commissioner of Taxation [2008] AATA 322 (18 April 2008)

1048 Bamford & Ors v FC of T 2008 ATC 10-022 see paragraph 7 and following. There is no trust deed before the Tribunal and no details of any interest that any of the discretionary beneficiaries in trust property and for example who actually owned the property at Queens Road, Five Dock NSW. Nor was there any facts as to the timing of the derivation of the income or the timing of the accruing of the gain under CGT rules (such as s 104-10). The case is all about a year-end distribution to discretionary beneficiaries which created a debt that is separate property to the property held by the trustee – see for example paragraph 15.

discretionary beneficiary "free loaders". A brief summary of the facts according to ATO[1049] are also found in the Bamford Impact statement[1050].

In essence, the facts (or more accurately the agreed statement of facts) presented were selective tax or more accurately tax distribution facts. There was no focus as to what was the income, what was the beneficial interest in income, who owned the property subject to a capital gain and to what date, who had the beneficial interests in the income or s 160A[1051] or s 108-5[1052] asset, when the amounts appointed were notified and then received by the discretionary beneficiary and the legal relationship of the appointed amounts with property previously owned by the trustee (but subject to equitable obligations to persons yet to be identified) or beneficially by the trustee with its lien and the beneficiaries beneficially. McNeil's[1053] case hints that as the amount appointed is not an increment to existing property (being the rights of the Discretionary Beneficiary) and therefore the amount even if it represents a share in income appointed is not to be characterised as income on the basis that it is increment to existing property. We are not saying that Division 6 is not constitutionally valid, but s 101[1054] specifically deals with assessing the amounts appointed by the discretionary trustee subsequent to derivation by the trustee itself. There is not even a discussion on the appointed amounts being property of the discretionary beneficiaries. We assert that all discretionary beneficiaries including each child of Mr. and Mrs. Bamford, Narconon Enzo Inc, the Church of Scientology Inc, Mr. and Mrs. Bamford were all "freeloaders[1055]"[1056] who neither owned under equity law any beneficial interest whatsoever in the property held by the trustee and only were subsequently appointed to amounts being separate property subsequent to the calculation of the "income" of the trust estate under the trust deed and this share in the income of the trust estate is different property to the property previously owned by the trustee. Peabody's[1057] like

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[1049] https://www.ato.gov.au

[1050] http://law.ato.gov.au/atolaw/view.htm?rank=find&criteria=AND~Bamford~basic~exact&target=CY&style=java&sdocid=LIT/ICD/S310/2009/00001&recStart=41&PiT=99991231235958&Archived=false&recnum=46&tot=51&pn=ALL:::C

[1051] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[1052] Income Tax Assessment Act 1997 - Sect 108.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s108.5.html

[1053] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[1054]http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

[1055] http://en.wikipedia.org/wiki/Freeloader

[1056] http://www.urbandictionary.com/define.php?term=freeloader

[1057] Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ at paras 30 and 35 in Federal Commissioner of Taxation v Peabody [1994] HCA 43; (1994) 181 CLR 359; (1994) 123 ALR 451; (1994) 28 ATR 344; (1994) 94 ATC 4663 (28 September 1994)

Cridland's[1058] interpretation of a taxpayer in relation to the discretionary beneficiary infers that the discretionary beneficiary is actually outside the income tax system, except for s 101[1059] deeming that the appointed amount is to be deemed to be "presently entitled. It is not surprising that the High Court says that the discretionary beneficiary cannot expect to derive the benefit[1060]. The High Court in Bamford[1061] recognise the issue as it states at its footnote 19 in reference to "assessable income, which is defined by reference to Div 6 of the 1997[1062] Act" that "See s 6(1) of the 1936[1063] Act (definition of "assessable income") and ss 6-10[1064] and 102-5 of the 1997[1065] Act.

So before the AAT and the Courts there was:

There is no statement as to:

- who owned the property, when it was and who acquired, when it was transferred or when the timing rules of taxation liability arose;
- what beneficial interests the discretionary beneficiaries had in the property that was characterised as income and what property was mere property only subject to capital gains tax;
- as to whether the trustee beneficially owned any of the income or capital gain as a result of the trustee borrowing some $175,000 from Equity Investment Bank[1066]. Therefore, there was no review by the Full High Court of

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[1058] Cridland v Federal Commissioner of Taxation [1977] HCA 61; (1977) 140 CLR 330 (30 November 1977)

[1059] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

[1060] Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ at paras 30 and 35 in Federal Commissioner of Taxation v Peabody [1994] HCA 43; (1994) 181 CLR 359; (1994) 123 ALR

[1061] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1062] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1063] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[1064] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[1065] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1066] Item 7 of para 7 of Bamford and P and D Bamford Enterprises Pty Ltd in its capacity as the Trustee of the Bamford Trust and Commissioner of Taxation [2008] AATA 322 (18 April 2008)

Octavo[1067], Buckle[1068], CPT[1069] and now Korda[1070] decisions limiting the trust estate to the net value of property after the lien is satisfied. But the borrowings do not appear in the facts of the High Court decision;

- how the discretionary beneficiaries had any "source" to the income being appointed amounts to satisfy the preconditions of s 6-10[1071], other than the sole existence of the appointed amount being owned and not in any previously existing property such as the rights of a discretionary beneficiary. But even s 101[1072] has extra preconditions of:
    - exercise of the trustee's discretion;
    - amount paid;
    - applied; and
    - implied timing rules based on when the amount was actually paid that could be very different to a "year-end" s 95 "net income" calculation date;

  The authors accept that following Harding's[1073] decision that the appointed amounts merely owned by the beneficiaries could be "derived" and have a "source" both based on their ownership of the appointed amounts, but not in relation to the notional amounts taxed in excess of the appointed amounts (the tax notional amounts) attributed to them by the s 97[1074] share in present entitlement trust income to satisfy the preconditions of assessability for ordinary income in s 6-5[1075] and for statutory income, such as capital gains in s 6-10[1076]. Cornell's[1077] decision suggests that Parliament does have the power to force the High Court to focus on the "share in present entitlements" to

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[1067] Stephen, Mason, Aickin and Wilson JJ para 35 in Octavo Investments Pty Ltd v Knight [1979] HCA 61; (1979) 144 CLR 360 (27 November 1979)

[1068] Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ paras 50 and 51 in Chief Commissioner of Stamp Duties (NSW) v Buckle [1998] HCA 4; 192 CLR 226; 151 ALR 1; 72 ALJR 243 (23 January 1998)

[1069] Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ at para 51 in CPT Custodian Pty Ltd v Commissioner of State Revenue [2005] HCA 53; (2005) 224 CLR 98; (2005) 221 ALR 196; (2005) 79 ALJR 1724 (28 September 2005)

[1070] French CJ para 38 and Keane J at para 231 in Korda v Australian Executor Trustees (SA) Limited [2015] HCA 6 (4 March 2015)

[1071] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[1072] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

[1073] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[1074] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s97.html

[1075] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[1076] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[1077] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

determine who is liable, but all preconditions of liability need to be satisfied – see MBI[1078] and Arthur Murray[1079] and South Australia[1080];

- showing how the income of the P & D Bamford Enterprises Pty Ltd ("the Trustee") and the discretionary beneficiaries income were aggregated to become the "income from the trust estate";
- How one reconciles the instructions in s 6-10[1081], s 104-10[1082] and s 100-10[1083] to focus on the "you[1084]" in relation to capital gains, with s 115-200, s 960.100(1)(f) of Income Tax Assessment Act 1997[1085] focus on the "trust estate", as the Full High Court states: "*Subdiv 115-C of the 1997[1086] Act then may allow beneficiaries to reduce their liability by their available capital losses and unapplied net capital losses*";
- How you get the ordinary income that is identified as assessable income under s 6-5[1087] to the you[1088] across from the 1997[1089] Act to s 95's[1090] "net income" then distributed pursuant to s 97[1091] back to be assessed again with the You's[1092] other non trust estate assessable income;
- How one reconciles what the Full High Court says at para 32: *"If a "net capital gain", as defined in s 995-1(1) of the Income Tax Assessment Act 1997 (Cth) ("the 1997 Act"), is made it will be taken into account in computing the net income of the trust estate within the meaning of s 95(1)[1093] of the 1936 Act as part of the assessable income, which is defined by reference to Div 6 of the*

[1078] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[1079] Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965)

[1080] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[1081] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[1082] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s104.10.html

[1083] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s100.10.html

[1084] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[1085] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1086] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1087] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[1088] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[1089] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1090] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

[1091] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s97.html

[1092] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[1093] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

1997[1094] *Act [19]"* as footnote [19] reference statement within the references to "yous" - "*See s 6(1) of the 1936 Act (definition of "assessable income") and ss 6-10 and 102-5 of the 1997 Act*." If the beneficiary owns the beneficial interest in the property s 108-5[1095] asset, then s 104-10[1096] change in ownership can apply to it!

No reconciliation of competing provisions is noted so:

Sara Lee[1097]

- How one reconciled the Bamford[1098] year-end[1099] decision with the contract timing rules of CGT as adjudicated by the Full High Court in Sara Lee[1100];

McNeil[1101]

- How does one reconciled the earlier decision in McNeil, where the trustee[1102] held all of her property with Bamford's[1103] allocation of the share of share of the income of the trust estate;
- Whether Division 6 was an exclusive code of assessing discretionary beneficiaries/beneficiaries, as in McNeil the High Court (Gummow ACJ, Hayne, Heydon And Crennan JJ - being four of the justices that decided Bamford[1104] in 2010) merely adjudicated that the dividend Subdivision D provisions of the ITAA 1936[1105] were not an exclusive code for assessing shareholders like Mrs. McNeil;

[1094] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1095] Income Tax Assessment Act 1997 - Sect 108.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s108.5.html

[1096] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s104.10.html

[1097] Commissioner of Taxation v Sara Lee Household & Body Care [2000] HCA 35; 201 CLR 520; 172 ALR 346; 74 ALJR 1094 (15 June 2000)

[1098] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1099] For example see 22 to 46 in Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1100] Commissioner of Taxation v Sara Lee Household & Body Care [2000] HCA 35; 201 CLR 520; 172 ALR 346; 74 ALJR 1094 (15 June 2000)

[1101] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[1102] St George Custodial Ltd

[1103] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1104] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1105] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

- How one reconciled the Bamford[1106] year-end[1107] decision with McNeil[1108] decision that one could assess the fixed beneficiary on her increment to existing property as assessable revenue income;

Capital gains

- What income and capital gains the discretionary brought to the s 95[1109] calculation of "net income" where the authors suspect the there was only income and capital gains derived or accrued by the trustee. The trustee appears to be the only person who owned a beneficial interest with its lien;

Income

- Whether the entitlement to a share of the "net income" was actually "income" as compared with the appointment to another of what was income in the appointers hands, but "mere uncharacterised property that was a net amount calculated under the trust deed at year end and often a different amount calculated under say s 95[1110] and s 97" in the appointees hand. We liken the income derived by the discretionary trustee to the income earned and derived by a hard working dad whose primary school daughter has a deed (signed and witnessed) of pocket money due weekly. Is the pocket money "income", even if the bright young future lawyer has a "Deed of Pocket money due" as fraction of after tax salary receipts/year end after tax income? McNeil[1111] suggests no, unless one can find a High Court, House of Lords or Privy Council saying that the discretionary beneficiary/beneficiary of a unadministered deceased estate owns property and property before all liabilities have been met or the trustee's lien been[1112] extinguished.

[1106] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1107] For example see 22 to 46 in Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1108] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[1109] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

[1110] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

[1111] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[1112] The issue of the trustee's lien keeps being mentioned such as in French CJ at para 38 in and … at para 232 in Korda v Australian Executor Trustees (SA) Limited [2015] HCA 6 (4 March 2015) *"Octavo Investments Pty Ltd v Knight* [1979] HCA 61; (1979) 144 CLR 360 at 367 per Stephen, Mason, Aickin and Wilson JJ; [1979] HCA 61; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 245–246 [47]; [1998] HCA 4; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* [2005] HCA 53; (2005) 224 CLR 98 at 120–121 [50]; [2005] HCA 53; *Trustee Act* 1936 (SA), s 35(2)." at para 232 "[1901] AC 118 at 123-125. See also *Trautwein v Richardson* [1946] ALR 129 at 134-135; *Marginson v Ian Potter & Co* [1976] HCA 35; (1976) 136 CLR 161 at 175-176; [1976] HCA 35; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] HCA 4; (1998) 192 CLR 226 at 244 [42]; [1998] HCA 4; *Jessup v Queensland Housing Commission* [2001] QCA 312; [2002] 2 Qd R 270 at 275 [14]."

What did Bamford[1113] in High Court decide?

According to the Commissioner's impact statement S310 and S311/2009 a number of general propositions emerge from the High Court's decision:

- the income of a trust estate for trust law purposes and its income for tax purposes are two different subject matters[1114] which do not necessarily correspond (which according to the authors hints at possible Constitutional[1115] problems);
- in subsection 97(1) 'income of the trust estate' takes its meaning from the general law of trusts and not from taxation law;
- under the general law of trusts the concept of 'income' is governed by a set of rules designed to ensure that trustees fairly apportion the receipts and outgoings of a period between those entitled to income and those with an interest in capital;
- the rules of apportionment adopted by the general law of trusts take the form of presumptions about whether particular receipts or outgoings constitute income or capital. The trust law presumptions can be displaced by express provision in the trust instrument;
- the apportionment of receipts and outgoings forms part of the processes in trust administration, explained in Totledge[1116], whereby the 'surplus or distributable income' to which income beneficiaries may become presently entitled in respect of 'distinct year[s] of income' is ascertained (the 'distributable income');
- once the amount of income to which a beneficiary is presently entitled has been ascertained it is converted into a percentage share of the distributable income (howsoever the entitlement was expressed for trust purposes); and
- that percentage is then applied to the [tax] net income of the trust to work out the amount which is included in the assessable income of the beneficiary under paragraph 97(1)(a). This is a simple mathematical calculation the product of which may not correspond with the beneficiary's actual entitlement.

See also TR 2012/D1[1117]

1113 Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

1114 Commonwealth Of Australia Constitution Act - Sect 55states: Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

1115 Commonwealth Of Australia Constitution Act - Sect 55

1116 Re Commissioner of Taxation of the Commonwealth of Australia v Totledge Pty Limited [1982] FCA 64; (1982) 60 FLR 149 (3 May 1982)

1117 http://law.ato.gov.au/atolaw/view.htm?docid=DTR/TR2012D1/NAT/ATO/00001

We as authors assert that the High Court will do their honest best to interpret the legislation (including attribution legislation) put in front of them by the parties involved. But they were not asked to:

- understand the operation of the combined and integrated operation of 1936 Act and its integration into the 1997[1118] ITAA to assess taxpayer on their trust and other non-trust income;
- reconcile their Bamford[1119] decision with their earlier McNeil[1120] decision.

We view the Bamford[1121] decision of a partial "rerun" of Cornell[1122], but where Parliament has not empowered the beneficiary who has only an expectancy under a discretionary trust deed[1123] (like a shareholder like Cornell[1124] who also has an expectation to income being a dividend, but whose share is separate property) is not deemed to have received notional statutory income ascertained under s 95[1125], s 101[1126] and s 97[1127]. Division 6 is a distribution of taxation "net income" calculated under tax rules where all too often the sole income derived by the discretionary trustee is distributed after actual earlier derivation of the income by the trustee who is under no equitable obligations in relation to any specific discretionary beneficiary, until they are appointed to an amount such as:

- Narconon Anzo Inc - possibly a Public Benevolent Institution
- Church of Scientology Inc

[1118] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1119] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1120] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[1121] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1122] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1123] Para 23 of Cridland v Federal Commissioner of Taxation [1977] HCA 61; (1977) 140 CLR 330 (30 November 1977)
Para 6 in Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1124] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1125] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

[1126] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

[1127]

Issues we identify in Bamford decision
Justices with common to both Bamford and McNeil were Gummow, Hayne, Heydon and Crennan JJ with in Bamford French CJ, Gummow, Hayne, Heydon and Crennan JJ and in McNeil - Majority Gummow ACJ, Hayne, Heydon and Crennan JJ - minority Callinan J)

Ownership of income and capital gains	**Beneficial ownership in property**	**Whose income is included in the trust estate's net income under s 95? As the trust estate is not a legal personality whose income can we identify?**	**Amount appointed by the trustee to each beneficiary of the "share of the net income".** **This share of the net income comes into existence no earlier than before exercise of the trustee's discretion, which traditionally or usually is dated 30 June.**	**Share of "net income" tax calculation attributed to discretionary beneficiary in excess of appointed amounts.** **Now we are focussing on the excess or the Notional Tax amount in excess of property actually appointed.**	**Other income identified by Treasury in "Re:Think Box 3.2." (p 49 http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf) to be aggregated to beneficiaries income.** **Does the statutory amount need to aggregated pursuant to s 6-5 and s 6-10 to assess all the beneficiary's income to include or exclude such from ITAA?**

Appears only to be P & D Bamford Enterprises Pty Ltd ("the Trustee")	Beneficial interest in trust property with trustee where has a valid lien. In relation to potential discretionary beneficiaries have no interest in any property held by trustee until the trustee subsequently appoints amounts to	Appears only to be P & D Bamford Enterprises Pty Ltd ("the Trustee") and that the trustee has a lien. The discretionary beneficiaries have no interest in the property held by the trustee and the trustee appears to have a valid lien at least for borrowing from Equity Investment Bank.	This amount can be "derived" and have a "source" in the amounts owned once appointed: see Harding. But what makes the appointed amounts in excess of actual property appointed income? Parliament can do so through s 97: see Harding. But trustee had already derived income where was no beneficiary with a beneficial interest?	In Bamford the FHC upheld the interpretation of attribution legislation enacted by Parliament nee Cornell. This amount in excess of the actual amount attributed cannot be "derived" and cannot have a "source" in relation to the notional amounts not owned. But what makes the share in tax net income in excess of appointed amounts income? Parliament can do so through s 97: see Cornell.	Box 3.2: Income definitions from Treasury "RE:Think document dated 30 March 2015 Page 49 of http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf

	the beneficiary that are held under different and fixed trusts and not usually under deed of settlement made 9 February 1995. What do you do with inchoate liabilities say for CGT for the emerging statutory gain period of ownership prior to the beneficiary becoming “absolutely entitled”? Does the trustee obtain a lien over trust property for inchoate tax liabilities.			But trustee already derived income where was no beneficiary with a beneficial interest to derive in its place. Therefore there are two concepts of income open to be assessed. But when each income is assessed under s 6-25 as the actual facts (with trustee resolutions mostly backdated) that the two income which straddle two different years like Sara Lee timing issues. So two concepts of	

				income, but the word income has presumably the same meaning in s 6-5 and s 6-10!	
			Section 101 preconditions . trustee . has a discretion (and the matter of trustee's lien) . to pay/ apply . for the benefit . beneficiary . amount . paid . applied by the trustee . inferred timing rules that may well be different from year-end rules	Section 101 preconditions . trustee . has a discretion (and the matter of trustee's lien) . to pay/ apply . for the benefit . beneficiary . amount . paid . applied by the trustee . inferred timing rules that may well be different from year-end rules	

			Notional amounts (issue not raised in Bamford under s 97 “share” preconditions) . income . you . source derive plus the issue of the trustee’s lien.	Notional amounts (issue not raised in Bamford under s 97 “share” preconditions) . income . you . source derive plus the issue of the trustee’s lien.	
TIMING RULES					

S 6-5 income "derivation" for ordinary income by legal owner see South Australiav Clth paras 6(f) to (h) and s 6-10 timing rules adopting the CGT statutory timing rules, such as contract date – see Sara Lee.	S 6-5 income "derivation" for ordinary income by legal owner see South Australiav Clth paras 6(f) to (h) and s 6-10 timing rules adopting the CGT statutory timing rules, such as contract. date – see Sara Lee.	S 6-5 income "derivation" by legal owner(s) and beneficial owner(s) see South Australia v Clth paras 6(a) to (e) for beneficial owners and (f) to (h) for legal owners. S 6-10 timing rules adopting the CGT timing statutory rules, such as contract date – see Sara Lee. But South Australia was a trustee of a superannuation fund that was assessable in accordance with Pt IX of ITAA 1936 and not Div 6 of Part III of ITAA 1936.	The s 95 calculation of "net income" is a year end" calculation with income reduced by deductions and losses to arrive at a statutory net amount. By contrast, s 6-5 income "derivation" by legal owner(s) and beneficial owner(s) see South Australia v Clth paras 6(a) to (e) for beneficial owners and (f) to (h) for legal owners is continuous derivation.	*"First, whether a particular receipt has the character of the derivation of income depends upon its quality in the hands of the recipient, not the character of the expenditure by the other party"* So is this statement by the Full High Court in McNeil at para 20 and GP Pipecoaters confined to income owned and not applicable to notional attributed income in excess of the amount owned?	S 6-5 income "derivation" by legal owner(s) and beneficial owner(s) see South Australia v Clth paras 6(a) to (e) for beneficial owners and (f) to (h) for legal owners. CGT timing statutory rules, such as contract date – see Sara Lee.

			S 6-10 timing rules adopting the CGT timing statutory rules, such as contract date – see Sara Lee. But South Australia was a trustee of a superannuation fund that was assessable in accordance with Pt IX of ITAA 1936 and not Div 6 of Part III of ITAA 1936.		

				The net amount is treated as income nee Cornell. Unlike s 16(2) of ITAA 1915 taking the corporate accumulated profits that exist as corporate property across to the shareholders, the s 97 amount is a net amount is appointed later to the derivation of income by trustee. So issue of whether "net income"	

				share being a notional amount is itself income needs to be adjudicated by FHC, as all one has is a tax calculation. **Derivation** South Australia derivation accumulated learning will never apply to notional amounts to assess under s 6-5.	
To Whom Does GAAR apply to under s 260 and Part IVA?					
Not to legal owner, where there is a identifiable beneficial owner who owns the relevant property				According to Cridland and Peabody, NOT to discretionary unit holder or beneficiary.	
CONFLICT					

How does one find a fundamental common base to the word "income" to provide the word "income" any common base meaning when (6 justices unanimous decision Cornell says that even ownership is not the common "building block" base factor)?					
Ownership of income and capital gains as property encompasses what a person owns.	Beneficial ownership of income and capital gains as property encompasses what a person beneficially owns.	The income and capital gains have been included in the trust's net income under s 95 to determine liability to income tax, but with the Core Provisions of s 6-5 and 6-10 one focuses on "you", "source" and "derivation" whilst for GST and FBT purposes and one focuses on "supply" and "benefits" provided.	Where the amount appointed by the trustee to each beneficiary of the "share of the net income", but for the Core Provisions one focuses on "you", "source" and "derivation" whilst for GST and FBT purposes and one focuses on "supply" and "benefits" provided.	When the share of "net income" tax calculation attributed to discretionary beneficiary is treated as income for income tax purposes. The word "income" as adjudicated in Cornell can be merely a notional statutory amount.	What does the statutory amount determined in accordance with s 97 have in common with other income identified by Treasury to be aggregated to beneficiaries income?

			But what are the identifiers that prevent one person being assessed on another's income, supply and benefit where there also attribution and GAAR legislation parameters encountered or “tripped over” especially in past Full High Court decisions?		
Trustee’s lien					

The Division 6 treatment of trustee's lien reducing the "trust assets" held for the beneficiaries, because the trustee's higher beneficial interest in trust property is in conflict with the asserted assumption (only agreed between parties before the Court) discussed by Slater that there is no impediment under Div 6 attribution rules to the beneficiaries claims on trust assets.	But can you attribute to a beneficial owner as the property is already beneficially own and derived. But "net income" calculation can be different amount to gross income less deductions, for example trust losses (not loss to trustee or beneficiary) can be carried forward which would not be available to the beneficiaries.				

Does s 55 ever drive Parliament to clean up its Act?

The Air Calenodie unanimous 7 member decision suggests that s 55 of the Constitution is a Senate and not a taxpayer protection section. But such is not a literal interpretation and focuses on words not actually present in the section located in Part V--Powers of The Parliament of the Constitution, but such an interpretation could well be supported by the nearby sections of the Constitution.

		On a lineal analysis all is possibly well, but Slater is hinting that ITAA is dysfunctiona l ;	On a lineal analysis all is possibly well, but Slater is hinting that ITAA is dysfunctiona l ;	On a lineal analysis all is possibly well, but Slater is hinting that ITAA is dysfunction al ;	On a lineal analysis all is possibly well, but Slater is hinting that ITAA is dysfunction al ;
		But if one adopts a matrix analysis, then issues such as satisfaction of all precondition s may open up. But our research is incomplete, but this paper is lodged within the lodgement deadline of 1 June 2015.	But if one adopts a matrix analysis, then issues such as satisfaction of all precondition s may open up. But our research is incomplete, but this paper is lodged within the lodgement deadline 1 June 2015.	But if one adopts a matrix analysis, then issues such as satisfaction of all preconditio ns may open up. But our research is incomplete, but this paper is lodged within the lodgement deadline 1 June 2015.	But if one adopts a matrix analysis, then issues such as satisfaction of all preconditio ns may open up. But our research is incomplete, but this paper is lodged within the lodgement deadline 1 June 2015.

Contrasting Table to explain contrasting decision in McNeil[1128]

McNeil[1129] in contrast you are dealing with imposing tax liabilities triggered by actual income in contrast to Bamford's[1130] addressing deemed s 101[1131] income. In Bamford the High Court never tell you that appointed amounts are only s 101[1132] deemed income.

Issues we identify in Bamford decision
Justices with common to both Bamford and McNeil were Gummow, Hayne, Heydon And Crennan JJ with in Bamford French CJ, Gummow, Hayne, Heydon and Crennan JJ and in McNeil - Majority Gummow ACJ, Hayne, Heydon and Crennan JJ - minority Callinan J)

[1128] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[1129] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[1130] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1131] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

[1132] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s101.html

Ownership of income and capital gains	**Beneficial ownership in property**	**Whose income included in the trust's net income under s 95?**	**Amount appointed by the trustee to each beneficiary. This property comes into existence no earlier than before exercise of the trustee's discretion which traditionally or usually is dated 30 June**	**Share of "net income" tax calculation attributed to beneficiary in excess of appointed amounts.**	**Other income identified by Treasury to be aggregated to beneficiaries income.** **Does it need to aggregated pursuant to s 6-5 and s 6-10 to assess all the beneficiary's income to include or exclude such from ITAA?**

Legal ownership with St George Custodial Pty Ltd	Beneficial ownership with Mrs. McNeil	Nobody's as this was the "sell-back right" that were the corpus of the trust estate. So was the trust estate held by St George Custodial merely a single trust estate for Mrs. McNeil or was it a trust estate for all the squillions of shareholders in St George Building Society Ltd.? The authors suggest was single and specific to Mrs. McNeil, as that is who equity law applied and between. The increment to existing property that is characterised as income only occurs in Mrs. McNeil's hands.	No appointment by trustee, as no income as all the trustee held was the corpus, being "sell-back right".	No "net income" calculation. Mrs. McNeil income was the market value of the "sell-back rights" as an increment to her existing property.	No problem, if one is aggregating all the property owed by a person and identifying whether one is aggregating legal or beneficially owned property and when. Then one needs to decide whether all property is included or only property that fits the undefined description and preconditions of income!

Why will the ATO[1133] not argue the Core[1134] provisions of the ITAA 1997[1135]?

It is even hard for Chris Jordan and his predecessors since 1915 to miss them. Slater[1136] is correct to advise that the taxation of trustees and beneficiaries is principally provided for in Division 6 of Part III[1137]. We surmise as authors in the best manner we can that some of the reasons include:

- A bureaucrat is most reluctant to admit that their organisation has made a mistake. That is one of the main reasons why our democratic system needs independent judges to review administrators decisions and independently apply the law and not necessarily follow administrative practice. But courts need to be advised exactly what they are adjudicating on;
- If the Commissioner applies the Core[1138] Provisions of ITAA 1997, other taxpayers will commence applying those provisions in their objections, especially PSI individuals, Head Entities assessed on subsidiary amended assessments;
- If the Commissioner administers[1139] contrary to words instructing him of the Act it is maladministration. But an incoming Commissioner may not want to administer against previous administrative and commercial norms, without first obtaining from Treasury clearance that the consequences will be addressed. But that may be a short curt conversation.

Treasury on Bamford[1140]

Treasury confirms the Bamford approach[1141] is the Conservative approach. It describes discretionary trust distributions in the following manner: *"Further*

1133 https://www.ato.gov.au

1134 Income Tax Assessment Act 1997 - Sect 2.5

1135 http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

1136 A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015

1137 A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 29

1138 Income Tax Assessment Act 1997 - Sect 2.5

1139 Income Tax Assessment Act 1997 - Sect 1.7
A New Tax System (Goods And Services Tax Administration) Act 1999 - Schedule 1
Fringe Benefits Tax Assessment Act 1986 - Sect 3

1140 Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

1141 Re:Think Tax discussion paper Better tax system, better Australia" AGPS March 2015 p 112 http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf

issues arise in the context of trusts, where the default treatment is that tax is imposed on beneficiaries rather than in the trust. These issues are compounded by longstanding problems with the legal framework for the taxation of trusts, highlighted in recent court decisions (such as Commissioner of Taxation v Bamford (2010) 240 CLR 481). For instance, one problem is that income received by trusts may not retain its character for tax purposes when passed on to beneficiaries. Another is the mismatch between the amounts on which a beneficiary is taxed and the amounts that they are entitled to under trust law. Following the decision in Bamford[1142], a discussion paper was released canvassing wider changes to address these systemic problems. However, while changes have been made to address some specific issues, wider reform has not occurred and the underlying problems remain."

The authors think Treasury statements are a pack of Pooh tickets[1143].

- There is no default position for trusts subsequent to McNeil[1144]. Mrs. McNeil owned property to which the Core[1145] Provisions could apply. The specialist provisions of Div 6 are the most commonly applied;
- A trust is not a person who owns property and is only used as a concept for year-end[1146] calculations of s 95[1147] "net income", but not for the Core[1148] Provisions of ITAA 1997 that impose the liability on the undefined word "income";
- There is no legal framework for trusts[1149]. The question is whether the property of the trustee or beneficiary is liable under ITAA, GST or FBT Acts.
- The issue is not passing on the character of the property to the beneficiaries, but more whether they have equitable law interests that are so specific that the Court will look to the beneficiaries that they are the identified beneficial owners of the property and not the legal owner as such, as for example St

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[1142] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1143] like a pakapoo/pakapu ticket phr. [1950+] (Aus.) said of anything untidy, complex, incomprehensible. ... [Chinese pidgin _puk-ah-pu ticket_, a form of betting slip used by Chinese gamblers; properly known as _pai-ke-p'iao_, lit. 'white pigeon ticket', it was a small square of paper marked with 80 Chinese characters; the gambler chose some of these, usu. 10, and, depending on how many matched that day's winning combination, would make a small profit for their sixpenny stake] http://www.phrases.org.uk/bulletin_board/52/messages/457.html

[1144] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[1145] Income Tax Assessment Act 1997 - Sect 2.5

[1146] For example see paras 22 to 46 in Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1147] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

[1148] Income Tax Assessment Act 1997 - Sect 2.5

[1149] "Re:Think Tax discussion paper Better tax system, better Australia AGPS March 2015 p112. The issue who is assessable on the property and you have in Division 6 of Part III of ITAA 1936 an attribution legislative regime.

George Custodial Ltd. The treatment of trusts is an example of the choice of either the legal owner or the beneficiary being assessed. But we attempt to argue that where the non-owner (and which non-owner) is assessed, then the wording of the three Acts cannot apply to the non-owner and is much more likely to apply to the owner as statutory words definitely can apply to owners that the Full High Court recognise. But we have Cornell[1150] to deal with, which says that there is no limitation on Parliament to attribute a meaning to the words, such as "income", "supply[1151]" or "benefit[1152]".

According to the authors the mismatch under Division 6 principally occurs when the ATO[1153] assesses the non-owner of property who should not be assessed.

Authors' comments on the Full High Court decision in Bamford[1154]

The authors note that:

- The Division 6 of Part III of ITAA 1936[1155] was enacted by Parliament and did not exist in the ITAA 1915[1156] s 14(e)[1157] with s 31 of 1922 Act providing the genisis[1158] for assessing both the trustee and the appointed amount under s 31(4) and not alternatively as both amounts can be assessed and the beneficiary's income from a trust estate was aggregated with their other derived income. This is a far cry from Bamford[1159]. The aggregation of McNiel beneficial interests make sense, but the discretionary beneficiary's amount is more like assessing Harding's[1160] mere property;
- The Full High Court appear to be unwilling to undermine the attributable

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[1150] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1151] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[1152] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[1153] https://www.ato.gov.au

[1154] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1155] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[1156] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[1157] See s 14 The income of any person shall include-
(e) beneficial interests in income derived under any will, settlement, deed of gift or instrument of trust;

[1158] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1922371922267/

[1159] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1160] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

income[1161] concepts of s 97[1162] without arguments presented to it. S 97[1163] merely needs to be interpreted by it;

- Nothing in the Full High Court judgement identifies the previous existence possible property being income derived or capital gain accruing to the discretionary beneficiaries like how the full High Court identified that Mrs. McNeil beneficial interest in the "sell-back rights" being the increment to her existing property which was income. The decision operates on the assumption that P & D Bamford Enterprises Pty Ltd ("the Trustee") income can be attributed under "present entitlement" rules to the discretionary beneficiaries. Such is the possible impact of Cornell's[1164] decision;
- In relation to Capital Gains Tax gains, research of the High Court as to whether a Capital gain is included in the Division 6 of Part III of 1936 calculation of trust "net income" under the 1997[1165] Act as amended by the 1998 Act that enacted the Simplified CGT legislation[1166] would have disclosed a contrast with the Full High Court's analysis of Part IIIA[1167] provisions of the CGT legislation in 1936 Act. The Full High Court in Sun Alliance[1168] consisting of Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ[1169] stated at para 4 stated:

> *Part IIIA of the Income Tax Assessment Act 1936 (Cth) ("the 1936 Act") is headed "CAPITAL GAINS AND CAPITAL LOSSES" and comprises ss 160AX-160ZZU. The stated object of Pt IIIA is to provide for the inclusion in assessable income of net capital gains (ss 160AX, 160ZO(1))[1170]. Net capital losses are taken into account in accordance*

[1161] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1162] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s97.html

[1163] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s97.html

[1164] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1165] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1166] Tax Law Improvement Act (No. 1) 1998 No. 46, 1998 - Schedule 2

[1167] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[1168] Commissioner of Taxation (Cth) v Sun Alliance Investments Pty Ltd (in liquidation) [2005] HCA 70; (2005) 225 CLR 488; (2005) 222 ALR 286; (2005) 80 ALJR 202 (17 November 2005)

[1169] Gummow and Heydon also decided Bamford

[1170]Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 "160ZO. (1) Where a net capital gain accrued to a taxpayer in respect of the year of income, the assessable income of the taxpayer of the year of income includes that net capital gain.

"(2) …

with s 160ZC but are not otherwise allowable as deductions (s 160ZO(2)).

The authors note that all these above provisions are based on the s 160C[1171] definition of a taxpayer.

- S 160ZO[1172] would have included any CGT gain directly into s 25[1173] or s 6-10[1174] income by passing s 95[1175] net income calculation with Sara Lee's[1176] timing rules before any trust deeds appointment of CGT gains to the Discretionary Beneficiaries;
- Bamford[1177] clashes with South Australia v Clth[1178] where the trustee was liable or exempt, when the beneficiaries had no interest in trust funds. Members of the superannuation fund had no interest in trust property;
- That the other equity law personality for partners Part IIIA[1179] was clarified that it applied to each partner, whilst the revenue provisions required a year-end calculation under Division 5 of Part III in relation to the partnership.

[1171] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 "160C. (1) A reference in this Part to a taxpayer, in relation to an asset that has been disposed of or in relation to a capital gain or listed personal-use asset gain that accrued or a capital loss or a listed personal-use asset loss that was incurred in respect of such an asset, is a reference-
(a) except where paragraph (b) applies-to the person who owned the asset immediately before the disposal took place; or
(b) where the disposal resulted from an act that is, by virtue of sub-section 160V (1) or section 160W, deemed to be the act of a person other than the person who owned the asset immediately before the disposal took place-to that other person.
"(2) A reference in this Part to a taxpayer, in relation to an asset that has been acquired, is a reference to the person who owned the asset immediately after the acquisition took place. Money or other property applied for benefit of taxpayer.

[1172] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 "160ZO. (1) Where a net capital gain accrued to a taxpayer in respect of the year of income, the assessable income of the taxpayer of the year of income includes that net capital gain.

"(2) …

[1173] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1936271936267/

[1174] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[1175] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

[1176] Commissioner of Taxation v Sara Lee Household & Body Care [2000] HCA 35; 201 CLR 520; 172 ALR 346; 74 ALJR 1094 (15 June 2000)

[1177] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1178] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[1179] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

Under 1997[1180] Act Part III CGT legislation under s 106-5[1181]applies directly to partners;

- The Full High Court did not adjudicate in Bamford[1182] on whether CGT gains entered into the s 95[1183] calculation of net income as the Commissioner withdrew the issue at para 9 and 10[1184]. However at para 32 the unanimous judgement concludes*: "If a "net capital gain", as defined in s 995-1(1) of the Income Tax Assessment Act 1997 (Cth) ("the 1997 Act"), is made it will be taken into account in computing the net income of the trust estate within the meaning of s 95(1) of the 1936 Act as part of the assessable income, which is defined by reference to Div 6 of the 1997 Act**[19]**. Special rules found in Subdiv 115-C of the 1997 Act then may allow beneficiaries to reduce their liability by their available capital losses and unapplied net capital losses."*
- If one focuses on the amount appointed by the trustee under its discretionary powers, one can easily say after Harding[1185] decisions that appointed amount is derived and has a source as the amounts are owned. The two major problems are whether (1) Can you characterise the appointed amounts as "income" post McNeil[1186] as the discretionary beneficiaries do not acquire any increment to their existing property (2) Whether the appointed amounts created during the year of income or afterwards with often back dated resolutions could be income during the relevant year. If one focuses on the trading income or the CGT gain from the sale of property, then one can rapidly conclude that the discretionary beneficiary had no interest in the assets of the trustee and were totally outside and beyond the liability imposed by the Core Provisions of ITAA;
- The Full High Court was not asked to adjudicate on whether the Bamford[1187]

[1180] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1181] (1) Any * capital gain or * capital loss from a * CGT event happening in relation to a partnership or one of its * CGT assets is made by the partners individually.

[1182] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1183] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s95.html

[1184] In this Court the Commissioner submits, contrary to the decision of the Full Court, that "the income of the trust estate" did not include this amount. This is said to be so because, while available for distribution in accordance with the Deed, the capital gain amount was not, in the sense of the 1936 Act, "income according to ordinary concepts".
On the second day of the hearing of the appeals the Commissioner made it clear that he accepts that the appeal (*by Commissioner of Taxation)* should be dismissed if "the income of the trust estate" within the meaning of s 97(1) includes "statutory income" such as capital gains which are brought in as "assessable income".

[1185] Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917)

[1186] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[1187] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

liabilities should be tested against the Core[1188] Provisions preconditions s 6-5[1189] and s 6-10[1190] "derivation" and "source" tests.

OVERREACH BY ALL TAX LEGISLATION

When have the the Full High Court "knocked back" assessments on non-owners"

We consider that Parliaments need to "buttress" its tax legislation, so that it raises necessary revenue. This buttressing legislation all to often clashes with any theory behind the legislation. Some amending legislation is clearly driven by economic considerations[1191] and even correctly focus on taxation issues. Example of such "overreach" we as authors identify as reaching the Full High Court include:

High Court decisions

Our initial review of Full High Court decisions indicating that the Commissioner is assessing by overreaching his power include:

- Waterhouse[1192]
- Purcell[1193]
- Bohemians[1194]
- Peabody[1195]
- Cridland[1196]
- Arthur Murray[1197]

[1188] Income Tax Assessment Act 1997 - Sect 2.5

[1189] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[1190] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[1191] Income Tax Assessment Act 1997 - Sect 700.10

[1192] Waterhouse v Deputy Federal Commissioner of Land Tax, South Australia [1914] HCA 16; (1914) 17 CLR 665 (24 March 1914)

[1193] Deputy Federal Commissioner of Taxation v Purcell [1921] HCA 59; (1921) 29 CLR 464 (12 August 1921)

[1194] Bohemians Club v Acting Federal Commissioner of Taxation [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918)

[1195] Federal Commissioner of Taxation v Peabody [1994] HCA 43; (1994) 181 CLR 359; (1994) 123 ALR 451; (1994) 28 ATR 344; (1994) 94 ATC 4663 (28 September 1994)

[1196] Cridland v Federal Commissioner of Taxation [1977] HCA 61; (1977) 140 CLR 330 (30 November 1977)

[1197] Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965)

In **Waterhouse**[1198] the full High Court decided that GAAR legislation of the Federal Land Tax Legislation that allowed the spouse to be assessed on land that had been transferred from one spouse to the other spouse was clashing with the concept of a tax upon the owner of the land.

In **Purcell**[1199] the Full High Court refused to allow the Commissioner to apply the GAAR legislation against the transferor of two thirds of the beneficial interest in a farm and associated assets (including chattels), where the transferor still retained the legal title, as the ITAA Act applied to the beneficial owner.

In **Bohemians**[1200] decision, the ITAA 1915[1201] included unincorporated Associations within the definition of a company. The Commissioner attempted to assess the unincorporated person as a separate tax entity on the unspent contributions as "income" of the association/company. However, the unspent funds were still owned by the members of the association[1202].

In **Peabody**[1203] the Commissioner attempted to assess under the GAAR[1204] the expectancy of the discretionary beneficiary for the benefit under a tax avoidance arrangement, before the discretionary beneficiary had even been appointed to any such benefit or to the gain. The High Court held that although there was a tax avoidance, arrangement there was no expectancy of that particular person to the

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[1198] Waterhouse v Deputy Federal Commissioner of Land Tax, South Australia [1914] HCA 16; (1914) 17 CLR 665 (24 March 1914)

[1199] Deputy Federal Commissioner of Taxation v Purcell [1921] HCA 59; (1921) 29 CLR 464 (12 August 1921
Purcell v Deputy Federal Commissioner of Taxation [1920] HCA 46; (1920) 28 CLR 77 (14 August 1920)

[1200] Bohemians Club v Acting Federal Commissioner of Taxation [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918)

[1201] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[1202] Treasury describes mutuality in the following manner: "Membership organisations not prescribed as income tax exempt may utilise the mutuality principle. Under the mutuality principle, where a group of individuals join together to contribute to a common fund, created and controlled by all of them for a common purpose, any surplus created in the fund from the individual contributions or dealings between the members of the fund is not considered to be income for tax purposes. For a mutual organisation, income received from transactions with their members is tax exempt. A range of licensed clubs and societies, co-operatives, strata title bodies corporate and other associations utilise the mutuality principle.
Tax discussion paper Better tax system, better Australia" AGPS March 2015 p 126 http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf

[1203] Federal Commissioner of Taxation v Peabody [1994] HCA 43; (1994) 181 CLR 359; (1994) 123 ALR 451; (1994) 28 ATR 344; (1994) 94 ATC 4663 (28 September 1994)

[1204] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html

"benefit[1205]". Mrs. Peabody had no property rights whatsoever in any amount being considered by the High Court, as she was merely a discretionary beneficiary[1206].

In **Cridland**[1207] the taxpayer was a discretionary income beneficiary[1208] of a unit trust where the trustee carried on primary production business. The discretionary unit beneficiary claimed the tax benefits of being a primary producer's averaging of income[1209]. The Full High Court unanimously dismissed the application of the GAAR

[1205] Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ para 35 "For these reasons, it cannot be said that the amount which the Commissioner included in Mrs Peabody's assessable income for the year ended 30 June 1986 was an amount which would have been included or might reasonably be expected to have been included in her assessable income for that year had the devaluation of the Kleinschmidt shares not taken place. Mrs Peabody did not, therefore, obtain a tax benefit in connection with a Pt IVA scheme and, accordingly, the appeal must be dismissed."

[1206]Federal Commissioner of Taxation v Peabody [1994] HCA 43; (1994) 181 CLR 359; (1994) 123 ALR 451; (1994) 28 ATR 344; (1994) 94 ATC 4663 (28 September 1994) at Austlii paras 24, 30, 33 and 35.

[1207] Cridland v Federal Commissioner of Taxation [1977] HCA 61; (1977) 140 CLR 330 (30 November 1977)

[1208] Mason J para 6 "The trustee had the right to distribute to the income beneficiaries the whole or any part of the trust or to retain and accumulate the whole or any part of the income of the trust (cl. 5 (a)). In the event that the trustee decided to distribute the income, it had a discretion to distribute the income between any one or more of the income beneficiaries and in such shares as it in its absolute and uncontrolled discretion might think fit (cl. 5 (b)). (at p336)"

[1209] Mason J para 1 "In the Supreme Court of New South Wales, Mahoney J. dismissed the appellant's appeals against assessments to income tax for the years ended 30th June 1970, 1971 and 1972. The issue in the appeals was whether the appellant was entitled to the benefit of the averaging provisions contained in Div. 16 of Pt III of the Income Tax Assessment Act 1936, as amended ("the Act"). The appellant claimed the benefit of these provisions on the ground that he was an income beneficiary under certain trusts the trustee of which carried on the business of primary production. The appellant relied particularly on s. 157 (3) of the Act which provides:
"(3) For the purposes only of determining whether a person is carrying on a business of primary production, a beneficiary in a trust estate shall, to the extent to which he is presently entitled to the income or part of the income of that estate, be deemed to be carrying on the business carried on by the trustees of the estate which produces that income."
His Honour (Supreme Court of New South Wales, Mahoney J) held that s. 260 of the Act applied so as to deny to the appellant the benefit of the averaging provisions on the ground that the appellant was party to an arrangement which had both the purpose and the effect of altering the incidence of income tax, or which would have that effect if it operated according to its terms. (at p335)
Para 2. The principal issue in the appeals to this Court is whether the primary judge was correct in so deciding. A second question arises because the Commissioner submitted that in relation to the assessment for the year ended 30th June 1970 the appellant was not an income beneficiary of the relevant trust, the No. 2 trust, in the previous year because the assignment to him of his unit did not comply with the terms of the trust relating to the vesting of the unit and was otherwise ineffective to vest an income unit in him. (at p335)"

provisions[1210]. The High Court according to the authors was unwilling to review whether a discretionary income beneficiary derived or "obtained" income when it had no property rights (especially beneficial interests) in the income whatsoever and was only subsequently appointed to different property being an amount that was separate property to the income from primary production, because the issue was not before the High Court. The characterisation of the discretionary beneficiaries property to which the discretionary trustee subsequently appointed to the unit holders was not before the Court nor whether it was only income of such discretionary unit holder on a "Cash Receipts" basis, such as when the appointed amount was actually received by the discretionary beneficiary. The High Court decision only says the GAAR s 260 cannot be used to strike down specifically provided tax concessions for primary producer, but not that discretionary unit beneficiary derived any primary production income whatsoever. The authors contend that the GAAR legislation was not needed to prevent inappropriate use of tax concessions. The authors agree with the High Court that it was inappropriate to so apply the GAAR legislation and the authors assert that it is inappropriate to apply GAAR to a person who was not primarily liable to tax and who appears to have derived no income. But such is the issue not discussed in the Unit Trend[1211] decision.

[1210] Mason J paras 21 to 23 (unanimously agreed with). "The transactions into which the appellant entered in the present case by acquiring income units in the trust funds in question were not, I should have thought, transactions ordinarily entered into by university students. Nor could they be accounted as ordinary family or business dealings. They were explicable only by reference to a desire to attract the averaging provisions of the statute and the taxation advantage, which they conferred. But these considerations cannot, in light of the recent authorities, prevail over the circumstance that the appellant has entered into transactions to which the specific provisions of the Act apply, thereby producing the legal consequences, which they express. (at p340)
22. Accordingly, it is my view that s. 260 has no application to this case. (at p340)
23. The respondent's second submission is that the appellant was not an income beneficiary of the No. 2 trust in respect of the 1969-year and that he was therefore not entitled to the benefit of the averaging provisions for the succeeding year. Though it is conceded that the appellant was registered as an income beneficiary in the No. 2 trust it is argued that he was registered in breach of the provisions of the trust deed in that the assignment to him of the income unit of D. P. O'Shea was ineffective because it was not an assignment of a proprietary interest but of a mere expectancy and because cl. 4 (f) of the trust deed forbade registration as an income beneficiary unless and until the person concerned satisfied the trustee that he had donated a sum of not less than one dollar to a s. 78 institution. The primary judge stated that he was not satisfied as a matter of fact that the appellant had paid this sum. The interest of the object of a discretionary trust is something more than a mere spes (Gartside v. Inland Revenue Commissioners [1967] UKHL 6; (1968) AC 553, at p 618). But this is by the way. For a sufficient answer to the respondent's contention is to be found in the circumstance that by the terms of the trust deed the trustee was required only to account to those persons who were registered as income beneficiaries (cl. 2 (c)) and that the trustee was authorized to distribute the income, in the event that he decided to distribute income instead of accumulating it, to the registered income beneficiaries and not to other persons. Non-compliance with the requirements of the trust deed antecedent to registration might give rise to some equitable claim to relief against a person who had been irregularly registered as an income beneficiary, at least at the suit of a transferor, but it could not affect the power of the trustee to pay income to a person whose name appeared in the register of income beneficiaries at the relevant time. If there be a non-compliance or an irregularity which could ground a claim to equitable relief in the present case, it is not a matter on which the respondent can rely in order to sustain his assessment. (At p341)"

[1211] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

In **Arthur Murray** [1212] the Commissioner attempted to assesses the consideration for the provision of future services by a company as income derived[1213] (ordinary income as compared with mere property or statutory income) when the company owned[1214] the consideration (and the consideration was not subject to any trust obligations) and the consideration and been actually received by the company in a "business[1215]" context. The 3-justice Full High Court held that the consideration was not to be characterised as income derived, until it was "earned" by the provision of the services. Although one can belittle the three judge full High Court decision, it is cited with unanimous approval by all seven justices in South Australia[1216] so that the proposition that ordinary income is not derived, if the amount of consideration received has not yet been earned meets strong judicial support by two very differently constituted High Courts. The High Court in MBI[1217] was consistent with Arthur Murray[1218] decision that all preconditions to the legislation is required to satisfy the preconditions of the legislation and impose a tax liability.

Conclusions

What the authors read into these full High Court "parameter" decisions is that the decision the decisions say:

- All tax legislation that meets the Constitutional preconditions is constitutionally valid[1219]
- GAAR[1220] legislation is not applied to non-owners (and which non-owner) of relevant property being assessed and the High Court have repeatedly stated that GAAR does not apply to discretionary beneficiaries, because they were not the owners of the property;
- Where the High Court is asked to review the preconditions for assessment, such as "derivation", "non derivers" such as prepaid owners of amounts of

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[1212] Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965)

[1213] Derivation is a precondition in Income Tax Assessment Act 1997 - Sect 6.5 - but not Sect 6.10

[1214] Para 6 of the joint judgement

[1215] Para 2 of the joint judgement

[1216] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[1217] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[1218] Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965)

[1219] See Cornell - Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1220] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html
GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html
FBT Fringe Benefits Tax Assessment Act 1986 - Sect 67 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s67.html

property that once "earned" can be characterised as income, will not be liable to be assessed until that and all precondition of the tax liability are satisfied. Arthur Murray[1221] decision is therefore consistent with the GST MBI[1222] decision in application of principle of statutory interpretation and fulfilment of the preconditions to the legislative liability. Not all income is assessable, especially income without being "derived" or without a "source". Not all supplies are subject to GST. They ordinarily need to be "taxable supplies[1223]";

- Where the Act allows one to consider a "tax entity" to be a relevant person, then that tax entity needs to satisfy the preconditions of the legislation, such as the amounts being not merely to be "income" but "income derived" where there is a clash between assessing the owners of the property and the tax entity. Therefore, for example in the authors' opinion the Head Entity of a tax consolidated group could never derive the subsidiaries income and s 6-5[1224] could not assess the Head Entity on the subsidiary's income. Statutory income under s 6-10[1225] prevails over "ordinary income"[1226]. Only s 701-63(3) is listed as "statutory income" for tax consolidation purposes in s 10-5[1227]. More importantly none of the subsidiary's property is owned by the Head Entity for it to included in statutory income and the source[1228] of the ordinary and statutory income would be with the subsidiary that owned the property, so preventing the Head Entity satisfying all of the preconditions of s 6-10[1229] being satisfied. The authors also assert problems exists with self-managed

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[1221] Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965)

[1222] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

[1223] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[1224] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[1225] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[1226] Income Tax Assessment Act 1997 - Sect 6.25(2) and 10.5.

[1227] Income Tax Assessment Act 1997 - Sect 10.5

[1228] The authors recognize that Lindgren J as a single judge of the Federal Court in Fowler v Commissioner of Taxation [2008] FCA 528 (21 April 2008) decided otherwise. But that decision clashes with:

(1) Griffith C.J in Bohemians Club v Acting Federal Commissioner of Taxation [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918) "As to the first point, the term "income" is not defined in the Act, but sec. 10 speaks of taxable income "derived directly or indirectly ... from sources within Australia." A man is not the source of his own income, though in another sense his exertions may be so described. A man's income consists of moneys derived from sources outside of himself."

(2) The concept that there was a "general or commercial" source of income as espoused by Gibb J (at first instance) in Esquire Nominees Ltd v Federal Commissioner of Taxation [1973] HCA 67; (1973) 129 CLR 177 (24 September 1973) was rejected by the Full Court decision especially by Barwick CJ at para 19, Menzies J. para 13, Stephen J para 22, but not by McTiernan J. at para 10.

[1229] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

superannuation[1230] where it is difficult to determine whether there is no more than co-ownership of property (or even separate ownership) and no transfer of contributions for retirement to a third party to be held for retirement etc.

But we read between the lines and assert that the Full High Court will deal "deftly" with the Commissioner, so that they do not undermine the collection of revenue that allows the Federal State to be administered properly by deciding cases on issues not raised by either the Commissioner or the taxpayer.

Current "untested" legislative overreach

The authors assert that for example the following untested issues exist for example in:

- GST where Basic Rules of "Taxable Supply[1231]" clash with the concept of a Group Representative[1232] being required to pay the GST liability, especially as in Unit Trend fact situation the Group Representative satisfied none of the preconditions to liability under the Basic Rules of "Taxable Supply[1233]" or even under the Margin[1234] Scheme or the GAAR[1235];

[1230] Para 4 (stating the facts of of the Shail Superannuation Fund) as reported in Shail v Commissioner of Taxation (Corrigendum dated 17 May 2007) [2007] FCA 655 (4 May 2007)
Paras 2, 45, 49 of Shail Superannuation Fund and Commissioner of Taxation [2011] AATA 940 (23 December 2011)

[1231] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[1232] A New Tax System (Goods And Services Tax) Act 1999 - Sect 48.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s48.1.html

[1233] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[1234] A New Tax System (Goods And Services Tax) Act 1999 - Sect 75.1

[1235] A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1

- FBT where the definition of a Fringe Benefit[1236] requires a provision of a benefit[1237], which the authors assert can only primarily apply to a change in ownership from the employer to the employee and thus usually fall to be characterised as "salary and wages[1238]" and thus excluded from FBT liability. FBT Act can be viewed as merely legislative "buttressing" or "support" for ITAA and not introducing a scheme of benefits that are exempt[1239]. Therefore, living-away-from-home allowance (LAFHA)[1240] payments would according to the authors be always since 1986 income, if contractually payable under employment contract as "salary and wages", but LAFHA treatment has had various tax treatments since 1986 to date[1241]. By contrast, LAFHA amounts payable under Statutory Awards etc. may need separate analysis. In the authors opinion only what cannot be caught under a PAYG system was excluded from income tax treatment not the "carving out" of a separate regime of treating "fringe benefits[1242]" to employee to provided tax arbitrage;
- CGT tests the exclusion of proprietary assets owned before 20 September 1985 by comparing the pre-20 September 1985 ownership repetitively from

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[1236] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of ***"fringe benefit "***, in relation to an employee, in relation to the employer of the employee, in relation to a year of tax, means a benefit:

(a) provided at any time during the year of tax; or

(b) provided in respect of the year of tax;

being a benefit provided to the employee or to an associate of the employee by:

(c) the employer; or

(d) an associate of the employer; or

(e) a person (in this paragraph referred to as the ***arranger)*** other than the employer or an associate of the employer under an arrangement covered by paragraph (a) of the definition of ***arrangement*** between:

(i) the employer or an associate of the employer; and

(ii) the arranger or another person; or

(ea) a person other than the employer or an associate of the employer, if the employer or an associate of the employer:

(i) participates in or facilitates the provision or receipt of the benefit; or

(ii) participates in, facilitates or promotes a scheme or plan involving the provision of the benefit;

and the employer or associate knows, or ought reasonably to know, that the employer or associate is doing so;

in respect of the employment of the employee, but does not include:

(f) a payment of salary or wages or a payment that would be salary or wages if salary or wages included exempt income for the purposes of the *Income Tax Assessment Act 1936* ; or

(g) a benefit that is an exempt benefit in relation to the year of tax; or

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[1237] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[1238] See definition of a "fringe benefit" in FrInge Benefits Tax Assessment Act 1986 - Sect 136

[1239] Income Tax Assessment Act 1936 - Sect 23l

[1240] Fringe Benefits Tax Assessment Act 1986 - Sect 30

[1241] Tax Laws Amendment (2012 Measures No. 4) Act 2012 (No. 142, 2012)

[1242] See definition in Fringe Benefits Tax Assessment Act 1986 - Sect 136

that date against changes in the "majority underlying interest[1243]" held by natural persons of the relevant property to establish the loss of the exempt status. The problem is that the CGT legislation since enactment in June 1986[1244] has been built on the central concept of disposals of "owned" property[1245] where "ownership" is a common law and equity law concept and the concept of "majority underlying interests" is basically unknown to the High Court[1246]. The legislation has attempted through remedial legislation to overcome this weakness, but the first testing time of establishing the existence of "majority underlying interests" in the property owned before 20 September 1985 was on 20 September 1985 and if that could not be so established, because the concept is not known to the law. Then the authors assert that the technical legislation (with its concepts of "majority underlying interests) needs to fall/fail in order to ensure s 160L central core concepts of ownership and disposal operate coherently. In essence, the concept of majority underlying interests clashes with ownership principles that the English and Australian Courts have been attempting to adjudicate on since 1066.

QUO VADIS - WHO IS LIKELY TO COMMERCIALLY TAKE UP THE ISSUE OF OWNERSHIP

Which non-owner is likely to challenge?

What really needs to happen is for somebody with some academic background to "go through" all the fiscal cases decided by the Full High Court and distil out of them the accumulated learning, especially for the three taxes – Income, GST and FBT. Is the Full High Court trying to infer any parameters or limitations on the right of Parliament to tax? The strength of our paper is we attempt to analyse backwards from

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[1243] A change in "majority underlying interests" was assumed in Commissioner of Taxation (Cth) v Sun Alliance Investments Pty Ltd (in liquidation) [2005] HCA 70; (2005) 225 CLR 488; (2005) 222 ALR 286; (2005) 80 ALJR 202 (17 November 2005). At para 14 the judgement states "*As at the merger date, Phoenix Securities Pty Limited ("Phoenix") and Sun Alliance Insurance Ltd ("SAIL") were wholly owned subsidiaries of RSA. The shareholding of RSA in these companies pre-dated 20 September 1985. However, the 40 per cent change in ownership of RSA that was contemplated in the Merger Agreement, coupled with various other developments that had occurred between 1985 and the merger date, resulted in a change in the majority underlying interests in RSA. As a result of this, the shares held by RSA in both Phoenix and SAIL were, by operation of s 160ZZS of the 1936 Act[10], deemed to have been acquired by RSA after 19 September 1985 (specifically, on 8 October 1992) for a consideration equal to their market value on that date. The market value of the shares in Phoenix on 8 October 1992 was $28,477,898, and that of the shares in SAIL $98,728,974.*"

[1244] http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[1245] S 160L of Part IIIA as enacted by Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 of 1986 - SECT 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[1246] Gaudron J talks about "underlying interests" at paragraph 6 of her judgement in Baumgartner v Baumgartner [1987] HCA 59; (1987) 164 CLR 137 (10 December 1987)
In Warman International Ltd v Dwyer [1995] HCA 18; (1995) 182 CLR 544; (1995) 128 ALR 201; (1995) 69 ALJR 362 (23 March 1995) the Full Court ignores the holding company's interests in a subsidiary at para 2 "*The case has been argued on that basis in this Court and, in the absence of any suggestion to the contrary, it is convenient to ignore the underlying interest of Peko-Wallsend except for the purposes of framing final orders.*"

all the Full High Court decisions since Federation to discover what the adjudicators are attempting to say in relation to assessing non-owners (and which non-owner). We as authors cannot find any equivocal decision by the Court in relation to a tax on property[1247] to uphold the assessment on the non-owner (and which non-owner), where the tax clearly assesses owners and/or beneficial owners For example, in Unit Trend[1248] where the High Court recognises that Unit Trend was never an owner or a supplier or recipient of the consideration, the High Court merely sates it does not accept the appellants three arguments[1249]. An argument based on the fact that Unit Trend owned no property or consideration was not before the Court for its adjudication. Ownership issues may not have been commercially relevant to Unit Trend and whether it made any taxable supplies[1250] or not.

The authors suggest that commercially most taxpayers would not be willing to challenge a tax liability, based merely on ownership issues. However, other professional advisers may consider:

- examining whether the 1997[1251] Act originally enacted did not apply to non-owners (and which non-owner). The closer you get to a deemed you[1252], a non-owner, a source that does not relate to that person that owns the property and derivation by another, the closer you get to two subjects of taxation;
- examining which amending Acts attempt to expand ITAA 1997[1253] role beyond the principles of the first enactment;
- where one tax is based on ownership another tax based on deeming that the framers of the Federal Constitution[1254] may have put a limitation on a tax that was based on legal reality, whist another subject of taxation being based on deeming away any preconditions based on ownership;
- where the trustee is trying to imposes the taxation liability on a beneficiary utilising Division 6 of Part III of ITAA 1936, whether the discretionary beneficiary has any identifiable beneficial interest in the property;

[1247] ITAA: South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)
GST: Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)
FBT: Queensland v Commonwealth [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)

[1248] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[1249] Paras 63 to 67 of Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[1250] A New Tax System (Goods and Services Tax) Act 1999 Sect 9.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.5.html

[1251] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1252] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[1253] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1254] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

- where the discretionary beneficiary(ies) are assessed for multi-million dollars of tax and penalties that they never beneficially derived[1255];
- where the Commissioner attempts to impose tax on a "fictitious tax entity[1256]" that is different from the common law or equity law owners of the property[1257]. There are good reasons to separate a trustee and assess its property subject to equitable obligations separately from its own personal property.
- where the individual has been assessed under the PSI legislation – i.e. in all cases where the PSI individual has the evidence that the PSI entity exists, entered into the relevant contracts and has previously declared all relevant changes in ownership between the PSI entity and the PSI individual as ordinary assessable income (and where capital gains are usually the liability of the PSI entity where that PSI entity owned the property, as ownership[1258] is a precondition of CGT legislation). One also needs to consider whether the income of the PSI entity has the same meaning as "income" attributed to the PSI individual (as only the PSI entity's income will be owned by the PSI entity);
- whether a messy amended assessment on the Head Entity where actually the liability falls on the subsidiary. With amended assessments on multinationals where the ATO[1259] have misunderstood the preconditions to the statutory liability and associated penalties, there may well be the financial incentive for the Head Entity especially when they hold a copy of the letter from the ATO that subsidiary does not need to lodge a tax return. Such a letter may bar the Commissioner from imposing penalties. The recent Senate Committee on Corporate tax avoidance[1260] would provide possible example of incorporated personalities, who could be assessed on the property that was owned by another;
- if the "Flow through of tax treatment of S-Corporations"[1261] was introduced into Australia, then attributing to shareholders income still owned by the company could lead to income being attributed to the individual whilst the incorporated separate legal personality is treated as a separate legal personality

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[1255] http://www.afr.com/business/legal/six-female-obeid-family-members-dispute-8m-tax-bill-20150513-gh0ikj

[1256] Income Tax Assessment Act 1997 - Sect 295.5 and 295-10 together with Income Tax Assessment Act 1997 - Sect 960.100(1)(g)

[1257] See for example Commissioner of Taxation v Commercial Nominees of Australia Limited [2001] HCA 33; (2001) 179 ALR 655; (2001) 75 ALJR 1172 (31 May 2001)

[1258] Say s 108-5, s 104-10 of Income Tax Assessment Act 1997

[1259] https://www.ato.gov.au

[1260] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Corporate_Tax_Avoidance

[1261] Box 6.1: Flow-through tax treatment for S-Corporations in the US
"Re:Think Tax discussion paper Better tax system, better Australia" AGPS March 2015 pp 109 -110
http://bettertax.gov.au/files/2015/03/TWP_combined-online.pdf

who owns property separately from the shareholder. This is very similar to PSI and Cornell[1262];

- all cases where commercially it is less fiscally expensive to the non-owner (and his associates) to dispute the assessment to the non-owner than to pay the disputed tax. Slater QC hints that this would often be a rare situation[1263].

We wish to highlight the explicit dangers of not identifying the preconditions to taxation liabilities and who is the taxpayer under the imposing and GAAR[1264] provisions of the various Acts[1265]. The different taxpayers liable under FBT, GST and Income Tax and CGT provisions of the ITAA 1997[1266] may be enough to alert computer programmers of taxation programmes that they face professional negligence issues (and their professional insurers), if they do not correctly identify with the guidance of the Full High Court decisions when tax is not liable to be paid. Computer programmes all too often operate mechanically.

We recommend that the Commissioner embark on a Test Litigation programme testing whether the Full High Court will uphold assessments on the non-owner (and which non-owner) of the property being assessed. Bet you that he will not[1267]. It is generally not in the Commissioner's interest to test fundamental concepts of the Core[1268] or Central[1269] Provisions and the parameters of Specialist Provisions.If our recommendation was executed the Commissioner would be attempting to actively ascertain the legal parameters under which he administers the various Acts.

DIFFERENCES FROM SLATER'S[1270] PAPER

[1262] See Cornell - Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1263] Slater QC example is found at p 43 of his paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 43 top paragraph

[1264] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html
GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html
FBT Fringe Benefits Tax Assessment Act 1986 - Sect 67 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s67.html

[1265]Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1266] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1267] See Test Case Funding 06/19784. There is no uncertainty in the ATO's opinion in assessing a person under deeming provisions when they will never be the owner of the property.

[1268] Income Tax Assessment Act 1997 - Sect 2.5

[1269] Chapter 2--The basic rules PART 2-1--The Central Provisions of A New Tax System (Goods And Services Tax) Act 1999

[1270] Slater QC example is found at p 43 of his paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015

In the authors' opinion, it would help to set out the core differences between the papers.

Our paper:

- goes beyond where taxpayers wish to fund research to actually humbly attempt to identify what are the theoretical bases for the three taxes, irrespective whether such actually imposes more tax on many taxpayers. It focuses on "ownership" of property as a basis precondition for assessing anyone and then notes where the deeming has been upheld as successful by the Full High Court[1271];
- Analyses backwards from income, supply[1272] and benefit to identify what are the core requirements or preconditions of each Act and we assert that ownership is a core requirement in each and then what words are preconditions that need to be satisfied to impose the liability so that all property is not assessed;
- Try to identify the preconditions to liability and provide matrixes to show that tax analysis is complex and interactive and that statutory words struggle to apply to non-owners (and which non-owner). when the tax enactment clearly applies to owners and beneficial owners of property;
- Tries to first identify and then focus on the Full High Court decisions especially where the Full High Court "signs off" on a concept;
- Attempts to demonstrate when the Full High Court will adjudicate and to interpret on an integrated approach bringing together:
    - How one interprets conflicting legislation;
    - How Acts interact. One example would be the interaction with the ITAA1997[1273] arising from the existing provisions of the Income Tax Assessment Act 1936 and its ownership based "taxpayer[1274]" based provisions including Part IVA taxpayer[1275] provisions that do not fit well with ITAA 1997[1276] broader "you[1277]" based provisions;
    - How double taxation is avoided.

[1271] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1272] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[1273] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1274] "*Taxpayer" in s 6(1)* of Income Tax Assessment Act 1936 "means a person deriving income or deriving profits or gains of a capital nature". The definition of taxpayer was amended by the introduction of the CGT legislation by Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 of 1986 - Sect 3

[1275] Income Tax Assessment Act 1936 - Sect 177A(1)

[1276] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1277] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

The strengths of Slater's[1278] approach include

- Broader knowledge and recognition of the law on statutory construction[1279];
- Identification of more issues.

RAISING DOUBTS

The proposition "one income, one taxpayer, one tax" per Evatt J in Richardson[1280] v FC of T (1932) 48 CLR 192 at 212 is flouted frequently by specialist legislation, including for example the Group Provisions in Unit Trend[1281]. Then Dixon J approving comments of Starke J at 197 that "*the Income Tax Acts do not authorise the Commissioner to take income tax twice over in respect of the same source for the same period of time*".

We have previously noted that this underlying philosophy does not stop the Commissioner from issuing more than one assessment in respect of the same item of income. In DFC of T v Richard Walter Pty Ltd (1995) 183 CLR 168, Brennan J said (at 201):

> *"The Commissioner is not required to determine on the balance of probabilities that one person rather than another is the person subject to the tax liability in respect of the particular income. Where the facts known to the Commissioner are such that he is unable to determine which of two or more persons is liable to tax on the same item of income in the same year, he may adopt the view in the case of any or all of those persons that there is a substantial possibility that the item of income is assessable income of that person. If that view is adopted in respect of two or more of those persons, he may validly assess each of them to tax. The making of an assessment on that view of the facts, provided it is not for the purpose of double recovery of the tax imposed by the relevant Taxing Act, is in my opinion a bona fide attempt to exercise the power to assess … The fact that a tax liability remains outstanding against two taxpayers pending the ascertainment of the taxpayer truly liable is no bar to the exercise of the power to assess both to tax in respect of the same income." (our emphasis)*

The technical issue is that one needs to identify all the preconditions to the liability and see if Parliament has drafted its legislation, so that all preconditions are satisfied. The problem with deemed legislation is often the other preconditions are not satisfied.

[1278] A H Slater QC paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015

[1279] Slater QC example is found at p 43 of his paper "*The Income Tax Assessment Acts: Statutes in Senescence?*" Justice Graham Hill Memorial Lecture: Session 1 30th National Convention of The Taxation Institute, National Division, 18-20 March 2015 p 12

[1280] Richardson v Federal Commissioner of Taxation [1932] HCA 67; (1932) 48 CLR 192 (8 August 1932)

[1281] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

The power of the Australian parliament to set the tax rules is at large (subject only to the Constitution[1282]) and includes the power to retrospectively tax. The power to deem — "to treat" — has been positively affirmed by:

- Cornell[1283];
- Bamford[1284].

Sole s 6-10 decision on its preconditions the authors have identified[1285]

In Fowler v FCT of his Lindgren J of the Federal Court reasoning upholding the interplay of the personal services income (PSI) provisions of the ITAA97 with the general liability provisions of the ITAA97, Lindgren J accepted the contention of the Commissioner that:

> "… *subject to any constitutional constraints, it is open to the legislature to tax as a person's assessable income any amounts it may choose to identify, and that it has unambiguously specified the amounts in question in the present*

[1282] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[1283] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1284] Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation [2010] HCA 10 (30 March 2010)

[1285] Commissioner of Taxation v Greenhatch [2012] FCAFC 84 (7 June 2012)
SCCASP Holdings Pty Ltd as trustee for the H&R Super Fund v Commissioner of Taxation [2013] FCAFC 45 (10 May 2013)
Commissioner of Taxation v Clark [2011] FCAFC 5 (21 January 2011)
Allen (Trustee), in the matter of Allen's Asphalt Staff Superannuation Fund v Commissioner of Taxation (Includes Corrigendum dated 21 September 2011) [2011] FCAFC 118 (7 September 2011)
Lean v Commissioner of Taxation [2010] FCAFC 1 (28 January 2010)
Commissioner of Taxation v Macoun [2014] FCAFC 162 (4 December 2014)
Sent v Commissioner of Taxation [2012] FCA 382 (16 April 2012)
SCCASP Holdings as trustee for the H&R Super Fund v Commissioner of Taxation [2012] FCA 1052 (26 September 2012)
Commissioner of Taxation v White [2010] FCA 730 (14 July 2010)

case as included in the statutory income[1286] of Mr Fowler."

The Commissioner relies on R v Barger [1908] HCA 43; (1908) 6 CLR 41 at 114, adopted in Fairfax v Federal Commissioner of Taxation [1965] HCA 64; (1965) 114 CLR 1 at 12-13, for the proposition that subject only to the limitations expressed in the Constitution, the Parliament's power to levy taxation: was plenary and absolute; unlimited as to amount, as to subjects, as to objects, as to conditions, as to machinery ... with the result that: The Parliament has, prima facie, power to tax whom it chooses, power to exempt whom it chooses, [and] power to impose such conditions as to liability or as to exemption as it chooses.

The Commissioner submits that on the assumption that there was a general principle contended for by Mr Fowler, it has been overtaken by the introduction of the Act, which evinces a clear intention to include in a person's assessable income, in the circumstances identified in the Act, amounts of

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[1286] "Income" does not have one same base meaning as decided by the Full High Court as for example in:

- Bohemians Club v Acting Federal Commissioner of Taxation [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1918/16.html
- Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1917/13.html
- James Fenwick & Co Ltd v Federal Commissioner of Taxation [1921] HCA 12; (1921) 29 CLR 164 (18 April 1921) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1921/12.html
- Webb v Federal Commissioner of Taxation [1922] HCA 27; (1922) 30 CLR 450 (19 June 1922) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1922/27.html
- Blockey v Federal Commissioner of Taxation [1923] HCA 2; (1923) 31 CLR 503 (12 March 1923) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1923/2.html
- Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1965/58.html
- Federal Commissioner of Taxation v Whitfords Beach Pty Ltd [1982] HCA 8; (1982) 150 CLR 355 (17 March 1982) http://www.austlii.edu.au/au/cases/cth/HCA/1982/8.html
- South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1992/7.html
- Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2007/5.html
- Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965) http://www.austlii.edu.au/au/cases/cth/HCA/1965/58.html
- Federal Commissioner of Taxation v Myer Emporium Ltd [1987] HCA 18; (1987) 163 CLR 199 (14 May 1987) http://www.austlii.edu.au/au/cases/cth/HCA/1987/18.html
- GP International Pipecoaters Pty Ltd v Federal Commissioner of Taxation [1990] HCA 25; (1990) 170 CLR 124 (20 June 1990) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1990/25.html

Also see "Profit" in Industrial Equity Ltd v Blackburn [1977] HCA 59; (1977) 137 CLR 567 (15 November 1977) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1977/59.html

The use of the word income is more like the use of the word "income" in Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1920/65.html

income[1287] *that the individual did not beneficially derive." (emphasis added)*

Lindgren J concluded that deeming is a legitimate feature of the ITAA97:

"Section 86-15 does not require that Mr Fowler receive or derive the personal

[1287] "Income" does not have one same base meaning as decided by the Full High Court as for example in:

- Bohemians Club v Acting Federal Commissioner of Taxation [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1918/16.html
- Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1917/13.html
- James Fenwick & Co Ltd v Federal Commissioner of Taxation [1921] HCA 12; (1921) 29 CLR 164 (18 April 1921) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1921/12.html
- Webb v Federal Commissioner of Taxation [1922] HCA 27; (1922) 30 CLR 450 (19 June 1922) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1922/27.html
- Blockey v Federal Commissioner of Taxation [1923] HCA 2; (1923) 31 CLR 503 (12 March 1923) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1923/2.html
- Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1965/58.html
- Federal Commissioner of Taxation v Whitfords Beach Pty Ltd [1982] HCA 8; (1982) 150 CLR 355 (17 March 1982) http://www.austlii.edu.au/au/cases/cth/HCA/1982/8.html
- South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1992/7.html
- Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2007/5.html
- Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965) http://www.austlii.edu.au/au/cases/cth/HCA/1965/58.html
- Federal Commissioner of Taxation v Myer Emporium Ltd [1987] HCA 18; (1987) 163 CLR 199 (14 May 1987) http://www.austlii.edu.au/au/cases/cth/HCA/1987/18.html
- GP International Pipecoaters Pty Ltd v Federal Commissioner of Taxation [1990] HCA 25; (1990) 170 CLR 124 (20 June 1990) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1990/25.html

Also see "Profit" in Industrial Equity Ltd v Blackburn [1977] HCA 59; (1977) 137 CLR 567 (15 November 1977) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1977/59.html

The use of the word income is more like the use of the word "income" in Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1920/65.html

services income[1288] *in question in order for that income to be included in his statutory income. Indeed, the section assumes that it will be received or derived by the alienee. Section 86-15 operates to include the amounts to which it refers in the statutory income of an individual without the necessity of his or her receiving them, and s 6-10(3)*[1289] *has no scope for operation."*

The reference to s 6-10(3) with its authority *"If an amount would be * statutory income apart from the fact that you have not received it, it becomes statutory income as soon as it is applied or dealt with in any way on your behalf or as you direct."* highlights the problem of assessing amounts that you do not own or control by direction.

Barger and Fairfax tests

[1288] "Income" does not have one same base meaning as decided by the Full High Court as for example in:

- Bohemians Club v Acting Federal Commissioner of Taxation [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1918/16.html
- Harding v Federal Commissioner of Taxation [1917] HCA 13; (1917) 23 CLR 119 (26 April 1917) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1917/13.html
- James Fenwick & Co Ltd v Federal Commissioner of Taxation [1921] HCA 12; (1921) 29 CLR 164 (18 April 1921) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1921/12.html
- Webb v Federal Commissioner of Taxation [1922] HCA 27; (1922) 30 CLR 450 (19 June 1922) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1922/27.html
- Blockey v Federal Commissioner of Taxation [1923] HCA 2; (1923) 31 CLR 503 (12 March 1923) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1923/2.html
- Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1965/58.html
- Federal Commissioner of Taxation v Whitfords Beach Pty Ltd [1982] HCA 8; (1982) 150 CLR 355 (17 March 1982) http://www.austlii.edu.au/au/cases/cth/HCA/1982/8.html
- South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1992/7.html
- Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2007/5.html
- Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965) http://www.austlii.edu.au/au/cases/cth/HCA/1965/58.html
- Federal Commissioner of Taxation v Myer Emporium Ltd [1987] HCA 18; (1987) 163 CLR 199 (14 May 1987) http://www.austlii.edu.au/au/cases/cth/HCA/1987/18.html
- GP International Pipecoaters Pty Ltd v Federal Commissioner of Taxation [1990] HCA 25; (1990) 170 CLR 124 (20 June 1990) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1990/25.html

Also see "Profit" in Industrial Equity Ltd v Blackburn [1977] HCA 59; (1977) 137 CLR 567 (15 November 1977) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1977/59.html

The use of the word income is more like the use of the word "income" in Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920) http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1920/65.html

[1289] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

Power to tax whom it chooses	**PSI legislation**	**Power to exempt whom it chooses**	**Power to impose such conditions as to liability …** as it chooses	**Power to impose such conditions as to … or as to exemption as it chooses**
ITAA1997 – "You" PSI legislation focuses on a "you" who would not satisfy s 6-5or s 6-10.	ITAA 1997 – PSI individual. Is PSI Individual a "you" as defined? The "you" who derived the income still exists and satisfies al the preconditions of s 6-5! But the PSI entity income is NANE exempt.	PSI entities income is NANE	**CORE PROVISIONS (still need to be satisfied when the PSI entity satisfies those preconditions and the original 1997 instructions)** S 6-5 • you (same "you" as in s 6-10?) • resident (same "resident" as in s 6-10?) • income (same "income" as in s 6-10?) • derive directly or indirectly • source (same "source" as in s 6-10?) and also ss 6-5(4) deeming in order to assess:	Are the preconditions in s 84-5 in additional to s 6-5 and s 6-10? Does PSI legislation supplant or merely support the Core Provisions?

			• existing mere property identified by Parliament to be income; • the profit on mere property subsequently utilised in a business; • increments to existing property; • property earned; • etc. Section 6-10 (more likely to be more relevant as • the PSI income is not ordinary income) • amounts • you (same "you" as in s 6-5?) • resident (same "resident" as in s 6-5?) • statutory • income (same base meaning for word "income" as in s 6-5?) • source (same "source" as in s 6-5?) • on some basis other than having an Australian source	

			PSI (a specialist provision that may not override s 6-10 and for the “income”/ attributable amount needs to also satisfy) • Your x 4 • Income x 7 with up to 7 different meanings of the word “income” (sa me “income” as in s 6-5?) • Ordinary • Statutory • other entity • personal services income (same “income” as in s 6-5?) • mainly • reward • personal effort; • skills	
GST - You		GST excludes non Taxable supplies		
FBT - Employer		FBT excludes “salary and wags and exempt benefits.		

Constitution s 55				
			Is Parliament the more successful in imposing tax on a non-owner (and which non-owner) getting closer to s 55 operating? Is this what accumulative full High Court decisions on "income" saying? Authors to further research?	

What Lindgren fails to do or examine when faced with a similar problem to Cornell[1290] is to test and examine:

- what are the clashes between the Core[1291] Provisions of ITAA and their instructions and the subsequently enacted PSI legislation, what are the preconditions to liability, as s 84-5[1292] never provides the clear attribution method for attributing PSI entity income to PSI individual. Section 84-5[1293] is not explicit to whom it applies and really poses the question whose income actually is its. It is quite clear that PSI legislation tries to make one person's income another's. So what is the fundamental base meaning of income, as it appears in bot s 6-5[1294] and s 6-10[1295]? Lindgren excludes beneficial ownership[1296];
- whether decisions like the recent MBI[1297] decision and South Australia v

[1290] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1291] Income Tax Assessment Act 1997 - Sect 2.5

[1292] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s84.5.html

[1293] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s86.30.html

[1294] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[1295] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[1296] para 45 of Fowler v Commissioner of Taxation [2008] FCA 528 (21 April 2008)

[1297] Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49 (3 December 2014)

Clth[1298] stands for the proposition that all preconditions of the legislation need to be satisfied;

- examine whether the "you[1299]" in ITAA 1997[1300] is the same person as the PSI individual, rather than the PSI entity whose income is NANE[1301] exempt. In contrast to s 16(2) of ITAA 1915[1302] and Cornell's[1303] case, PSI legislation does not actually explicitly specify who is deemed to have the other person's income[1304] (except for Examples 1 and 2) and then does not address s 6-10[1305] identifiers (such as "you[1306]", "income", "source" that separate income of the PSI individual from the PSI entity. Under PSI legislation one is left with incomplete deeming and determining whose income it was with two meaning of income where one meaning is based on ownership and another meaning based on ownership of another person;
- examine whether the source test in s 6-10[1307] is satisfied, as the only person Lindgren J can find whose income has a source is the PSI entity, who is not a party to the case. Does the word "source" have the same meaning in s 6-10 as it has in s 6-5[1308]?

Then one runs into the Constitutional[1309] point not explicitly raised in Cornell's[1310] decision, as Cornell only focused on the word "income" and not in contrast the word "ownership" of property. Cornell decision needs to be rerun to determine whether s 55[1311] fails the test of two taxes based on (1) "ownership" and the other on (2) "non-ownership"

[1298] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[1299] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[1300] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1301] Income Tax Assessment Act 1997 - Sect 86.30

[1302] http://www5.austlii.edu.au/au/legis/cth/num_act/itaa1915341915267/

[1303] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1304] Lindgren J disagrees para 46 of Fowler v Commissioner of Taxation [2008] FCA 528 (21 April 2008)

[1305] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[1306] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[1307] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[1308] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[1309] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[1310] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1311] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

The authors wish to further research whether Parliament runs am increasing risk from being attacked under s 55[1312] of the Constitution whenever they successfully shift "income" to the non-owner" (and which non-owner) especially when there is a perfectly identifiable person owning the property. But the authors consider that it may be better for taxpayer to attack amending Act that inserted PSI legislation into ITAA 1997[1313]. But Air Caledonie[1314] unanimous decision needs to be further researched.

By contrast, the appointment of liquidator provides the independent statutory criteria to make a corporate distribution that is capital in nature and not revenue income to be statutorily characterised as revenue income.

OUR RECOMMENDATION

In an environment where the Commissioner of Taxation will not clearly indicate to taxpayers what are the limitation of his administration of the various Acts, we recommend especially that the incorporated accounting and incorporated legal practices identify and incrementally learn:

- what each Full High Court decision has actually decided;
- from the Full High Court cases that recognise the States of Australia can be assessed on their property (legal and beneficial) under the ITAA, FBT and GST legislation etc. (despite the literal wording of the Constitution[1315]) and then try to put down the arguments that the Federal Government can assess what the States of Australia do **not** own under those Acts. We suggest people who are taxpayers (not being a State of Australia) learn from South Australia[1316] and Queensland[1317];
- identify the objectives of the various Acts and do not assume that the tile of the Act accurately conveys the base policy of the Act. Should the ITAA be more accurately entitled the Income and Property Assessment Act 1997?
- In relation to taxpayer's:
    - What is not "income" of the person being assessed;
    - Whether a tax that taxes a person on what he owns and also on what he does not own contravenes the Constitution. Probably not. But how do the preconditions to the legislation operate?
    - Who does not qualify as the "you[1318]" to be assessed;

[1312] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[1313] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1314] Mason C.J., Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ in Air Caledonie International v Commonwealth [1988] HCA 61; (1988) 165 CLR 462 (24 November 1988)

[1315] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s114.html

[1316]South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[1317] Queensland v Commonwealth [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)

[1318] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

    - How the Double taxation agreements interact with non-owners (and which non-owner);
    - How the GAAR[1319] regimes apply to non-owners (and which non-owner)?
- How does provisions preventing double taxation operate (such as s 160ZA[1320] and s 118-20 and para (1) of the definition of a s 136 "Fringe Benefit"
- Identify what obligations tax advisers owe to clients who seek their professional advice and what quality control obligations advisers owe to their insurance companies, especially where the facts that appertain to the taxpayer involved and the "tax facts" are not set out in detail with relevant accompanying documents that should be readily available as the basis of professional advice.

Such would be a Good Start. Others may wish to draft their own checklist as how one address and incrementally learn about the issues.We observe that the understanding of ITAA, GST and FBT and associated Acts are now so complex that it is actually beyond the resources of a single person to understand, but should not be an excuse for incorporated professional organisations and commercial organisations - such as tax publishers to incrementally address the issues that they professionally provide advice on for consideration.

But ultimately taxpayers need to recognise that Parliament has extensive powers to enact taxation that is only limited by the words of enacted legislation and the Constitution[1321]. Taxpayers have little or no say in the drafting of the legislation and merely need to comply. Where conflict exists in the legislation, the taxpayer needs to ask himself is this conflict serious or fatal to the assessment. Judges appear to be willing to uphold the intent of the legislation and its amending Acts, rather than support taxpayer's technical points[1322]. However, a large number of High Court decisions indicate assessing non-owners on property that they do not own, is actually fatal to the creation of the liability. Based on Full High Court decisions ownership appears to be a building block for all property taxes[1323]. But bitter experience says

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[1319] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html
GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html
FBT Fringe Benefits Tax Assessment Act 1986 - Sect 67 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s67.html

[1320]Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[1321] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[1322] Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation [1981] HCA 26; (1981) 147 CLR 297 (5 June 1981)

[1323] ITAA: South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)
GST applying to the non-owner where al the facts in relation to the owner are made clear: Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)
FBT: Queensland v Commonwealth [1987] HCA 2; (1987) 162 CLR 74 (3 February 1987)

about only the Full High Court will listen – if the taxpayer has the determination and venom to take the issue and argue ALL the preconditions to the liability that far[1324].

WHAT NEEDS TO BE DONE MOVE FORWARD

The authors' suggestions are:

1. If Isaac J is correct that the objection and appeal process loads the system in favour of the Government, then Isaac's concerns need to be addressed. His Honour stated "*Therefore the objection that the Income Tax Act 1915 deals with more than one subject matter of taxation fails. But, further, if I were not so clearly satisfied I would still be prepared to hold that the appellant had not satisfied the onus on him of clearly establishing the contrary, so as to invalidate the Act—in other words, he has not clearly demonstrated that Parliament could not reasonably have considered the word "income" as sufficiently comprehensive; and I should have held accordingly that the objection equally failed*." If the only person who needs to understand the Acts and their interactions, then the objector needs to be buttressed by the Commissioner explaining to the objector in detail in writing why he considers the assessment is correct and why the assessment satisfies all of the Core[1325] Provision or Central[1326] Provisions and Specialist Provisions preconditions as well citing High Court authority for his position;
2. In essence the Full High Court are being asked to provide an answer to a question that even they are not confident to answer! Therefore. the Commissioner needs to put before the Courts in all situation where the non-owner (and which non-owner) is being assessed what does she consider the word "income" means and how all the preconditions have been satisfied by the non-owner appealing against the assessment;
3. The Commissioner advise the objector any uncertainties in his position and the
4. The Commissioner issue a Public Ruling as to his understanding what is income and more importantly what is not income or not yet income. This should be executed accumulatively, especially since Cornell's[1327] decision;

TACTICS OF OBJECTORS, IF WE DO NOT MOVE FORWARD

[1324]Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)
Federal Commissioner of Taxation v Peabody [1994] HCA 43; (1994) 181 CLR 359; (1994) 123 ALR 451; (1994) 28 ATR 344; (1994) 94 ATC 4663 (28 September 1994)
Deputy Federal Commissioner of Taxation v Purcell [1921] HCA 59; (1921) 29 CLR 464 (12 August 1921)

[1325] Income Tax Assessment Act 1997 - Sect 2.5

[1326] Chapter 2--The basic rules PART 2-1--The Central Provisions of A New Tax System (Goods And Services Tax) Act 1999

[1327] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

The authors recommend the following for persons who are being assessed on what they do not own, as they sorely need assistance:

Recognition of your problems

It may assist to read TR 2011/5[1328] as that sets out the limitations according to the Commissioner as to your rights of objection to income tax assessments. GST and FBT are likely to have similar drafted rulings. The objector is "screwed" and has to understand all and many more issues about taxation Acts in the time constraints of objecting and appealing. It is system that designed to "break the taxpayer and impose liabilities".

On appeal TR20111/15states:

48. The taxpayer is limited to the grounds stated in the objection to which the decision relates, unless the AAT or the Federal Court orders otherwise.[32]
49. The taxpayer has the burden of proving to the AAT or the Federal Court that an assessment is excessive. For assessments made on or after 1 July 2013 in relation to the 2013-14 or later income years, the taxpayer has the burden of proving that the assessment is excessive or where the taxpayer contends that the assessment should be higher, that the assessment is incorrect. In all cases, the taxpayer must also prove what the correct amount of the assessment is.[33]
50. A decision of the AAT or the Federal Court becomes final when the appeal period has expired and no appeal has been lodged against the decision.[34]
51. There is no time limit on the Commissioner's discretion to amend an assessment to give effect to a decision on a review by the AAT or appeal to the Federal Court pursuant to paragraph (a) of item 6 in the table in subsection 170(1) of the ITAA 1936.

The following do not need to understand fiscal laws:

- The Commissioner – she merely administers;
- The AAT member – they merely stand in the Commissioner's feet and review;
- The Courts – they merely adjudicate on what is before them;
- The objectors professional advisers – they merely need to be registered and collect their fees.

But the objector needs all the knowledge of all the tax legislation and judicial decisions and financial resources to fight the imposition on property that they do not own. The ATO need only "sit back" and identify "counter arguments".

As authors we suggest that attention be paid to:

(1) Facts

- Insist that the facts only relate to what their facts – i.e. so only the certificate

[1328] http://law.ato.gov.au/atolaw/view.htm?Docid=TXR/TR20115/NAT/ATO/00001&PiT=99991231235958

of incorporation of the Head Entity is before the Court;

- Identify what property that the non-owner (and which non-owner) owns – its certificate of shareholding or copy of trust deed showing that the discretionary beneficiary had no interest in the property held by the trustee;
- Insist that the facts of anyone else be excluded, as they are not objectors or parties in the appeal and their facts are irrelevant to the application of facts to the appellant;

(2) Preconditions

- Given the wide interpretation given to the words "income", "supply[1329]" and "benefit[1330]" and in situations that the Full High Court do not understand the limitation or boundaries of such words as enacted by Parliament such as by the Full High Court in "Cornell[1331]", you need to identify and then argue that all the preconditions to liability need to be satisfied say for attributed "income" and "source" all the way to Full High Court[1332] as even an academic[1333] single judge[1334] will find any source[1335] whatsoever and attempt to uphold the will of Parliament by finding for example a "source[1336]" with a legal personality that is not taxpayer/appellant whose income is actually NANE[1337] exempt and whose income is not before the Court. It is similar to be confronted with a Legislative "Check mate", even though what you are arguing is reasonable. But the issue remains what are the identifiers that prevent one person being assessed on another's income, supply[1338] and benefit[1339], where there also

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[1329] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[1330] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[1331] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1332] Esquire Nominees Ltd v Federal Commissioner of Taxation [1973] HCA 67; (1973) 129 CLR 177 (24 September 1973)

[1333] http://purl.library.usyd.edu.au/parsons/9780980334692
http://purl.library.usyd.edu.au/parsons/9780980334647
http://www.academyoflaw.org.au/publication?id=2
http://trove.nla.gov.au/work/80920471?selectedversion=NBD46873753

[1334] Fowler v Commissioner of Taxation [2008] FCA 528 (21 April 2008)

[1335] Esquire Nominees Ltd v Federal Commissioner of Taxation [1973] HCA 67; (1973) 129 CLR 177 (24 September 1973)

[1336] Para 32 of Fowler v Commissioner of Taxation [2008] FCA 528 (21 April 2008)

[1337] Income Tax Assessment Act 1997 - Sect 86.30

[1338] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[1339] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

attribution and GAAR[1340] legislation parameters encountered or "tripped over" especially in past Full High Court decisions? Cornell[1341] was being very reasonable as asking the Full High not to confirm assessments on what he did not own, and may never own whilst there was a perfectly identifiable owner of the property being assessed accumulated profits[1342];

- Analyse the preconditions to the ITAA tax liabilities under s 6-10[1343] and examine whether they have the same base meaning as in s 6-5. Section 6-10[1344] must be the most un-litigated[1345] provision in ITAA1997[1346], but critical for assessing statutory amounts not owned;
- Examine any interaction with the ITAA1997[1347] arising from the existing provisions of the Income Tax Assessment Act 1936 and its ownership based "taxpayer[1348]" based provisions including Part IVA taxpayer[1349] provisions that do not fit well with ITAA 1997[1350] broader "you[1351]" based provisions;
- Focus on the legislation that imposes the liability, for example:
    - PSI does not identify which individual, that is left to an example in s

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[1340] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html
GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html
FBT Fringe Benefits Tax Assessment Act 1986 - Sect 67 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s67.html

[1341] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1342] First paragraph of unanimous joint judgement Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1343] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html
Section 6-10 must be the most un-litigated provision in ITAA1997, but critical for assessing statutory amounts not owned. See Fowler v Commissioner of Taxation [2008] FCA 528 (21 April 2008)

[1344] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html
Section 6-10 must be the most un-litigated provision in ITAA1997, but critical for assessing statutory amounts not owned. See Fowler v Commissioner of Taxation [2008] FCA 528 (21 April 2008)

[1345] Fowler v Commissioner of Taxation [2008] FCA 528 (21 April 2008)

[1346] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1347] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1348] "*Taxpayer" in s 6(1)* of Income Tax Assessment Act 1936 "means a person deriving income or deriving profits or gains of a capital nature". The definition of taxpayer was amended by the introduction of the CGT legislation by Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 of 1986 - Sect 3

[1349] Income Tax Assessment Act 1936 - Sect 177A(1)

[1350] http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/

[1351] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

84-5[1352] and that PSI entities income actually derived is NANE[1353] (but they are not a party to the proceedings);

- Tax Consolidation only says for ITAA tax purposes, if the Head Entity elects the wholly owned subsidiaries are treated as part of the Group but not for GST or FBT purposes. That says nothing about who the ITAA focuses on to impose liabilities and limits the application of s 6-5[1354] and s 6-10[1355] preconditions to income of the Head Entity and more importantly to the relevant "You[1356]";
- Focus on the Core[1357] Provision or Central[1358] Provisions preconditions;
- Focus on who GAAR[1359] applies to;
- Identify what legislation probably does not apply, such as Double Tax Treaties[1360] applying to owners of profits etc.
- Focus on the provisions that assesses or exempt the other person like the NANE[1361] income of the PSI entity;
- How do generally do the specialist provisions interact with Core[1362] and Central[1363] provisions to impose liabilities. Have any preconditions not been satisfied?
- Examine how the Full High Court says one must interpret conflicting instructions[1364]

[1352] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s84.5.html

[1353] Income Tax Assessment Act 1997 - Sect 86.30

[1354] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.5.html

[1355] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s6.10.html

[1356] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s4.5.html
http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s960.100.html

[1357] Income Tax Assessment Act 1997 - Sect 2.5

[1358] Chapter 2--The basic rules PART 2-1--The Central Provisions of A New Tax System (Goods And Services Tax) Act 1999

[1359] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html
GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html
FBT Fringe Benefits Tax Assessment Act 1986 - Sect 67 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s67.html

[1360] http://www.treasury.gov.au/Policy-Topics/Taxation/Tax-Treaties/HTML/Income-Tax-Treaties

[1361] Income Tax Assessment Act 1997 - Sect 86.30

[1362] Income Tax Assessment Act 1997 - Sect 2.5

[1363] Chapter 2--The basic rules PART 2-1--The Central Provisions of A New Tax System (Goods And Services Tax) Act 1999

[1364] Project Blue Sky v ABA [1998] HCA 28; 194 CLR 355; 153 ALR 490; 72 ALJR 841 (28 April 1998)

(3) Ownership v Beneficial ownership

- Determine whether the Act applies to either or both legal ownership and beneficial owners where the deeming or GAAR[1365] is also applying. Determine whether it applies to legal or beneficial owner (especially where there is no equitable interest in the deemed amount for equity law to apply);
- Review Full High Court cases on "source[1366]" of income, to see how decisions since 1915 have been adjudicated;

(4) Timing

Review the clash in any timing rules, such as the clash between derivation, CGT timing rules and year-end rules. This frequently raises the issues in all non-ownership assessments, such as PSI and tax consolidation.

(5) Loneliness

- Realise that you are on your own, so that even Test Case Funding[1367] is unlikely as to be available, as you are challenging Parliament powers to deeming and the Supremacy of Parliament and that the ATO[1368] are incompetent;
- Quietly advertise or approach academic QC who may wish to assist for nominal costs. There is great satisfaction arguing fundamental principles before the Full High Court;
- Research High Court cases on non-ownership (not limited to taxation) for its own information sake;
- Research other tax provisions to see if there is incomplete deeming, such as for deemed dividends and the try to research other High Court decision on such deeming;
- Review funding issues for "break through cases", such as Mabo;
- Steel your self that no judge below the High Court is actually going to sympathise with you, as their focus will be on implementing the will of Parliament as compared your challenge against fundamentals;
- Publish your experience, so that others can gain from your experience (like this paper);

[1365] ITAA Income Tax Assessment Act 1936 - Sect 177A and following http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s177a.html
GST A New Tax System (Goods And Services Tax) Act 1999 - Sect 165.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s165.1.html
FBT Fringe Benefits Tax Assessment Act 1986 - Sect 67 http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s67.html

[1366] For example James Fenwick & Co Ltd v Federal Commissioner of Taxation [1921] HCA 12; (1921) 29 CLR 164 (18 April 1921)

[1367] https://www.ato.gov.au/General/Tax-and-super-law/Test-case-litigation-program/

[1368] https://www.ato.gov.au

- Research Rex v Barger[1369] and the limitations imposed on that decision by Engineers case to see if there any lessons on the power to tax constitutionally, if you are **not** a State of Australia;
- Research Fairfax[1370] and Barger[1371] and all cases that cite them for their strengths and weaknesses
- Identify person who have also previously challenged, such as;
    - Waterhouse[1372]
    - Cornell[1373];
    - Mildura[1374]
    - Fowler[1375];
    - Shail[1376];
- Attempt to talk to their advisers;
- You have to be prepared that ATO[1377] will drop Barger[1378] and Fairfax[1379] on you at the last minute before Court proceedings. You need to have your written and oral submissions ready;

[1369] R v Barger [1908] HCA 43; (1908) 6 CLR 41 (26 June 1908)

[1370] Fairfax v Federal Commissioner of Taxation [1965] HCA 64; (1965) 114 CLR 1 (2 December 1965)

[1371] R v Barger [1908] HCA 43; (1908) 6 CLR 41 (26 June 1908)

[1372] Waterhouse v Deputy Federal Commissioner of Land Tax, South Australia [1914] HCA 16; (1914) 17 CLR 665 (24 March 1914)

[1373] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1374] Mildura & District Dried Fruit Growers' Hail Storm Damage Compensation Scheme v Federal Commissioner of Taxation [1968] HCA 70; (1968) 118 CLR 342 (31 October 1968)

[1375]Fowler v Commissioner of Taxation [2008] FCA 528 (21 April 2008)

[1376]Shail v Commissioner of Taxation (Corrigendum dated 17 May 2007) [2007] FCA 655 (4 May 2007)
Shail Superannuation Fund and Commissioner of Taxation [2011] AATA 940 (23 December 2011)

[1377] https://www.ato.gov.au

[1378] R v Barger [1908] HCA 43; (1908) 6 CLR 41 (26 June 1908)

[1379] Fairfax v Federal Commissioner of Taxation [1965] HCA 64; (1965) 114 CLR 1 (2 December 1965)

- Track down good articles on statutory interpretation such as by Spigeleman[1380]. Geddes[1381], Australian Conferences[1382] on the topic.

AUTHORS' CONCLUSIONS

The authors conclude that the words "income", "supply[1383]" and "benefit[1384]" included all things imaginable and maginable by Parliament, by Treasury, Re:Think, the Commissioner[1385], the Attorney General, Board of Taxation[1386] and Inspector-General[1387] of Taxation.

The objector is the only person who needs to convince the Full Bench of the High Court that there are actually there are limitations on the three concepts in a situation where the High Court may not initially know where the limitation exists and need convincing. In essence, the Full High Court are being asked to provide an answer to a question that they are not confident to answer! What we can concluded that the CGT

[1380] 'It's The Statute, Stupid': The Centrality Of Statutory Interpretation In Judicial Review http://www.lec.justice.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011711808/pepperj_statutory_interpretation_and_judicial_review.pdf

[1381] Associate Professor RS Geddes "Purpose and Context in Statutory Interpretation" http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph4/07_geddes.pdf

[1382] **Statutory Interpretation Statutes**
The Honourable WMC Gummow AC Justice of the High Court of Australia
The Principles of Legality and Clear Statement *The Honourable JJ Spigelman AC Chief Justice of New South Wales*
The Intent of Legislators *The Honourable Justice Keith Mason AC President, New South Wales Court of Appeal*
The High Court of Australia and Modes of Constitutional Interpretation
The Honourable Justice Susan Kenny Judge of the Federal Court of Australia
Legislative Drafting and Statutory Interpretation *Ms Hilary Penfold QC*
First Parliamentary Counsel
Commonwealth Office of Parliamentary Counsel, 1993–2004
Statutory Interpretation in Canada *Professor Ruth Sullivan Faculty of Law, University of Ottawa*
Purpose and Context in Statutory Interpretation *Associate Professor RS Geddes School of Law, University of New England*
Structuring Purposive Statutory Interpretation *Professor Philip P Frickey*
School of Law, University of California at Berkeley
Saving the Literal *Professor James C Raymond Consultant in Legal Writing and Reasoning*

http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph4/statutory_interpretation.pdf

[1383] A New Tax System (Goods And Services Tax) Act 1999 - Sect 9.10 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s9.10.html

[1384] Fringe Benefits Tax Assessment Act 1986 - Sect 136 definition of a "Benefit" http://www5.austlii.edu.au/au/legis/cth/consol_act/fbtaa1986312/s136.html

[1385] https://www.ato.gov.au/About-ATO/About-us/Who-we-are/Organisational-chart/

[1386] http://www.taxboard.gov.au

[1387] www.igt.gov.au/

legislation is limited by the s 160A[1388] and s 108-5[1389] definitions of an asset and the fact the asset needs to owned at acquisition/creation, during period of ownership and just before disposal or extinction. But that does not stop Parliament providing tax concessions to non-owners (and which non-owner) and Commissioner assessing non-owners (and which non-owner) of the s 160A[1390] and s 108-5[1391] assets.

Life and maladministration and publishing Treasury papers on the complexity of the Tax Acts simply goes on and on.

CHANNEL SOLILOQUY

An examination of the Channel decision by five justices of the Federal Court would likely to be illuminating as the issues, but not at the solution. But the lodgement deadline of 1 June 2015 does not permit much more than noting the decision. Prima facie on the below case digest it appears to say that the GAAR single taxpayer approach prevails over the Tax Consolidation "Group Approach". This was the issue not raised in "Unit Trend[1392]".

Allsop CJ in the Federal Court Channel[1393] decision on the 7 May 2015 quoted from Project Blue Sky at para 4 of his decision by stating of central importance to the resolution of the controversy is the approach required by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at 381-382 [69]- [71]:

- *Conflicting statutory provisions should be reconciled so far as is possible*
- *The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute[45]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"[46]. In Commissioner for Railways (NSW) v Agalianos[47], Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always*

[1388] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[1389] Income Tax Assessment Act 1997 - Sect 108.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s108.5.html

[1390] Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 Of 1986 - Sect 19 http://www5.austlii.edu.au/au/legis/cth/num_act/itaaga1986420/s19.html

[1391] Income Tax Assessment Act 1997 - Sect 108.5 http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s108.5.html

[1392] Commissioner of Taxation v Unit Trend Services Pty Ltd [2013] HCA 16 (1 May 2013)

[1393] Channel Pastoral Holdings Pty Ltd v Commissioner of Taxation [2015] FCAFC 57 (7 May 2015)

begin by examining the context of the provision that is being construed[48].

- *A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals[49]. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions[50]. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other"[51]. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.*

- *Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision[52]. In The Commonwealth v Baume[53] Griffith CJ cited R v Berchet[54] to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".*

Taxation Institute of Australia summary - 07 May 15 Consolidation and the general anti-avoidance rule – Channel Pastoral Holdings

Authors' initial impressions of Taxation Institute digest

The first impressions on reading the below summary report is that Part IVA being a s 177A "taxpayer" based GAAR is authorising the reconstruction of a tax consolidated group back to the separate corporation approach to taxation, but because s 6-5, s 6-10 and s 177A definition of taxpayer all authorise that approach, based on separate legal personalties based on who actually owned the property.

A five-judge Full Court of the Federal Court has confirmed the paramountcy of the operation of Pt IVA (the general anti-avoidance rule) of the *Income Tax Assessment Act 1936* over the consolidation regime in Pt 3-90 of the *Income Tax Assessment Act 1997*. Section 701-1[1394] of the ITAA 1997 and the rules therein cannot limit the operation of Pt IVA: s 177B(1). Further, s 701-1 does not remove or destroy the existence of an entity in the group, but makes it a part of the head company. The court held that, to the extent that the decision of the majority of the Full Court in *FCT v Macquarie Bank Ltd* [2013] FCAFC 13 may be taken to decide to the contrary of the availability of a determination under s 177F(1) concerning an entity that is part of a group contemplated by Pt 3-90 in circumstances such as the present case, that

[1394] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s701.1.html

decision was wrong and should not be followed.
This judgment arose from a special case stated to the Full Court posing three questions reserved for the court. The questions concerned the application of Pt IVA of the ITAA 1936 to companies governed by the consolidation regime in Pt 3-90 of the ITAA 1997, where the statutory consequence arising from a company joining a consolidated group is an essential element in what the Commissioner contends to be a tax benefit for the application of Pt IVA.

Channel Cattle Co (CCC) owned two cattle stations with associated plant and equipment, trading stock (cattle and horses) and the stations' stock brand. All the shares in CCC were owned by the Sherwins, husband and wife. They had acquired their shares prior to 20 September 1985 and these shares were thus pre-CGT assets. Until 31 December 2007, Channel Pastoral Holdings (CPH) was a dormant company. On that date, the Sherwins agreed to transfer their shares in CCC to CPH for consideration totalling $61,232,074. Thereafter CPH became the sole owner of CCC. The "value" of the trading stock held by CCC as at 31 December 2007, for the purposes of Subdiv 70-C of the 1997 Act, was $6,522,502.
CPH elected to form a consolidated group with effect from 1 January 2008, with CPH as head entity and CCC as a subsidiary entity.
In February 2008, CCC entered into a contract to sell the agricultural assets to an unrelated third party purchaser. The sale price of the agricultural assets was $70,000,000. The sale of the agricultural assets by CCC was completed on 29 February 2008.
In the absence of any application of Pt IVA, these transactions would have had the following effects, for CPH as the head entity of the CPH consolidated group:
(a) a capital loss on the sale of the land
(b) derivation of $25,405,000 in assessable income from the sale of the trading stock, and
(c) a deduction of $23,026,930 being allowed for the amount by which the tax cost setting amount of the trading stock exceeded the value of the trading stock as at 30 June 2008, by which time the trading stock had been sold.

The Commissioner contended that if the steps described above had not been entered into and carried out, it might reasonably be expected that:
(a) CCC would not have joined the CPH consolidated group with effect from 1 January 2008
(b) CCC would have sold the agricultural assets in February 2008, and
(c) accordingly, amongst other things:
(i) CPH would not have made a capital loss on the sale of the land
(ii) CCC would have made an assessable net capital gain in the sum of $33,795,402 on the sale of the land
(iii) CPH would not have been entitled to a deduction for the trading stock
(iv) CCC would have derived $25,405,000 in assessable income from the sale of the trading stock, and
(v) CCC would have been entitled to an additional deduction of $6,393,252 in respect of movement in the value of the trading stock over the income year ended 30 June

2008.
In essence, the Commissioner took the view that the entry of CCC into the consolidated group and subsequent sale of the properties amounted to a "scheme" within Pt IVA. On this basis, the Commissioner made alternative determinations and raised alternative assessments to apply the anti-avoidance rule in Pt IVA. The taxpayers contended that the determinations could not be made consistently with the consolidation provisions because of the single entity rule in Div 701 of the ITAA 1997.

The special case asked three questions, namely, by reason of Div 701 of Pt 3-90 of the ITAA 1997:

1. whether the Commissioner was not authorised to make a determination to CCC that CCC obtained a tax benefit for the year of income ended 30 June 2008, referable to the capital gain, and to give effect to that determination by issuing an amended assessment to CPH
2. whether the Commissioner was not authorised to make a determination to CPH that CPH had obtained a tax benefit referable to the net capital gain, in connection with the consideration of CPH's objection to an amended assessment issued to CPH
3. whether the Commissioner was not authorised to make alternative determinations to CCC that CCC obtained tax benefits, referable to the capital gain made from the sale of the land and the non-inclusion of assessable income from the sale of trading stock, and to give effect to those determinations by issuing the alternative assessment to CCC.

The majority of the Full Court (Edmonds and Gordon JJ in a joint judgment; Allsop CJ in a separate judgment) answered the first two questions "yes". The minority (Pagone and Davies JJ in separate judgments) would have answered those questions "no". All five judges answered the third question "yes".
On the first question, Edmonds and Gordon JJ said this:
"We accept that, at the time of issue of the assessment, CCC is part of CPH under the single entity rule in s 701-1[1395], and that an assessment to CPH to give effect to the anterior determination to CCC can be said, in the context of the single entity rule viewed in isolation, to be consistent with that determination. But we cannot agree with that analysis when the single entity rule has to be viewed through the prism of its intersection with Pt IVA and the hierarchy afforded those latter provisions by s 177B(1). Arguably, this is best exemplified in our answer to reserved question 3 ... , and, in particular, our acceptance that s 177B(1) does not allow the single entity rule in s 701-1[1396] to stand in the way of the Commissioner making a determination to include in the assessable income of CCC the amount that would have been included on the postulate upon which the determination to CCC was predicated, and issuing an assessment to CCC to give effect to that determination. Such an outcome leads to 'harmonious goals' ... in contrast to the conflicting outcome achieved by the issue of an assessment to CPH, said to give effect to an anterior determination to CCC only

[1395] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s701.1.html

[1396] http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s701.1.html

because CCC was a subsidiary member of the CPH consolidated group at the time of the issue of the assessment. Moreover, having regard to the objects of Pt 3-90, in particular that expressed in s 700-10(a)... – to prevent double taxation of the same economic gain realised by a consolidated group – it cannot be the case that the Commissioner is authorised to assess both CPH and CCC."

On the second question, Edmonds and Gordon JJ said this:
"On the postulate or counterfactual, upon which the tax benefit the subject of the CPH determination is predicated, namely, that CCC would have, or might reasonably be expected to have, sold the CCC agricultural assets otherwise than as a subsidiary member of the CPH consolidated group, CPH could never, and did not, obtain such a tax benefit from such a sale. ... Here, the Commissioner seeks to defend an anterior assessment to CPH as head company of a consolidated group, which included CCC as a subsidiary member at the time the assessment was issued, by the making of a subsequent determination to CPH when, on the postulate upon which the s 177F determination was made to CPH, CPH was not the head company of a consolidated group which included CCC as a subsidiary member. ... [I]n our view, the Commissioner is not authorised to do this."

On the third question, Edmonds and Gordon JJ said:
"In the present case, the application of Pt IVA proceeds on the basis that CCC is not a subsidiary member of the CPH consolidated group for part of the 2008 income year. The fact that CCC is not a member of the CPH consolidated group for part of the 2008 income year is the basis for the alternative determination. The Commissioner then is required to, and did, give effect to that determination by issuing the alternative assessment to CCC: s 177F(1)(a). The ability to issue an assessment to a subsidiary member of a consolidated group that was not a member for part of the income year is expressly provided for by s 701-30. That section does not ignore the single entity rule in Pt 3-90. It recognises, as was the fact, that there will be instances where a subsidiary member is not part of the consolidated group for the whole income year. Section 701-30 provides a method of working out how the entity core rules apply to the entity for periods in the income year when the entity is not part of the group. The method involves treating each period separately with no netting off between them. That is what occurred here. There is no basis for reliance on the default exception to the core rules in s 701-85."

Channel Pastoral Holdings Pty Ltd v FCT [2015] FCAFC 57 (Allsop CJ, Edmonds, Gordon, Pagone & Davies JJ, 7 May 2015).

http://www.taxinstitute.com.au/news/consolidation-and-the-general-anti-avoidance-rule-channel-pastoral-holdings

Possible Issues For A Tax Soliloquy

- S 6-10 not s 6-5

- "Source" United Aircraft[1397]"
- S 10-5, s 104-10, s 108-5
- Definition of "taxpayer" for Part IVA legislation v s 701-1
- Income
- Compare this decision with Spotless[1398] with s 23(q) v s 701-1;
- Cornell[1399] - compare with Cornell and what did both miss;
- Who owned the property
- IEL v Blackburn[1400] v South Australia v Clth[1401], Arthur Murray[1402] v Linter Textiles[1403];
- Liabilities of fictitious tax entries - Bohemian[1404] v Mildura[1405]
- Creditors of Head Entity affected/not affected by tax and penalties;
- How do you jump from a single taxpayer in Part IVA (extended to trustee[1406]) to tax consolidated group group applying Part IVA;
- Limited to issues raised in objection/appeal
- Decision at first instance;
- McNeil[1407] decision infers that the technical specialist provisions (such as Division 6 of Part III of 1936 Act) do not need to be satisfied, so long as the Core Provisions[1408] are satisfied;
- Prepare a matrix analysis.

CONCLUSIONS

Does one write another paper researching backwards in order to identify to identify base principles to examine whether any of the three Acts have each two or more

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[1397]Federal Commissioner of Taxation v United Aircraft Corporation [1943] HCA 50; (1943) 68 CLR 525 (6 December 1943)

[1398] Federal Commissioner of Taxation v Spotless Services Ltd [1996] HCA 34; (1996) 186 CLR 404; (1996) 141 ALR 92; (1996) 71 ALJR 81 (3 December 1996)

[1399] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1400] Industrial Equity Ltd v Blackburn [1977] HCA 59; (1977) 137 CLR 567 (15 November 1977)

[1401] South Australia v Commonwealth [1992] HCA 7; (1992) 174 CLR 235 (25 February 1992)

[1402] Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; (1965) 114 CLR 314 (18 November 1965)

[1403] Commissioner of Taxation v Linter Textiles Australia Ltd (In Liquidation) [2005] HCA 20; (2005) 220 CLR 592; (2005) 215 ALR 1; (2005) 79 ALJR 913 (26 April 2005)

[1404] Bohemians Club v Acting Federal Commissioner of Taxation [1918] HCA 16; (1918) 24 CLR 334 (21 March 1918)

[1405] Mildura & District Dried Fruit Growers' Hail Storm Damage Compensation Scheme v Federal Commissioner of Taxation [1968] HCA 70; (1968) 118 CLR 342 (31 October 1968)

[1406]Income Tax Assessment Act 1936 - Sect 177A

[1407] Commissioner of Taxation v McNeil [2007] HCA 5; 233 ALR 1; (2007) 233 ALR 1; (2007) 81 ALJR 638 (22 February 2007)

[1408] Income Tax Assessment Act 1997 - Sect 2.5

subject matters and then review all Full High Court decisions on s 55[1409] to see if there is a possibility that the provision has been infringed according to past decisions of the Full High Court. Federal Parliaments are greedy persons without base principles. They deem away all their problems and leave the objector with the problem of convincing the judiciary that there any problems. The objector may well be wise to draft her objection in a well mannered fashion on the approved form within the statutory time limits covering:

- Ownership;
- Non-ownership (and which non-owner);
- Setting out why the Act assesses beneficial owners, to replace legal owners to demonstrate where the preconditions of the legislation (especially Core or Central Provisions) can easily apply to owners then the application of the legislation to non-owners should be "read down" in favour of application to owners;
- The facts of the non-owner – probably very few as she does not own any relevant property;
- Exclusion of the facts of other persons (normally very close to the "you" that are irrelevant to the appeal, as they are not facts of the appellant;

I am willing to "play Russian Roulette[1410]" with 53 blanks so I need to investigate the following (but include them in the objection):

- Source – non-owners have no "source" or third party source for the statutory income – gentle argument;
- The "you[1411]" can appropriately apply to an owner as ownership provides a method of identifying a relevant "you";
- S 55 of the Constitution[1412] states amending Act is unconstitutional – the lifting of the risks to the Federal Parliament when an Act attempts to assess two subject matters, namely property owned and property not owned – to be investigated. But the Air Calenodie[1413] unanimous 7 member decision suggests that s 55[1414] is a Senate and not a taxpayer protection section. But such is not a literal interpretation and focuses on words not actually present in the section located in Part V--Powers of The Parliament of the Constitution, but such an

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[1409] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[1410] http://www.haaretz.com/weekend/2.409/the-russian-roulette-film-that-astounded-critics-1.415875

[1411] Income Tax Assessment Act 1997 - Sect 4.5 for "you"
Income Tax Assessment Act 1997 - Sect 960.100 for "entity"
GST - ***"you "*** : if a provision of this Act uses the expression ***you*** , it applies to entities generally, unless its application is expressly limited. A New Tax System (Goods And Services Tax) Act 1999 - Sect 195.1
A New Tax System (Goods And Services Tax) Act 1999 - Sect 184.1 http://www5.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/s184.1.html

[1412] Commonwealth Of Australia Constitution Act http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[1413] Mason C.J., Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ in Air Caledonie International v Commonwealth [1988] HCA 61; (1988) 165 CLR 462 (24 November 1988)

[1414] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

interpretation could well be supported by the near by sections of the Constitution;

- S 55[1415] in relation to the whole of ITAA 1997 – rerun Cornell[1416], but in relation to "ownership" rather than the word "income";
- Hypothesise how s 114 of the Constitution[1417] prevents the States of Australia taxing the Federal Government on what the Federal Government does **not** own.

Can cope with 53 blanks.

There should be enough time between lodging the objection and any AAT or Federal Court hearing to execute research on possible application of the Federal Constitution[1418] taxing persons on what they do not own. If not, publish a paper with your conclusions.

But one must be warned not to expect too much from s 55[1419] as a seven justice unanimous decision by Mason C.J., Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ in Air Caledonie International v Commonwealth [1988] HCA 61; (1988) 165 CLR 462 (24 November 1988) advises:

> *"14. An obvious purpose of the constitutional requirement that a law imposing taxation deal only with the imposition of taxation was to confine the impact of the limitations upon the Senate's powers with respect to proposed taxing laws to provisions actually dealing with the imposition of taxation, that is to say, to prevent "tacking". That being so, there is something to be said for the view that, in a case where an amending Act inserts a taxing provision in an existing Act, all that s.55 requires is that the amending Act itself deal only with the imposition of taxation. On balance, however, it seems to us that the requirement of s.55 should be construed as extending to laws in the form in which they stand from time to time after enactment, that is to say, as extending to Acts of the Parliament on the statute book. That construction gives full effect to the ordinary meaning of the words of the section. It is also supported both by the contrast between the reference to "laws" in s.55 and the references to "proposed laws" and a "proposed law" in ss.53 and 54 and by considerations relating to the nature of an amending Act which is ordinarily to be construed as part of the principal Act (see, e.g., Acts Interpretation Act 1901 (Cth), s.15) and is commonly treated as "exhausted" upon commencement and incorporation of the amendments which it effects in the*

[1415] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[1416] Cornell v Deputy Federal Commissioner of Taxation (SA) [1920] HCA 65; (1920) 29 CLR 39 (25 October 1920)

[1417] Commonwealth Of Australia Constitution Act http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[1418] Commonwealth Of Australia Constitution Act http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

[1419] http://www5.austlii.edu.au/au/legis/cth/consol_act/coaca430/s55.html

principal Act. Indeed, no submission disputing that construction was advanced on behalf of the Commonwealth. On that construction, s.55 requires that both an amending Act imposing taxation and the amended principal Act deal only with the imposition of taxation.
15. If an amending Act purports to insert a provision imposing taxation in an existing valid Act which contains provisions dealing only with other matters, it seeks to bring about something which the Constitution directly and in terms forbids and which is not within the competence of the Parliament to achieve (cf. Attorney-General (N.S.W.); Ex rel. McKellar v. The Commonwealth (1977) 139 CLR 527, at p 550 per Gibbs J., p 560 per Stephen J. with whom Mason J. agreed). In such a case, one cannot disregard the barrier of the constitutional injunction against a law dealing both with the imposition of taxation and other matters on the basis that, once the result which that injunction forbids has been achieved, the second limb will rectify the breach by invalidating all the other provisions of the principal Act. The injunction of the first limb constitutes a restriction on legislative power. Its effect in the present case is to invalidate the relevant provisions of the amending Act and one never reaches the situation where the second limb operates to strike down all of the provisions of the principal Act dealing with matters other than the imposition of taxation."

Tax Behaviour Experiment

If you start with a cage containing four monkeys, and inside the cage hang a banana on a string from the top, and then you place a set of stairs under the banana, before long a monkey will go to the stairs and climb toward the banana.

ALL the monkeys are sprayed with cold water. After a while, another monkey makes an attempt with same result -- As soon as he touches the stairs, you spray ALL the monkeys with cold water.

Pretty soon, when another monkey tries to climb the stairs, the other monkeys will try to prevent it.

Now, put the cold water away. Remove one monkey from the cage and replace it with a new monkey. The new monkey sees the banana and attempts to climb the stairs. To his shock, ALL of the other monkeys beat the crap out of him. After another attempt and attack, he knows that if he tries to climb the stairs he will be assaulted.

Next, remove another of the original four monkeys, replacing it with a new monkey. The newcomer goes to the stairs and is attacked. The previous newcomer takes part in the punishment – with enthusiasm -- because he is now part of the "team.

Then, replace a third original monkey with a new monkey, followed by the

fourth.
Every time the newest monkey takes to the stairs, he is attacked.

Now, the monkeys that are beating him up have no idea why they were not permitted to climb the stairs.
Neither do they know why they are participating in the beating of the newest monkey. Finally, having replaced all of the original monkeys, none of the remaining monkeys will have ever been sprayed with cold water. Nevertheless, not one of the monkeys will try to climb the stairway for the banana.

Why, you ask? Because in their minds, that is the way it has always been!

ALL of the monkeys need to be REPLACED AT THE SAME TIME!

DISCLAIMER: This is meant as no disrespect to monkeys.[1420]

In this paper we attempt to set down our tentative evidence for the "banana" thought that "ownership" is a precondition to tax liability. That is more than the reported monkey experiment ever attempted.

ABBREVIATIONS

A	
ATO	Australian Tax Office
B	
C	
CGT	Capital Gains Tax
Commissioner	Commissioner of Taxation
Constitution	Commonwealth of Australia Constitution Act
D	
E	

[1420] http://www.nzhealthtrust.co.nz/health_inspiration.html
http://lunaticoutpost.com/showthread.php?tid=543863
https://www.psychologytoday.com/blog/games-primates-play/201203/what-monkeys-can-teach-us-about-human-behavior-facts-fiction

F	
FBT	Fringe Benefits Tax Assessment Act 1986
G	
GAAR	General Anti-Avoidance Regime
	Section 53 of the Income Tax Assessment Act 1915
	Section 260 of the Income Tax Assessment Act 1936
	Part IVA of the Income Tax Assessment Act 1936
GST	A New Tax System (Goods And Services Tax) Act 1999
Goods And Services Tax	A New Tax System (Goods And Services Tax) Act 1999
H	
Head Company	Head Company and any other subsidiary member of the group are taken for the purposes covered by subsections (2) and (3) of s 701-1 of ITAA 1997 to be parts of the head company of the group, rather than separate entities, during that period
Head Entities	Income Tax Assessment Act 1997 - Sect 701.1
High Court	High Court Of Australia http://www.hcourt.gov.au/about/role-of-the-high-court
I	
Inspector General of Taxation	The office of Inspector-General of Taxation (IGT)
ITAA 1997	Income Tax Assessment Act 1997

J	
K	
L	
Lien	Situations where the Full High Court as a Court of Equity will recognise the valid trustee's lien for borrowings made of liabilities of the trustee so the trustee does not hold the value of the trust funds for the benefit of the beneficiaries, but the trustee owning the beneficial interest in the trust property until their lien has been discharged.
M	
N	
O	
P	
Part IIIA	The 1986 CGT legislation inserted into 1936Act by Income Tax Assessment Amendment (Capital Gains) Act 1986 No. 52 of 1986
Part IVA	Part IVA
PSI	Personal Services Income - Division 86 of ITAA 1997--Alienation of personal services income
Personal Services Income individuals	Income Tax Assessment Act 1997 - Sect 84.5
Q	
R	

S	
T	
U	
V	
W	
Wholly owned	One entity (the *subsidiary entity*) is a *wholly-owned subsidiary* of another entity
X	
Y	
Z	