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Justice Richard Edmonds

THE CONTRIBUTION OF JUSTICE HILL TO THE DEVELOPMENT OF TAX LAW IN AUSTRALIA

At the time of his death in August of last year, the late Justice Graham Hill was undisputedly, and deservedly, recognised as the leading tax judge in this country. As I said on a previous occasion, we, and I include in that the members for the time being and from time to time of the High Court of Australia, may not have always agreed with his Honour's views nor his conclusions in tax matters, but in the vast majority of cases we did.

I have been invited today to address this Conference in its opening plenary session, on the late Justice Hill's contribution to the development of tax law in this country. I readily accepted the invitation because of my respect and admiration for a great jurist in a field of endeavour in which I have always aspired to succeed. I have come to accept that I will never succeed to the extent that his Honour did, however, that acceptance is no bar or impediment to one's own aspirations. I knew his Honour, personally and professionally, for over 30 years: First as a student; then as a fellow practitioner, as a solicitor and then as a fellow member of the Bar; then as a judge of the Federal Court of Australia before whom I appeared on many occasions, successfully and unsuccessfully; and finally, for too short a period, as a fellow judge of the Court.

His Honour's contribution to the development of tax law in this country manifested itself through a number of mediums, and I propose to say something about each of them.

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1. His Honour's contribution in the early days, in his role as a scholar.
2. His Honour's contribution as a teacher/lecturer. This was a contribution which started at a fairly early time in his Honour's professional career, but continued until the day before his Honour died. For those of you who do not know, his Honour gave his last lecture in the indirect tax course in which he lectured in the Master of Laws programme at the University of Sydney, on the evening before he died.
3. His Honour's contribution as a practitioner, first as a solicitor and then as a barrister.
4. Finally, his Honour's contribution as a judge of the Federal Court of Australia for over 16 years, for a large part of which, as I have said, he was acknowledged and recognised as the leading tax judge in Australia.

Role as a Scholar

In his early days as a scholar, Graham Hill's personal achievements, as distinct from his contribution to the development of tax law in Australia, was nothing short of brilliant.

Educated at Fort Street Boys High School, after gaining a maximum pass in the NSW Leaving Certificate he then went to the University of Sydney where he gained a Bachelor of Arts and Bachelor of Laws, the latter with First Class Honours, winning the University Medal in law. That was in a year in which the graduating class included Chief Justice Gleeson of the High Court of Australia, Justice Kirby of the High Court of Australia and Justice Hodgson, a judge of the New South Wales Court of Appeal.

In 1962 his Honour moved to Harvard University on a Ford International fellowship, a Fullbright scholarship and a Sydney University post-graduate scholarship; he graduated as a Master of Laws in 1963. While there he studied under the Dean of the Faculty of Law, Professor Erwin Griswold, widely regarded as the leading tax law scholar in the United States and later to become

US solicitor-general. From there his Honour went to Britain where he spent a year as a post-graduate scholar at the London School of Economics.

But it was on his return from overseas that his Honour's contribution to the development of tax law in Australia as a scholar first manifested itself. Through the persuasion of the late Justice Russell Fox, a founding judge of the Federal Court of Australia, with whom his Honour had been associated at the University of Sydney for several years in teaching the subjects of stamp, death, estate and gift duties, Justice Hill wrote and published, through the Law Book Company, his seminal work: *Stamp, Death, Estate and Gift Duties (New South Wales, Commonwealth and Australian Capital Territory)*. In the preface to this work, his Honour wrote:

'The starting point of this book was The Law relating to Stamp, Death, Estate and Gift Duties by R. C. Smith. The third edition of that book was published in 1953 and by supplement brought up to date to 1st February, 1957. It has for many years now been out of print. The present book differs, however, in many ways from that written by Mr. Smith ...

This book owes a debt of gratitude to many people. Mr Neil McIntyre, my former senior partner, first set me on the road of exploring stamp duty; Professor Wheatcroft of the London School of Economics and Political Science directed my thinking and research more deeply into the topic; but it was Mr. Justice Fox, then lecturer in Stamp, Death, Estate and Gift Duties at the Law School of the University of Sydney, who instilled in me the courage to attempt this book. I am grateful to him for the insight he gave me, for his constant reminders to return to the words of the legislation and for the wealth of knowledge he imparted to me born of his close practical association with the subject ...

Many others have given me encouragement and assistance ... My thanks are also due to Mr. Gordon Taylor of the A.M.P. Society for his assistance in discussions on the provisions of the Stamp Duties Act dealing with insurance, to Professor Parsons and Mr. Peden of the Law School of the University of Sydney for suggesting avenues of research from time to time and for their comments.'

In his foreword to his Honour's work, the late Justice Fox said this:

'My part in the preparation of this book has been without effort and without anguish; I persuaded Mr. Hill to write it, and left him to do the work. We were associated together at the University of Sydney for several years in teaching the subjects with which it deals, and we both became most conscious of the need for a good up-to-date book in the field.

I can only say that I am most gratified at the result of his considerable labours. It is certainly the most comprehensive and thorough work yet to appear on the law of stamp, death, estate and gift duties. There is information to answer the routine enquiry, and informed and intelligent commentary to aid the solution of the serious problem. The field is a difficult one, in which precise analysis of the legal nature of a transaction is but the starting point for the consideration of legislation which too often betrays neither clarity of concept nor symmetry of scheme. Uncertainties result for all concerned – uncertainty as to what to do, or what to assess, or what to pay. The present work, it may confidently be expected, will help to reduce the area of uncertainty, by giving a wide range of people a closer and readier insight into the operation and application of the legislation.'

For those of us who lived and practised through this period when his Honour's work first appeared, it is fair to say that the expectations of Justice Fox were not only fulfilled, but exceeded. His Honour's work came to be the benchmark in the field of endeavour which it covered and, not surprisingly, formed the basis of his Honour's great contribution to the development of this area of tax law in Australia. It was supplemented by the many papers he wrote and presentations he made on 'cutting edge areas' in these fields. That very much continued until Queensland abolished death and gift duties in 1976, New South Wales and Victoria abolished death duties in the same year and the Commonwealth and other states had followed suit by 1979.

His Honour's work made such an outstanding contribution to the development and understanding of the law in this country in the fields of stamp, death, estate and gift duty, that even today, the work, in a modified version devoted to stamp duty, still exists as a leading text in the field. That that is so nearly forty years after it was first published, speaks for itself. Many, many students, as equally many practitioners and perhaps fewer judges, only because there are fewer of them, have benefited from his Honour's commentary and observations in this work. I do not think I can give it higher praise than by saying that his Honour's work on stamp, death, estate and gift duties and its successor on stamp duties is, in scholastic expertise, the composite equal of Sergeant and Sims on Stamp Duties and Dymond's Death Duties.

Role as a Teacher/Lecturer

Next, I come to his Honour's contribution to the development of tax law in Australia in his role as a teacher/lecturer. From the time of his return to Australia in the mid 1960s, his Honour joined Justice Fox in lecturing to students in the post-graduate Master of Laws Course offered by the Sydney University Law School. His Honour lectured in stamp, death, estate and gift duties, subsequently in sales tax and more recently in GST principles. In 1967 his Honour became Challis Lecturer in Taxation Law, a part-time post he held for 39 years until he died. At the time of his death he was Sydney Law School's longest serving teacher, lecturing every term for the past forty years, and had, according to the Chancellor of the University of Sydney, his Honour Justice G F K Santow OAM, a research and publication record of which a full-time academic could be proud. I was one of his students in the early 1970s, along with two of my colleagues from Allens at the time, the late Justice John Lehane of the Federal Court of Australia and Justice Reg Barrett of the New South Wales Supreme Court. As well, there were many leading members of the Bar, of the solicitors profession and of the different bodies of accountants wishing to pursue further studies in the field of revenue law. His Honour's contribution to the further education of all these people has been enormous.

But it was not only at the University of Sydney that his Honour's role as a teacher/lecturer contributed so greatly to the development of tax law in this country. It was also through organisations such as the Taxation Institution of Australia, the Law Council of Australia, the Law Society of New South Wales, the New South Wales Bar Association, the Australian Tax Research Foundation, the International Fiscal Association or IFA, as it is known, to mention some, not to mention this Association itself. In addition, there were many other private organisations and groups to which his Honour belonged, of which I mention one, the Gunn Club (having nothing to do with firearms) – named after its founder, Mr J.A.L. Gunn, the well-known and highly respected tax accountant and author of the middle decades of the last century. His Honour's work for these organisations and bodies in giving lectures, writing and presenting papers, conducting workshops, leading discussion groups and generally just participating in revenue law subjects was prolific.

His Honour's contribution to the development of tax law in Australia in his role as a teacher/lecturer is best exemplified in recent times in the way his Honour, in consequence of the introduction of the GST, developed and structured a program devoted to the study of GST principles as part of his indirect tax course in the Master of Laws program offered at the University of Sydney Law School. It was a program, which, as far as I am aware, had no parallel in New South Wales and few, if any, parallels in other States. Not surprisingly, his indirect tax course was heavily patronised and this was no doubt one of the reasons why.

Role as a Practitioner

When his Honour returned to Sydney in the mid 1960's he joined Parish Patience & McIntyre and became a partner in that firm. In 1970, he left that firm and became a partner at the firm which was then known as Dawson Waldron Edwards & Nicholls. He remained there until 1976 when, at the age of 37, he was admitted to the New South Wales Bar. During the next thirteen years he established himself as one of the country's premier tax advocates. In 1984, after nearly nine years at the Bar, he was appointed a Queen's Counsel.

In 1980–81 he and A M Gleeson QC, as his Honour then was, were invited by the present Prime Minister, then the Federal Treasurer, to assist in the drafting of a general anti-avoidance provision to take the place of s 260 which, rightly or wrongly, probably the latter, was perceived by many as having been effectively emasculated by the High Court of Australia.

I'll say something more about his Honour's contribution to the development of tax law in Australia in the context of Part IVA when I speak of his role as judge of the Federal Court, suffice it is to say now that his involvement with our current general anti-avoidance rule from before its birth in 1981 up to and including his participation in the Full Court in *Commissioner of Taxation v Hart* (2004) 217 CLR 216 and as the trial judge in *Macquarie Finance Ltd v Commissioner of Taxation* (2004) 210 ALR 508 has led to his Honour having made an indelible contribution to the development of the law in this area. Some might well say that it is his most important contribution and time might well prove them right.

His Honour's contribution to the development of tax law in this country in his role as a practitioner is best exemplified through a review of a number of the cases in which his Honour appeared, both for the taxpayer and the Commissioner. Time does not permit me to undertake such a review on anything approaching a basis which would do justice to his Honour, however, the names will be readily familiar by mentioning only a few of the more than 150 tax cases in which his Honour appeared::

Slutzkin and Others v. Federal Commissioner of Taxation (1977) 140 CLR 314
Federal Commissioner of Taxation v. St. Hubert's Island Pty. Limited (1978) 138 CLR 210
Federal Commissioner of Taxation v. Total Holdings (Australia) Pty. Limited (1979) 43 FLR 217
Federal Commissioner of Taxation v. Tourapark Pty. Limited (1980) 49 FLR 17
Federal Commissioner of Taxation v. Everett (1980) 143 CLR 440
Federal Commissioner of Taxation v. St. Helens Farm (A.C.T.) Pty. Limited (1981) 146 CLR 336
Federal Commissioner of Taxation v. Totledge Pty. Limited (1982) 40 ALR 385
AVCO Financial Services Limited v Federal Commissioner of Taxation (1982) 150 CLR 510
D.K.L.R. Holding Co. (No. 2) Pty. Limited v. Commissioner of Stamp Duties (N.S.W.) (1982) 149 CLR 431
Brayson Motors Pty. Ltd. v. Federal Commissioner of Taxation (1983) 57 ALJR 288
Mutual Acceptance Limited v. Federal Commissioner of Taxation (1984) 81 FLR 209
Federal Commissioner of Taxation v. Walker 84 ATC 4553
Federal Commissioner of Taxation v. Australian Guarantee Corporation Limited (1984) 2 FCR 483
Brayson Motors Pty. Ltd. v. Federal Commissioner of Taxation (1985) 156 CLR 651
Travelodge Papua New Guinea Ltd. V. Chief Collector of Taxes 85 ATC 4432
Federal Commissioner of Taxation v. Galland (1986) 162 CLR 408
Commissioner of Stamp Duties (N.S.W.) v. J.V. (Crows Nest) Pty. Limited (1986) 7 NSWLR 529
Smith v. Federal Commissioner of Taxation (1987) 164 CLR 513
MacFarlane v. Federal Commissioner of Taxation (1986) 13 FCR 356
Federal Commissioner of Taxation v. Creer (1986) 65 ALR 485
Federal Commissioner of Taxation v. Gregrhon Investments Pty, Limited (1987) 76 ALR 586
North Coast Grazing Pty. Limited v. Federal Commissioner of Taxation (1987) 15 FCR 104
Australian National Hotels Limited v. Federal Commissioner of Taxation (1988) 81 ALR 667
Federal Commissioner of Taxation Ors v. Citibank Limited (1989) 20 FCR 403

Role as a Judge of the Federal Court of Australia

But it was in his role as a judge of the Federal Court of Australia that his Honour made his greatest contribution to the development of tax law in this country. Not long after his death, his

former PA devoted a considerable amount of time to taking out a list of all his Honour's judgments in tax matters that had come into his docket as well as a list of all Full Court judgments in which his Honour participated as a member of the Court.

You should all have a copy of this list or if you don't please speak to Miranda Stewart and I am sure she will be able to supply you with one.

There are a number of indicia of this list which immediately strike you.

First, its sheer size. One hundred and seven Full Court judgments and one hundred and nine judgments at first instance.

Second, the diversity of issues to which the cases give rise.

Third, the relatively few cases which finished up in the High Court – approximately ten:

The Commonwealth v Genex Corporation Pty Limited (1992) 176 CLR 277

F C of T v Peabody (1994) 181 CLR 359

F C of T v Australia & New Zealand Savings Bank Ltd (1994) 181 CLR 466

F C of T v Prestige Motors Pty Ltd (1994) 181 CLR 1

F C of T v Energy Resources of Australia Ltd (1996) 185 CLR 66

F C of T v Consolidated Press Holdings Ltd (2001) 207 CLR 235

F C of T v Hart (2004) 217 CLR 216

F C of T v Linter Textiles Australia Ltd (in liq.) (2005) 79 ALJR 913

F C of T v Stone (2005) 79 ALJR 956

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

Securities Limited and *Orica Limited*; and the interaction of the provisions of Part X and the thin capitalisation provisions of Division 16F to controlled foreign companies. Indeed, they were so complex, not all of them got to the High Court.

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

It is possible to discern perhaps three areas where, through the cases he decided, his Honour made a significant contribution to the development of tax law in this country.

First, in the ever evolving concept of 'income', particularly following the decision of the High Court of Australia in *F C of T v Myer Emporium Limited* (1986-87) 163 CLR 199. *Myer Emporium* was decided not long before his Honour's appointment to the Bench and it was not long after his appointment that his Honour was called upon to first consider its application in *Cooling* and *Westfield*. His Honour's contribution in this area, in particular in relation to what has become known as the 'second stream' of *Myer*, is exemplified in his reasons for judgment in cases such as *Henry Jones (IXL)* and *SP Investments/Perron Investments*.

The second area where his Honour's contribution can be clearly seen is in the area of statutory construction. This is best exemplified, in one of the last judgments in which his Honour participated on the Full Court, namely *H P Mercantile*. Stone and Allsop JJ agreed with his Honour's reasons, however, importantly Allsop J said:

'Were it not for the matters with which his Honour deals concerning the statutory scheme and the purpose and the context of the legislation, I would be inclined to the view that the acquisition of legal and management services in collecting the debts did not relate to making the relevant supply, being the acquisition of the book of debts. As a matter of textual meaning, it can be said that the acquisitions relate to the debts but not to the acquiring of the debts.'

In a paper which I delivered for the Taxation Institute of Australia at a GST Intensive Seminar in October of last year, I proffered the following conclusions concerning his Honour's approach to the matter of statutory construction in *HP Mercantile* (ignoring footnotes):

'As I said at the outset, it is not often that the Courts are given the opportunity of interpreting legislation providing for the implementation of an entirely new tax. It provides the Court with the opportunity to approach the task of statutory construction free of 'muffled echoes of old arguments' concerning other legislation.

I will be surprised if the Court's approach in HP Mercantile does not provide a template for the approach that will be adopted by the Courts in the future, at least in cases involving the construction of provisions of the GST Act where there are, prima facie, competing arguments based on syntactical enquiry into the meaning of words, either standing alone or in juxtaposition with other words.

But it has to be remembered that such an approach by the Courts is not a panacea for all problems thrown up by the drafting of legislation. The purposive construction of legislation can only deal with the problem of how legislation is to be construed; it cannot deal with the problem of how it is written. There is a need for the Parliament, the Executive and the administrators who advise them to remain vigilant in identifying the wording of legislation which gives rise to unintended consequences judged against or by reference to legislative policy. The words of Kirby J, in dissent, in Network Ten to which I referred, cannot be put to one side and ignored.

As Hill J so ably put it in a paper to which I have already referred:

"There will obviously be unintended consequences which arise in the implementation of a new tax drafted in a way which in many respects differs from comparable legislation in other jurisdictions. While, in part, such unintended consequences can be dealt with by the ruling system that is not a satisfactory long-term solution to problems. There is a need for the legislature to cure defects from time to time. Yet there seems to be a refusal on the part of the government to admit there are defects and to make amendments other than amendments which may be thought necessary to overcome avoidance. In some cases, the courts may be able to resolve difficulties by applying a purposive construction but in the Australian constitutional context where there is a sharp separation of the legislative and judicial powers there is a limit to what one can expect of the courts. Ultimately the courts can not act as legislators. Parliament can not stand by and then blame the courts if a decision is one that does not favour the revenue when the problem lies not in how the legislation is to be interpreted in a common sense way, but in how it is written."

Finally, I want to say something about his Honour's contribution to the development of the construction and application of Part IVA. Having been involved in the drafting of Part IVA and in discussions with others engaged in the same task, his Honour held fairly strong views about the construction and application of Part IVA, in particular, whether it should apply to a given set of facts. These views manifested themselves for the first time when *Peabody* was in the Full Court (1993) 40 FCR 531 at 548, 549 where his Honour said:

'The question which was required by s 177D to be answered on the facts of the present case was whether, having regard to the matters in s 177D(b), it would be concluded that Mr Peabody carried out the whole of the scheme, from acquiring the Kleinschmidt shares through the financing arrangements and concluding with transferring the shares either to the public company or to TEP Holdings Ltd, for the purpose of excluding from the assessable income of each of the three beneficiaries of the Peabody Family Trust the sum of \$888,005. One has only to pose that question to see how absurd such a conclusion would be. Clearly enough, the whole scheme, as formulated, was entered into or carried out by Mr Peabody with a dominant commercial purpose, namely, the acquisition of shares from Mr Kleinschmidt and the flotation of a public company. The fact that an element of that scheme had a tax advantage does not detract from the dominant purpose of Mr Peabody in relation to the scheme as a whole. The matters to which regard may be had under s 177D clearly direct attention on the one hand to the commercial elements of the scheme and on the other hand to the tax elements. They require a balancing of the two. But the factors which predominate in the present scheme considered as a whole are purely commercial. Once the scheme is analysed as encompassing the acquisition of shares, the financing of those shares and the ultimate flotation of a public company, it is hard to see, in a case such as the present, how the relevant conclusion as to purpose could have been drawn. Part IVA would seldom, if ever, operate to permit the Commissioner to make a determination, carrying with it as it does an automatic penalty upon a taxpayer assessed, where the overall transaction is in every way commercial, although containing some element which has been selected to reduce the tax payable. Part IVA is no more applicable to such a case than was its predecessor, s 260.'

Significantly, that passage did not attract any comment, adverse or otherwise, when *Peabody* went up to the High Court. What his Honour there said helps explain the position his Honour took, with the concurrence of Hely and Conti JJ, in *Hart*. His Honour thought, rightly or wrongly, that he had an advantage of bringing to bear on the issue of the application of Part IVA, what Part IVA was intended to apply to and what it was not. His Honour may ultimately be proved to be right, however, having regard to the High Court's decision in *Hart* and the very different processes of reasoning by which the various members of the Court got to the conclusion it did, it is fair to say that his Honour's views, as expressed in the final sentences of the extract

from *Peabody* cited above, do not, at this point in time, represent the law. Speaking for myself, I think that is somewhat unfortunate because his Honour's views do not carry the baggage of uncertainty which is perceived to flow from the diverse reasons of their Honours in the High Court.

On a previous occasion I said that it is unlikely we will see the likes of his Honour in the area of taxation law again; but if we do, it will be a long time hence. He was, as Professor Richard Vann aptly described him, 'a tax titan'.