1. EARLY DAYS

Actually it’s more than 30 years. I taught my first income tax course at the University of Queensland in 1972. It was in the last, farcical year of the long (1949-1972) Liberal-Country Party regime. The economy was booming, though the boom soon proved fragile. The Prime Minister was William McMahon and the Treasurer was one Billy Mackie Snedden. In Queensland, Johannes Bjelke-Petersen was in the fourth year of his long reign as Premier. Despite the high top rate of income tax, 67% (which very few paid), tax was not a subject on the front pages of the newspapers; in fact the rate scale had not been touched since the early 1950s. Although people were paying proportionately more tax than they used to, there also had rising incomes after tax. There was plenty of tax planning going on amongst the wealthy, including a lucrative trade in estate duty planning; no-one paid estate duty unless they wanted to. But all this activity was discreetly conducted with the minimum of publicity. There were some official misgivings and McMahon appointed a committee of enquiry into Commonwealth taxation headed by a NSW judge, Kenneth Asprey.

The course I taught was for commerce students for whom it was virtually compulsory. For many it was of no interest. As a young lawyer I was disinclined to send time on worked arithmetical calculations which did not seem to be a very productive activity at University level, so I concentrated on the areas where a legal perspective was useful – property dealings, the general deduction provision, taxing companies, trusts and partnership and of course the general anti-avoidance provision. International tax was pretty minor in those days of limited Australian investment abroad and strict currency controls. Teaching alongside accountants and economists, particularly the latter, I became aware that tax policy was relevant to understanding the tax system also. My two main instructors, Ray Ball and Bob Officer were graduates of the Chicago Business School and held uncompromising views on the power of the market, but they also introduced me to ideas of Milton Freidman on taxation, which were more enlightened than one might think. I was also very much helped by Noel Dallon, then an Assistant Commissioner of the ATO in Brisbane who had an invaluable practical perspective gained over 40 years with the Office.

I came to Queensland not expecting to have tax as my main area of interest; my previous work and study had been in the company law area though I was involved while working in a very junior capacity in the NZ Crown Law Office on what turned out to be a landmark tax case, Europa. However, my senior colleague in Queensland Harvey Mason (a cousin of Sir Anthony Mason), a company lawyer of some note, was keen for me to replace him in tax, so tax it became. I had done a Masters’ paper with Ivor Richardson, then a Professor at VUW, but I knew nothing about Australian tax law other than the cases we had studied at VUW. It was a steep learning curve.
Admittedly the law was rather less bulky then. The ITAA 1936-71 filled a single volume in reasonably large print covering 750 pages; the Master Tax Guide (CCH had started out in Australia in 1969) was 390 pages. There were a couple of loose-leaf services, the CCH one which incorporated an earlier work by Neville Challoner and Jim Greenwood, and the Butterworths one, known as Bock and Mannix, but which originated in the work of JAL Gunn, one of the first real tax scholars in Australia. These works, though of intimidating bulk, were no more that annotated statutes though some of the commentary was of considerable depth. Because of the way they had been compiled they were invaluable if you needed to find out the history of a provision, though not necessarily what justified its existence.

We used as a textbook Kevin Ryan’s “Manual of the Law of Income Tax in Australia”. This book had been first published in 1965 when there was literally nothing else and although modest in compass did attempt to explain the major interpretive forays the courts had made into the income tax statute. It did however treat tax as merely an exercise in statutory interpretation and as a policy-free zone. The politics and economics were for others. This was understandable given the author’s background (Ryan was a Professor in the Law School at Queensland), but even at that stage, my awareness being raised by Ball and Officer, I realised tax policy could not be ignored in a law course. You could not bring students thorough the thicket of legal reasoning surrounding s 26(a) and not point out that the root of the problem here was the incoherency of the capital – income division and the need for a more rationally defined tax base, and what that base might look like. For, as lawyers play esoteric games with clients’ money, out in the real world officials, politicians and the media will be goaded into action, which may well impact on those very clients. As we know, something eventually happened to capital gains, though not until 1985.

With hindsight what I should have done was to sit down and, borrowing Colin Howard’s and Abe Greenbaum’s technique, write a book about Australian Income Tax Law, and learn about it that way. A book was eventually written, but it had to wait a while, and it turned out not to be a black-letter text. Within a couple of years I was in a quite different situation. I was recruited by Professor Harry Whitmore who was searching the world, so it seemed, for staff for the new law school at an obscure new University in Sydney called the University of NSW. Once again I thought I was being hired to teach company law, having spent a year or so with the committee which was revising the New Zealand Companies Act. And for a couple of years, this is what I did, under the supervision of Don Harding, who was only a few years older, but very experienced and knowledgeable. Harry Whitmore had already hired some tax lawyers; Razeen Sappideen, David Bloom and Richard Gelski. Bruce Cutler, a Freehills partner was teaching part time, and a team from Greenwood Challoner and Co, Tony Slater and John Durack were teaching Estate Planning, which soon acquired the reputation of the most demanding subject in the curriculum. We needed all these teachers as almost everyone seemed to do tax. The ALP had been elected to office in December 1972 and interest in tax matters was high. However, David Bloom stayed only a couple of years and left to pursue a career at the bar where he is now a leading

Section 26(a) of ITAA 1936 dealt with isolated property transactions and “profitmaking undertakings or schemes”. Liability depended on the taxpayer’s subjective intention. After the general deduction section it was the most litigated provision of the Act. With the introduction of capital gains tax it was (partly) repealed in 1985.
tax counsel, and Razeen also went off to greener pastures, which by 1978 left only Richard and me. Frank Marks came for two years in 1978-79 but he was only part time in tax, his main area being industrial relations. The Whitlam government turned out to be a false dawn as far as tax reform was concerned; Asprey produced a thorough and far-sighted report but it was ignored in the superheated political climate of 1975.

Originally we relied on some very patchy cyclostyled materials which consisted almost entirely of edited Australian cases. Then in 1978 the first decent Australian Tax Law casebook appeared, “Cases and Materials on Taxation”. It was the brainchild of Bob Baxt, then at Monash, and had substantial contributions from Kevin Pose, Yuri Grbich, Bernard Marks and Richard Gelski. Although the commentary was rather brief and uneven and there was little in the way of teaching aids such as questions, it was a step forward and we adopted it for our courses without hesitation.

By 1983 Richard was gone, seduced by practice, and the University decided to let us hire a professor, Harry Whitmore having retired. The successful candidate was a tax lawyer, Yuri Grbich, a New Zealander who after doing a doctorate at the London School of Economics had spent the previous 10 years at the Monash Law School. At UNSW Yuri put a great deal of energy into re-writing courses and developing new ones – two at master’s level. He also developed the most comprehensive tax continuing legal education this country has ever seen. His timing was good; after the new ALP government’s tax summit in which Yuri participated there was a large body of accounting and law practitioners who needed to get to grips with the new system. With the aid of Patrick Gallagher’s legendary organisational abilities the program from 1985 to 1990 was an outstanding success. The amount of money we made was positively embarrassing.

Again in hindsight, the Australian Taxation Studies Program, with Yuri and Pat at the helm, was “son of CLE” though Yuri had me convinced at one stage that he was not interested in a proposal that the ATO put to the second ATTA conference at UNSW in early 1990, thinking it was more a job for a College of Advanced Education. The ATO was concerned about upgrading the qualifications and skills of its non-graduate staff right around the country. It seemed like an experienced provider of distance education would be the most appropriate choice, but eventually a coalition of UNSW and Central Queensland University was put together. Yuri shamelessly used all his contacts in academia to produce materials for the new courses, the B Tax and the M Tax, as well as the ATAX staff and within a very short time ATAX was up and running.

Back at the Law School, Yuri’s translation to Director of ATAX left quite a hole and indeed it was no longer possible to offer masters' subjects on the same scale as previously. But the undergraduate tax courses continued to generate good enrolments. One of the reasons that students still enrol in tax is that the Chartered Accountants professional body, the Institute, still require students entering their professional year to have done two semesters of Tax (and of Company Law). Although it is not yet really feasible to hold out both shingles as both solicitor and accountant students seem to want to hedge their bets.
2. MATERIALS

We use at UNSW the Cooper Krever Vann Casebook, “Income Tax Commentary and Materials”, first published in 1989. This was a new generation book with a policy perspective, much more commentary and detailed questions (with answers for the teachers). It was originally conceived by Graeme Cooper who was much influenced by American precedents. Policy, which had a fitful presence in Baxt et al, was now strongly featured. There was even a chapter on ethics, for as I pointed out to some of my more recalcitrant students, knowing the ethical rules might help you to stay out of jail. There was a second edition in 1993, two curious “half” editions in 1999 and 2002, and finally a welcome return to a full edition (but with no answers to the questions and ethics deleted) in 2005. For our purposes in the Law School nothing has come along to beat it, though Commerce students are well served by “Understanding Taxation Law” (2002) by Gilders et al and “Australian Taxation Analysis” by Coleman and Hart which first appeared in 1994 and is now in its 6th edition. One undeniable fact is that the quantity and quality of available teaching materials has improved over the last 30 years. So of course has the number and quality of tax teachers. In 1972 there may have been a dozen tax teachers in Australia’s universities teaching in Commerce and Law faculties, almost all of whom taught other subjects as well, though there would have been more in the then Colleges of Advanced Education and Technical Colleges. ATTA whose membership is voluntary has now over 100 members, almost all of whom have higher degrees and many of whom have substantial research and publication records. It is not a growth one would have predicted 30 years ago.

I mentioned my own book earlier. Actually it was a joint effort with one Stan (Yeshia) Ross and published in 1991 under the title “Income Tax: a Critical Analysis”. A second edition appeared in 1996. It was an attempt to put the income tax law in a larger context, to relate it to the political and social and ethical context in which it functioned. The book was well reviewed and sold well, and it was adopted for several Arts and Humanities courses. (The second edition did not sell well to a complete lack of promotion by a publisher who had lost all interest in print products). I was particularly interested in seeing the courts pay more attention to policy in interpreting legislation, Like Graeme Cooper I have always been impressed by the way the US courts operate in this regard. For this however they require guidance and there is a particular lack of historical material explaining the background of the tax law. My major project of writing the Australian tax law according to historical principles is yet to come to fruition – a retirement project perhaps.

Associated with the expansion of tax education and research has been the appearance of several specialist journals and many monographs. In 1972 there was not a lot of choice for a young tax teacher wanting to publish in Australia, or elsewhere (outside of the United States). There was the Taxation Institute journal, Taxation in Australia, which since 1945 had published short articles of interest to practitioners (in fact I published my first Australian article in a supplement to Taxation in Australia in 1974). Then there was the Australian Law Journal, published by the Law Book Co

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2 It behoves us to remember those few who pioneered teaching tax law in Universities under difficult conditions in the 1960s, like Ron Bowra (Sydney – Commerce), Ross Parsons (Sydney – Law) and Kevin Ryan (Queensland).
but very much the Barrister’s Journal. The ALJ occasionally ran tax articles but tax authors had to compete with all other areas of legal practice for space, as was the case with University law reviews. In 1972 the Law Book Company commenced publication of the Australian Tax Review, a specialist quarterly journal devoted to tax law edited by Melbourne barrister and former Monash academic Ian Spry. Most of the articles were focused on legal analysis – it was not a journal for those with more than a perfunctory interest in policy. It continues, now edited by Chris Evans, with a somewhat broader focus. In 1984, at what turned out to be a crucial time for tax law reform, a journal of a very different character was launched, “Australian Tax Forum”. This was the brainchild of Rick Krever, a young Canadian law teacher at Monash University, who developed the journal along interdisciplinary lines. Krever rightly billed it as the only journal in this country dedicated to a broad-based discussion of all tax policy and tax reform issues. Australian Tax Forum continues to this day, though now published by the Taxation Institute, perhaps proof enough that tax policy is now a concern of tax practitioners.

In 1990 Bond University gave birth to the Revenue Law Journal, edited by Duncan Bentley and Jim Corkery which has a content somewhere between that of the Australian Tax Review and Australian Tax Forum (and may also be found on the internet). In 1999 another journal, the Journal of Australian Taxation, edited by Steve Barkoczy, appeared out of Monash, but this time from the Business and Commercial Law Department. Meanwhile there had been an expansion in University Law Reviews and many significant tax articles have been published there also. “Taxation in Australia” expanded into two discrete publications; the “Blue” journal for everyday articles and the “Red” journal for more specialist articles. We now also have electronic journals such as the ATAX E-Journal of Taxation.

All these journals are merely the tip of the iceberg as regards secondary material on taxation law and policy. There has been the continuing work of the private but non-profit Australian Tax Research Foundation which has produced at least 50 reports over the last 20 years on various aspects of our tax system, all the papers given to conferences organised by professional bodies and private CLE providers, and a steady stream of monographs on various aspects of tax law. The problem, of course, is keeping up with it, not all of it is rich in pearls of wisdom.

The internet now presents the quality problem in an acute form. The editors of the paper journals, keen as they are for copy, do at least exercise some quality control over what gets into print. The need for academics to publish in refereed journals does ensure some scrutiny over what is published. But anyone can be a publisher on the net and it seems every law and accounting firm with a desire to attract tax clients can become an instant commentator. There are also some very expensive pay sites which, because they are expensive are difficult for impecunious academics to evaluate.

All this material informs teaching, but adds value only indirectly. ATAX has long experience as a distance education provider, in recent years using the internet. But students still prefer face to face contact with teachers and their fellow students, an

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3 In 1972 there were 9 Australian law schools which produced in that year 715 graduates; Australasian Universities Law Schools Association Report no 2 “Legal education in Australian Universities” 1977, 60. By 1995 there were 27 law schools which in that year produced 2777 graduates; S Vignaendra, “Australian Law Graduates Career Destinations,” 1998 Centre for Legal Education, 16.
experience difficult to replicate exactly on the internet. I recall going to a talk at a Law Teachers Conference in the late 1990s by a gentlemen from a leading American law school who told us how his law school was going to take us all over via the ‘net. They were going to offer such brilliance over the ‘net that we would all have to become their branch offices. Well of course this has not happened because, leaving aside small matters such as different jurisdictions, flesh and blood teachers are still capable of adding value to education.

3. ATTA

ATTA had its origins, like ATAX, in UNSW’s CLE program. Late in 1988 someone, I have forgotten whether it was Yuri or Pat, had the idea of running some CLE for law teachers at the time they would (hopefully) be preparing their courses for the New Year. Why not have a two day event in late January, one day for the academics to update each other and the second day for the profession to get some state of the art stuff from the academics (and pay for the conference)? I have forgotten exactly how many people turned up to our not very salubrious (but cheap) venue at UNSW, but it was a financial success. We repeated the idea in 1990, and in 1991 the University of Southern Queensland took over and organised the smallest tax teacher’s conference ever (about 30 people) but one of the most enjoyable I have attended. By now the CLE idea had taken a back seat and the conference became an academic one. By the time of the Christchurch conference, 1993, a formal organisation seemed appropriate and ATTA was formed shortly afterwards. At the Perth conference in 1995 it became evident to me that this organisation had a real purpose, particularly as a way young academics could gain a sympathetic audience for their work.

4. COURSE CONTENT

In the early 1970s there was not much difficulty about what to cover, given the extent of the income tax law at the time. You might have views about how it should be taught and the context in which it should be taught, but the subject matter itself could be contained in a normal year-long university course. Now year-long courses have all but vanished and many degree courses have room if at all only for one semester of tax. At the same time the law has expanded exponentially. Even after the 2006 culling process there will still be 6000 pages of legislation, plus all the rulings (unheard of in 1972) and of course the ever-growing volume of case law, probably mostly less relevant than everybody thinks, but still there. Even if you think as I do that there is no excuse for this level of complexity, there is still the problem of teaching your way through it. One side-effect is that a teacher must have a very clear idea about what they are trying to achieve (that is, apart from the receipt of their salary). I no longer believe it is possible to expect students with no prior tax background to solve difficult tax questions, though some can. After a 52 hour introductory tax course, it is enough that students recognise a tax issue when they see it. It is a fatal mistake to expect students to master detailed technical rules when they have no overall appreciation of the tax system. This insistence on the overview does not come from distaste for detail but from the insight that without it, the entire analysis might be a waste of time. I suppose the aim is to reduce the risk of a professional negligence action though it has to be said that in tax no-one is fully competent and even the best can be sued. My secondary aim is to destroy student’s fear of the ATO - how to deal with bureaucracy is an essential feature of any worthwhile tax course.
Looking back, the rot started with the legislation introduced as a result of the tax summit. The irony is that these changes were sorely needed and on any test improved the Australian tax system. But the draftspersons drafted them in the most obscure and prolix style imaginable, allegedly because they were afraid of hostile interpretation by the High Court. Perhaps the worst example was the Fringe Benefits Tax legislation. The drafters started out by defining “fringe benefit” in FBTAA s 136(1) as any benefit with the remotest connection to employment and then excluding all the benefits it was not intended to tax. Thus for example it was necessary have an exclusion in s 47(4) FBTAA for toilets and water fountains on the employer’s property. The New Zealand approach, on the other hand was to focus on big-ticket items like cars and housing, and to ignore minor benefits. Because of the complexity a bureaucratic empire had to be created deal with it, but the equity of our tax system was only marginally improved, if at all.

The strange part about this resort to complexity as an anti-avoidance weapon was that even by the late 1970s, and certainly by the mid-1980s the Courts had moved away from what might be described as over-solicitude for those who indulged in aggressive tax planning. It is true and well documented⁴ that Sir Garfield Barwick took a pro-taxpayer stance in several leading cases but even in the High Court some of his brethren did not feel the same way. The coup de grace to the former general anti-avoidance provision s 260 was given not by Sir Garfield but by Mason J in Cridland and Mullens⁵ who clearly intended to nudge parliament into replacing it. Indeed this occurred. The record of the Federal Court in tax cases since its foundation in 1977 was one of extreme moderation. Yet the draftspersons after the tax summit were either not aware of the Court’s change of attitudes or else chose to ignore it.

There was of course a concerted effort to resist complexity in the tax law improvement program of the early to mid 90s (“TLIP”), which resulted in the 1997 Act. Unfortunately the project was adjourned sine die when only half-completed, but some of the parts that did become operational at least showed what was possible. Thus the TLIP capital gains tax provisions were actually an improvement on the original 1985 CGT provisions which were cobbled up largely out of UK legislation. The underlying ideas of the TLIP rewrite were fundamentally sound although some traditionalists were annoyed by quirks such as the taxpayer being referred to in the second person. I had a very interesting experience travelling around the country giving a series of seminars on the 1997 Act, meeting for the first time the consumers of tax law en masse. It was then I discovered how few practitioners actually read the Act. The 2006 spring-clean has eliminated large tracts of the 1936 Act, placing more of the still-relevant provisions in the 1997 Act, so at least the law will be in one place than two.

As a teacher I think one of my functions is to get my students to actually read bits of the statute, but this is not easy. It is a sobering fact that most practitioners rely on secondary sources such as Master Tax Guide, and only a few barristers and other specialists actually look at the law itself. The tax office has it easy here, because no matter how recondite or obscure the law there will be someone in the office who

⁵ Mullens v FCT 76 ATC 4288; Cridland v FCT 77 ATC 4538
knows it – it’s just a question of finding them. The cost of finding out the law in the private sector is often prohibitive and more and more taxpayers don’t bother. The rulings system does ameliorate this but only to some extent. The concept of “reasonably arguable position” has not proved robust enough to protect taxpayers with honest intentions.

5. THE 800 POUND GORILLA – THE ATO

There is today probably almost nobody working in the ATO who was there in 1972 (the present Commissioner started in 1977) and yet it is recognisable the same organisation. I never met Sir Edward Cain, the then Commissioner (he did not often visit Brisbane) though I have met all his successors, Messrs O’Reilly, Boucher, Carmody and D’Ascenzo. All were or are career tax officials who have had no significant work experience elsewhere in the Government, let alone in the private sector, before becoming Commissioner. In fact most of the senior management of the ATO have not worked elsewhere. Hence it is an inward-looking organisation and slow to change, despite the major changes in the tax system over the past 30 years. In 1972 the ATO had about 15,000 employees, but it operated rather differently – a huge effort was put into the assessment process whereby thousands of clerical staff second guessed taxpayers (or more likely their tax agents) about what was deductible (very little attention was paid to extra income). For some years, numbers declined, down to 13,000 in 1993 but the average skill level rose. There was a big increase in numbers to deal with the GST and the ATO currently employs some 21,000. To an outsider, what all these people do in the age of self-assessment is something of a mystery – in the United States the IRS employs about 115,000 and collects 20 times as much. Audit activity, except that directed towards the very wealthy, seems to have dropped off. My own suspicion is that a very large number of quite well qualified people spend a lot of their time writing memos to each other. A couple of years ago the tax policy function was transferred to Treasury so we can only assume these are about operational matters.

One enormous difference between now and 30 years ago in tax as well as everywhere else is the part played by computers. There were computers in the tax office in 1972, of the original mainframe variety, but they were used to produce accounting information and notices of assessment. The ATO remained a paper-based organisation for many years. An ambitious attempt to cross-match dividends and interest with taxpayers’ returns took far longer than anticipated because the information was seldom in a format that matched the ATOs’. As late as the mid-1980s tax file numbers missing from returns were looked for on microfiche. Eventually “Tax Pack” and then electronic lodgement came, but paradoxically the percentage of returns lodged by tax agents increased. Given the complexity of even individual taxation E-Tax really is an impressive achievement and in theory almost anyone should be able to complete their return through it in a couple of hours. The only downside I can see is that because it is so good at dealing with complexity it does not provide an incentive to simplify things – for example, doing away with returns for the majority of taxpayers.

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6 For a partial history see Burgess “Contagious trends in Tax Administration” (1991) 21 VUWLR 59
Another huge change has been in the ATOs’ attitude towards information. In the 1970s internal assessing manuals and rulings were secret, though many a former ATO employee now practising as a tax agent had a set on their desk. In 1982 the Commonwealth introduced Freedom of Information legislation\(^8\) which has a presumption in favour of access to government information. The ATO were initially reluctant to comply – I recall putting in a request under FOI in 1984 and getting back only the taxpayer’s return with all the assessor’s notes carefully whited out, on the grounds that they were all either internal working documents or subject to legal professional privilege. Sometime in the later 1980s a more sensible approach developed, and the publication of internal manuals and guidelines became not only routine, but officially desirable. With the advent of the internet (only in the last 10 years) the utility of this policy became evident. It is now possible to quickly determine the ATO’s policy and practice on almost any issue by having recourse to the same database the ATO has itself. Coupled with this the ATO has made a concerted effort to meet all reasonable requests for rulings. In the Public Rulings area I wonder that the ATO has been over-productive – rulings tend to be treated by practitioners as legislation, and some are not well-considered. However wrong rulings are fairly easily changed, at least compared to legislation. I have to point out that the frequent ignoring by the ATO of Court decisions contrary to a Ruling, or just contrary to the ATO’s official view does not its reputation any good.

The role played by tax agents has also evolved over the years and as noted above a greater percentage of individuals lodge through them, despite “Tax Pack” and electronic lodgement. I am sure this is connected to the remarkable increase in work related deductions which have risen faster that employment income almost continuously over the past 20 years. When the substantiation provisions for travel and employment-related expenses were first introduced as part of the tax summit changes I thought that they were a cynical ploy to reduce claims for quite genuine expenses, though I remember a well known practitioner of the period pointing out that the record-keeping requirements were no more onerous than those for the Commonwealth car pool. What seems to have happened is that the public learned to keep the required records and then handed them over to their tax agents to do the best he or she could with them. Claims rose accordingly. I have no hard data, but the ATO seems to have all but given up on work-related expenses – there are 10-20,000 audits a year, miniscule beside the claims of 7 million taxpayers.

6. THE STATUTORY JUGGERNAUT

I have not said much about the changes in the law over the period, except to note the huge expansion in legislation. Strangely enough the substantive law has proved surprisingly stable. We still have something called “income according to ordinary concepts” though it was called “gross income” in ITAA 1936. Certain other amounts are deemed to be income (“statutory income”). From this “assessable income” you take away the costs of producing it (“deductions”) and certain other expenses. What you have left is your taxable income on which tax is calculated, though perhaps reducible by a rebate or tax offset.

\(^8\) Freedom of Information Act 1982 (Com)
If this underlying framework has remained the same, then why the huge increase in legislation? Much of the tax legislation is a series of tombstones marking the site of long-dead tax schemes. These are legion; most of the trust provisions, pre-payment provisions, company loss provisions. Some of it represents attempts by the tax administration to bring order to a particular problem area, though usually at the cost of simplicity – the debt/equity provisions\(^9\), the personal service provisions\(^10\) and the non-commercial loss provisions\(^11\) for example. Several areas stand out; the CFC and FIF\(^12\) rules, superannuation, and company taxation. All these provisions are inordinately complicated even though the ideas behind them are for the most part clear and coherent. The company “imputation” system works simply and effectively when the company and its shareholders are all Australian residents; complications do not occur until foreign resident shareholders are involved. Since 1985 Australia has become a much more favoured investment site, but our imputation system is based on the resident model.

There is one piece of legislation which though not particularly complicated, has caused more uncertainty and controversy at least in professional circles than any other, and that is the general anti-avoidance rule, or GAAR. Those with longer memories will recall that at the start of this period the Commissioner had made some modest headway with s260 of the 1936 Act against tax schemes in the courts, particularly in Newton and Peate\(^13\) (both Privy Council decisions) but as Ian Spry put it in 1977: “The course of recent High Court authorities has involved a continued reduction in the operation of s 260”\(^14\). In fact Mullens, Slutzkin and Cridland\(^15\) pretty well put s 260 of ITAA 1936 out of business. It was defective as it lacked a reconstruction provision, but the High Court ensured it scarcely worked at all.

In 1981 we got a new GAAR, Part IVA of ITAA 1936. Both sides in the eternal war between taxpayer and revenue went quiet for a while, but in 1989 the first Part IVA case came before a tribunal\(^16\). The Commissioner won this case (involving the tax planning of employment income) and several similar ones, and then suffered a technical knock-out rather than a total defeat (Peabody\(^17\)), a big win in Spotless\(^18\), and

\(^9\) ITAA 1997 Div 974  
\(^10\) ITAA 1997 Divs 84-87  
\(^11\) ITAA 1997 Div 35  
\(^12\) Controlled Foreign Companies provisions in Part X ITAA 1936; Foreign Investment Fund rules in Part XI ITAA 1936  
\(^13\) Newton v FCT (1958) 98 CLR 1 (PC) (the origin of the “predication” test); Peate v FCT (1964) 111 CLR 443 (H Ct), (1966) 116 CLR 38.  
\(^14\) ICF Spry “Section 260 of the Income Tax Assessment Act” 2nd ed 35  
\(^15\) In Mullens v FCT 76 ATC 4288 a majority of the High Court found the s 260 did not apply to a transaction designed to exploit a particular concession for subscriptions to a petroleum exploration company because, according to Sir Garfield Barwick, no “antecedent transaction” was being replaced. In Slutzkin v FCT 77 ATC 4076 the disposal of shares via a dividend stripping operation was held not to produce any income to the vendors because they were entitled to choose the way they disposed of their capital assets. And in Cridland v FCT 77 ATC 4538 a scheme whereby university students could become partners in a primary production business and thus take advantage of the averaging provisions was found to be a valid exercise of a choice allowed under the Act.  
\(^16\) Case W 58, 89 ATC 524, heard by the President of the AAT, Hartigan J  
\(^17\) In Peabody v FCT 94 ATC 4663, the High Court, disagreeing with the Federal Court found there was a Part IVA scheme even though it was part only of a larger commercial transaction. However both Courts agreed that in the circumstances it could not said there was a tax benefit to the taxpayer as a result.
another win in Hart\textsuperscript{19}. He was successful in several Federal Court cases as well, the one or two losses being explained by the view taken by courts of particular facts. As of 2006 the Commissioner has a robust anti-avoidance provision applicable to a number of likely sources of abuse. To taxpayers though it is a source of great uncertainty – both the courts and the Commissioner have been invested with a great deal of discretion and despite published reasons and guidelines, predicting what the Commissioner will do is on a par with long range weather forecasting.

I ask myself the question, are we any better off now than in 1972? In some ways, yes. Part IVA is a lengthy provision but has some underlying sense, and incorporates the necessary reconstruction provision. The key factors are in isolating and identifying the “scheme” which has the dominant purpose of creating a tax benefit. It does however suffer from the indeterminacy of s 260 because the relevant “scheme” is something the courts and commissioner detect after the fact, as it were. If I were starting again with drafting a tax code I would leave Part IVA out; the UK and US systems have survived without them\textsuperscript{20}. Outrageous tax schemes are best pursued by employing existing specific provisions which are these days likely to be objectively construed by the courts or retrospective legislation\textsuperscript{21} as was done in the case of the bottom of the harbour schemes in the 1980s.

7. THE JUDGES DO THEIR BIT

As well as legislation we tax teachers have to concern ourselves with the case law as well. I mentioned earlier that we might think this of lesser importance, but as you know many important principles are embodied in it. Student interest in cases is easier to foster than in legislation, and in the reasonably small classes I have been lucky enough to have in most years it is easy to get discussion going, at least when a few of them have read the cases set.

The rather pro-taxpayer approach one saw in the courts in the 1970s has faded away, but the complexity of the task faced by the courts has made prediction of the results of litigation very difficult. Nevertheless there have been some landmark decisions during the period which have given more shape to our law. As mentioned I started out in practice involved in the Europa\textsuperscript{22} litigation case which ended in a defeat for the New Zealand revenue in 1976. The “legal rights” test in that last decision did not endure as a basis for applying the general deduction section; it was overcome by the Federal Court’s “purposive” test in Phillips\textsuperscript{23}, subsequently endorsed by the High Court in

\textsuperscript{18} In Spotless v FCT 96 ATC 5201 a straightforward investment of funds in an overseas bank account was found to be caught by Part IVA.

\textsuperscript{19} In Hart v FCT, a minor saving in tax arising from the particular terms of a real estate loan was found the be a scheme in terms of Part IVA.

\textsuperscript{20} For the current British approach see IRC v Scottish Provident Society [2004] UKHL 52 (avoidance found) and Barclay’s Merchant Finance v Mawson [2004] UKHL 52. Both were “tax effective” schemes undertaken by large financial institutions.

\textsuperscript{21} See (the now repealed) Taxation (Unpaid Company Tax) Assessment Act 1982 which took effect from

\textsuperscript{22} CIR v Europa Oil (NZ) Ltd 70 ATC 6012; Europa Oil (NZ) Ltd v CIR 76 ATC 6001. It was the latter decision, reputedly drafted by Sir Garfield Barwick, which set up the impossibly narrow “legal rights” test for determining when a deduction would be disallowed because it purchased some collateral benefit not productive of income. See also FCT v South Australian Battery Makers 78 ATC 4412.

\textsuperscript{23} FCT v Phillips 78 ATC 4361 (the accountants’ service trust case)
Fletcher\textsuperscript{24}, The avoidance cases – Curran\textsuperscript{25}, Westraders\textsuperscript{26} were important for negative reasons, for they forced parliament to do something about the GAAR, although each scheme was also the subject of specific legislation. FCT v Everett\textsuperscript{27}, where the Court upheld the assignment of a share in partnership income by a solicitor to his wife was another high point in purblind interpretation. Anyone who thinks otherwise is invited to read the NZ case of Hadlee\textsuperscript{28} to the opposite effect.

By the late 1970s the Federal Court at least (despite its majority decision in Everett) was pursuing a more moderate line, Phillips v FCT being an example. But one of the truly significant cases of the period was FCT v Whitford’s Beach where the High Court acted constructively and creatively (though not quite in unison), to dispose of many of the complications which had grown up over 50 years in the taxation of isolated property transactions. This good work was not to last long, for the CGT came along three years later, but the courts work was not in vain. In 1987, relying on Whitford’s Beach but in less forthright terms the court took a broad approach to the characterisation of isolated transactions falling outside the ordinary scope of business, at from that moment, despite some deviation, the fate of such transactions was sealed, as we finally saw in Montgomery.

The “bottom of the harbour” scandal, though it involved evasion rather that avoidance, had its effect on judicial attitudes at it illustrated how easy it was to slip into illegality in this area and the dangers of turning a blind eye to completely artificial tax planning. It also saw the use of retrospective legislation to recover lost revenue – a rare event, if one ignores the “legislation by press release phenomenon. Even staunch defenders of the Rule of Law” found it hard to oppose retrospectivity in this case. The associated amendments to the Commonwealth criminal law (which were probably unnecessary) were not, however, retrospective.

The High Court’s first major encounter with the new capital gains provisions in Hepples\textsuperscript{29} was not encouraging, and forced remedial amendments, but this proved only to be a glitch. In the 1990s the court interpreted Part IVA in several cases in a broad fashion – it could not be accused of making things more difficult for the Commissioner, The number of appeals which went to the High Court tailed off, and some of the cases which did get there were not of general significance (FCT v Stone\textsuperscript{30})

\textsuperscript{24}Fletcher v FCT 91 ATC 4950. A deduction was denied for interest on borrowings to purchase of an annuity in circumstances where it was likely that no income would ever be generated.

\textsuperscript{25}Curran v FCT 74 ATC 4296. The artificial deeming of a “cost” to bonus shares generated a tax loss. The effect of this decision was overcome by legislation (s 6BA ITAA 1936 and the High Court subsequently reversed it in John v FCT 89 ATC 4101.

\textsuperscript{26}FCT v Westraders 80 ATC 4357, where adroit use was made of the ITAA 1936 s 36A(2) option to transfer trading stock to a new partnership in such a way as to generate a tax loss.

\textsuperscript{27}FCT v Everett 80 ATC 4076

\textsuperscript{28}Hadlee v CIR (1991) 13 NZTC 8116 (CA); [1993] AC 524 (PC). The judgment of Richardson J in particular embraces the policy considerations of permitting this type of tax palming.

\textsuperscript{29}Hepples v FCT 92 ATC 4013. In this case, generally regarded as a low point in the interpretation of tax law by the High Court, a majority of judges were in favour of subjecting a restrictive covenant payment to the CGT but a majority could not agree on which provision applied. The provisions in question, ITAA 1936 ss 160M(6) and (7), were subsequently amended.

\textsuperscript{30}FCT v Stone 2005 ATC 4234, where the Court found itself adjudicating on a simple question of fact, whether or not the taxpayer was a professional or amateur sports person. The transcript of argument on the special leave application suggests the Court thought it might as well take the case since we Australians take our sport seriously.
for example). The Citylink\textsuperscript{31} decision in 2006 was interesting since some very sophisticated tax planning survived an attack on technical grounds (the timing of an expense deduction) and the application of Part IVA. It also seems that the Taxation of Financial Arrangements provisions, which presently exist as an exposure draft (proposed Division 230) may not alter the outcome of similar cases despite its reliance on a “coherent principles” approach. In fact the revenue v capital question still haunts the(2,22),(999,989)

Some cases demonstrate anomalies that, mysteriously, remain uncorrected. For example in at least two instances Harmer\textsuperscript{33} and Walsh Bay commercial organisations have for technical reasons (lack of “present entitlement”) been taxed on trust income at the top individual rate instead of the company rate even though there was no tax avoidance purpose in either case. In the case of annual leave and long service payments to employees which are anomalously allowed as deductions only when paid\textsuperscript{34} the legislature has enshrined the anomaly by legislation (s 26-10) only because to treat it as a normal accrued expense would cost a significant once-only amount. Another strange anomaly now enshrined by legislation is the treatment of the expenses of travelling between two different jobs. After Payne\textsuperscript{35}, a piece of judicial legislation by the High Court, ITAA 97 s 25-100 was added to allow a deduction for such travel, provided the taxpayer did not call at home between the two jobs. It would have made more sense to have adopted the High Courts view that all such travel was private, but this would have flown in the face of many years practice to the contrary.

Well, if we had a perfect tax system it would be rather dull, and students seem to find the area of personal deductions interesting, so that is some consolation.

8. FACING THE FUTURE

The most significant event in tax law and policy in the last 30 years, was the 1985 Tax Summit and its aftermath. You may remember that New Zealand was having an upheaval of its own at that time – Rogernomics. Roger Douglas’ modus operandi, as he later admitted, was to create a “big bang” – to put a large number of changes up at once to make it more difficult for opponents to pick off the bits they did not like. The idea was to get the lot passed before the critics pounced – easier in New Zealand given its unicameral parliament. Douglas largely succeeded though his political career ended precipitately. The Hawke-Keating government also put a lot of reform on the table at once but the game plan was for people to talk themselves into a consensus. Strangely enough this strategy worked as well – except that the broad-based

\textsuperscript{31}[2006] HCA 35

\textsuperscript{32}Eastern Nitrogen 2001 ATC 4164. An admittedly tax-driven finance scheme was unaffected by Part IVA on the basis that the “ruling, prevailing or most influential purpose” was to obtain finance, not to avoid tax.

\textsuperscript{33}Harmer v FCT (1991) 173 CLR 264; Walsh Bay Developments Ltd v FCT 95 ATC 4378. It is not clear in situations such as these, where a trustee has paid tax under ITAA s 99A on the basis that no-one is presently entitled to the trust income, whether a company subsequently receiving such income, would be able to pass on to shareholders credit for the tax paid.

\textsuperscript{34}FCT v James Flood Pty Ltd (1953) 52 CLR 28; Nilsen Development Laboratories Pty Ltd 81 ATC 4031.

\textsuperscript{35}FCT v Payne 2001 ATC 4027.
consumption tax was rejected. The capital gains tax, a much more significant reform, got little discussion whereas two minor issues, the deductibility of entertainment expenses and the fringe benefits tax got inordinate amounts of air time.

What seems to follow from this is that if you bring out a reform proposal which is going to affect some people adversely, as most worthwhile proposals will, bringing it out by itself maximises the chances of it failing. Or, to put it another way, a sure way of disposing of it is to refer it to that graveyard of reform proposals, the Board of Taxation.

One almost unnoticed effect of the 1985 summit was to alter the way in which tax was discussed at the political level in Australia. Politicians began to conduct debate on tax policy in economic rather than class terms. “Base-broadening” became a fashionable term, as did the tax mix. Even the electorate as a whole seemed to understand things like “bracket creep”. When John Howard, after renouncing GST “forever” in 1996, won an election on a promise to introduce it in 1999, the electorate showed a degree of sophistication it had not shown before. The GST eliminated an unfair and partial sales tax with a much broader and fairer consumption tax.

There are some possible tax reforms that are peculiarly in the government’s ambit. The present government, given its continuing surpluses, is quite likely to cut the top rate or raise the upper bracket thresholds in the 2007 budget. However we are not likely to see the top rate drop to 30%, which is fiscally feasible but not electorally saleable. It would be a remarkable change if it did occur, and we could all burn our copies of ITAA 1936 Division 7A (the impact of which is to be modified, it was recently announced).36

If one was to consider reform in terms of simplicity and equity, instead of political feasibility, raising the tax threshold would make a lot of sense. The current level, $6,000 was set over 10 years ago and it could easily be raised to $20,000. A liberal leader like Malcolm Turnbull might do something like that, but not the present treasurer.

Even after 10 years the present government is not incapable of the occasional bold move. The abolition of income tax on superannuation pensions announced in the 2006 Budget which was associated with simplifying the tax treatment of superannuation was one such move. Given the increasing impact of globalisation we will see our international tax arrangements mutate from their present nationalistic form to a form more consistent with international norms. Already this year we have seen special arrangements enacted for “temporary” residents to facilitate skilled labour migration and (in the pipeline still) a reduction of the ambit of CGT as it affects non-residents. The continued existence of our company tax imputation system must also be in doubt although it is not obvious what might replace it. Going back to the classical system would be a retrograde step.

It has also been a surprise to see the relative acceptance of GST and apart from some particular issues (the margin scheme, residential property) the relative lack of disputes. The most likely area of controversy here is a rise in the rate, though the

36 Australian Financial Review, 7 December 2006
biggest countervailing forces here are the state electoral cycles. If there is a rise in the 
rate the Commonwealth will make sure the States get the blame for it.

One should of course consider the policies of the opposition, but Labor seems to have 
little to contribute to the policy debate. The current ALP web site does not have a tax 
policy and Labor’s only real policy for the 2004 election was a proposal to fiddle 
around with Family Tax Benefits A and B to make them a little less favourable to 
high income earners. One would expect an ALP government to reduce tax on lower 
income earners, although while in power from 1983 to 1996 the gap between lower 
and higher income earners grew markedly.

Where may things be headed? I have to admit not to have a very good track record in 
the field of fiscal prediction. I did predict the capital gains tax, and the GST. I also 
managed to predict that the CFC rules were going to work quite well and the FIF rules 
would not. I have also learned that judges do indeed read the newspapers and the 
uproar over some of the late 1970s and early 1980s decisions in tax scheme cases had 
some effect on judicial attitudes. I was wrong about work-related expenses being 
reduced, but it is still possible the government might heed the Treasury’s advice and 
eliminate them. My hope that someone as knowledgeable in tax as Hill J will be 
appointed to the High Court has yet to occur\(^{37}\), although of course Gleeson CJ is 
credited with drafting Part IVA (with Hill J). I was surprised with the difficulty the 
present government had selling various aspects of the Ralph report to its own back 
bench (for example entity taxation), but I suppose I shouldn’t have been. It was in 
reality a kind of Treasury wish-list and it was to be expected that much of it would 
meet political resistance.

In the era of globalisation national governments are constrained from varying widely 
from international “norms” vague though those norms may be. They can beat up on 
their own populations, or at least on the less mobile elements, but their business tax 
options are limited indeed. The current round of treaty negotiations are proof of this; 
we are forced to accept lower withholding rates on royalties and non-portfolio 
dividends even in treaties like Australia–Norway because, under US pressure, that has 
become the international norm. As a source country we will not do well out of a shift 
to residence based taxation. Legislation, allegedly in line with international norms, to 
reduce capital gains taxation on non-residents, has passed the Senate after 
considerable opposition and our imputation system may go because of international 
pressure.

Taxation as a means of protecting the environment has been around for some time, 
but community concern with the effects of global warming has heightened its 
importance. My crystal ball tells me environmental taxes are going to become 
important. At present they are a tax policy question – we have no carbon tax, or 
mechanism for carbon trading, but as the details emerge the tax profession will 
become involved. Perhaps there is nothing very new here – Adam Smith’s 230 year 
old canons of taxation will apply to carbon taxes as well, but I hope that some of the 
lessons of 200 years of income taxation will be absorbed. Good taxes should be 
eQUITABLE, neutral, predictable and administratively efficient.

\(^{37}\) In the early 1970s the High Court had original jurisdiction in cases and perhaps 25% of its time was spent on tax cases. Almost all the then members of the court had prior professional experience in tax. This of course did not mean that the Court was impartial in tax matters, as the 1970s demonstrated.
Equity is not difficult to achieve if the tax base is as wide as possible and we create as few exemptions or special deals as possible. Efficiency can be obtained by having fewer rather than more taxpayers and this would mean that carbon taxes will need to be paid by the producers rather than consumers. The market will, we hope, pass on the tax burden to the consumer. Full neutrality of course cannot be obtained because the purpose of the tax is to reduce carbon dioxide production on the planet, but partial neutrality can be achieved by ensuring that the only distortion caused to the market is to increase the price of carbon emissions without discriminating against or favouring any particular emitter. It was reported recently that the British government is considering doubling a charge called air passenger duty on airline tickets. The proposed charge is 10 pounds for a short-haul flight and 20 pounds for a long-haul one in economy class. For business class passengers a charge of 40 pounds is contemplated. I assume they pay more because they take up more room in the plane.

I am no expert in this area; I mention it only as an example of things to come. Globalisation may help us to save the planet or it may speed its destruction, but taxes of this nature are likely to take their place in an international context. To be really effective a global regime is required. Those already skilled in international tax would seem to have a head start here.

38 Sydney Morning Herald 7 December 2006, 9.