

APPLICATIONS FOR SPECIAL LEAVE IN TAX MATTERS

Tax Bar Association Annual Dinner  
29 October 2015  
Justice Geoffrey Nettle, High Court of Australia

Your Honours, ladies and gentlemen, in light of the High Court's decision in *Ausnet Transmission Group Pty Ltd v Federal Commissioner of Taxation*<sup>1</sup>, it will not have escaped the attention of some of you that there is a degree of irony in my addressing a gathering of tax experts.

One imagines that the organisers of this dinner could more profitably have selected a speaker from among my brethren who comprised the majority in that case, or alternatively asked my colleague Justice Gordon who was upheld on appeal. Leastways, had they done so, you would have had a better chance of learning something worth knowing about tax law than in what you will hear from me.

I should also disclose to you that the last time I attended a Tax Bar Association dinner was nigh on 20 years ago and, as I recall, it was possibly the first tax bar dinner to be convened. It was organised by Alex Richards QC, in the Willows Restaurant on St Kilda Road, and was essentially for the purpose of marking the

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<sup>1</sup> (2015) 89 ALJR 707; 322 ALR 385; [2015] HCA 25.

retirement of the late Justice Ken Jenkinson of the Federal Court of Australia.

As some of you will recall, Justice Jenkinson was a fine judge and tax lawyer with an acute appreciation of the social importance of revenue law. He had an apparently encyclopaedic knowledge of the provisions and case law and an infectious enthusiasm for their correct application. Consequently, he was admired and respected.

Of course, that is quite some time ago and you might be wondering what relevance it has for today. I mention it now, however, by way of introduction to the first of two questions on which I should like to reflect upon this evening: what is it for people like Justice Jenkinson, and for us here this evening, that makes tax law attractive?

Presumably, none of us would answer that conundrum in exactly the same way. Each of us is the product of our own life experiences, and our perceptions are forged accordingly. But, even so, it occurs to me that there may be some considerations on which we are likely to agree.

First, as Chief Justice French noted in a speech entitled "Tax and the Constitution" which he delivered in Canberra a couple of

years ago<sup>2</sup>, the practice of tax law necessitates knowledge and application of a broad sweep of the general law – of contract, torts, equity, trusts, corporations, partnership, administrative law and constitutional law<sup>3</sup> and, dare I say it, also of crime. Mastering all that is intellectually challenging and therefore it is interesting.

Secondly, when it comes to aspects of tax law with which barristers are principally concerned, tax presents (in some ways like crime) as a contest between the state and the individual (or, just as often, between the state and an individual corporation) with the not unexciting spectre of the state's vast resources and capacity pitted against the more fleet of foot albeit relatively under-resourced response of the individual or corporate taxpayer. It has a David and Goliath quality about it, in the secular sense, which makes it intriguing.

Thirdly (and again not unlike crime), in the majority of cases, tax litigation is an essentially facts-based exercise; much dependent on what people have done, or not done, or intended to achieve or supposedly not contemplated, that, at least at first instance, it tends to be a talking-head, hard-swearing jurisdiction in which the forensic

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2 Chief Justice French, "Tax and the Constitution", speech delivered at the Tax Institute 27th National Convention, Canberra, 14 March 2012.

3 See, eg, *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 164 [55]; [2008] HCA 32.

skills of trial counsel are at a premium, and the demands upon the solicitors and accountants who support them are accentuated; with consequent opportunity for very considerable satisfaction in one's contribution to the outcome.

Fourthly, and now getting closer to what Justice Hayne might have described, in another context, as the "killing ground", tax is about money – and not infrequently a lot of money – and, for many of us, the vulgarity of money, especially a lot of it, is interesting. After all, we live in a society which, to considerable extent, measures the success of its members by reference to their money.

Fifthly, and at a related but more conceptually elevated level of discourse, as Professor Graeme Cooper of the University of Sydney has observed<sup>4</sup>, taxation has a constitutional function of allocating the burden of public spending among society in a manner which, to a greater or lesser extent, determines the distribution of wealth between us. And, since human beings are social animals, who spend large parts of their lives comparing their plight to that of their neighbours, the distribution of wealth between us tends to be of even more interest than the absolute amounts of money which each of us derives. Depending on one's point of view, tax is the principal

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4 Cooper, "The Political Economy of Taxation and the Roles of the High Court", (1993) 23 *Western Australian Law Review* 101 at 102.

constituent of what some conceive of as aspirational politics and others call the politics of envy.

But yet; you may say, if all that is so, how does it come about that it is only some of us – we, the tax barristers, tax solicitors and tax accountants – who are interested in tax, while our colleagues in our respective professions by and large are not. What is queer about us that makes that difference?

Once again, views are likely to differ but, contrary to what I conceive to be the popular point of view, I repudiate the notion that our interest in tax is necessarily a manifestation of a DSM-5 personality disorder. The broad range of people here this evening renders that unlikely.

I am also disinclined to think that an interest in tax is confined to those of exceptional academic ability. When I studied tax as an undergraduate, there was an honours class and a pass class and it used to be announced at the outset that unless one had obtained so many firsts or H2A's in various subjects which were nominated, but which I cannot now recall, one was wasting one's time and, more importantly, the lecturer's time in bothering to attend the honours class.

Truth to tell, however, although tax law is not overly simple – and not infrequently may prove more conceptually demanding than,

say, questions of what amounts to reasonable care or what is in the best interests of the child – tax law is no more intellectually demanding than commercial law, equity, intellectual property, crime, financial accounting, insolvency or auditing.

And, contrary also to popular belief, I doubt that one's interest in tax has much to do with the hope of making a great deal of money out of the process. That might have been the motivation of some of the promoters of the more questionable tax avoidance schemes of the 1970's, and perhaps even later. But, by and large, those days are gone and, even when they were upon us, it is possible that the thrill was more often in the chase than the capture of the quarry.

If then we put aside the possibilities of personality disorder, academic ascendancy and the hope of making lots of money, and if, as I do, we discount the forensic aspects of tax litigation as an explanation of why we are interested in tax when others are not – on the basis that, although unique, the forensic aspects of tax have much in common with the forensic aspects other fact-specific jurisdictions – we are left with the societal aspects of tax as the most likely explanation of our fascination with the subject. And, as it appears, history bears that out.

During the first half of the 20th century, a good deal of the academic interest in tax was in its capacity for social engineering.

That first assumed significance during World War I, with the introduction of a Commonwealth income tax to sustain the war effort on a scale unprecedented in our nation's then short history<sup>5</sup>.

Then, between the wars, the focus of academic and political debate turned to the harmonisation of State and federal taxation, and the allocation of federal grants between them. Remarkably, at one point in that process the Commonwealth even offered to cease levying income tax in return for being relieved of the responsibility of making grants to the States<sup>6</sup>.

War, however, changes things majorly, and it was in the midst of World War II, in 1942, that we first came to something approximating our present system with the introduction of Commonwealth uniform tax arrangements that conditioned State grants on the cessation of State income tax. From then on, of course, the die was effectively cast<sup>7</sup>.

By the end of World War II, taxation revenue had grown to more than 22 per cent of GDP, largely as a result of the need to fund

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5 Reinhardt and Steel, "A brief history of Australia's tax system" in Commonwealth of Australia, *Economic Roundup*, (2006) at 7.

6 Reinhardt and Steel, "A brief history of Australia's tax system" in Commonwealth of Australia, *Economic Roundup*, (2006) at 7.

7 Reinhardt and Steel, "A brief history of Australia's tax system" in Commonwealth of Australia, *Economic Roundup*, (2006) at 7-8.

the war effort, and to pay for newly introduced social security programmes beginning with the introduction of the widow's pension in 1942 and the inception of unemployment benefits in 1944<sup>8</sup>.

After the war, the percentage of GDP paid in tax at first declined, but less than a generation later it was back at war time levels and it climbed still further as a result of the election of the Whitlam government in 1972 and the increase in social welfare spending which was undertaken by that administration<sup>9</sup>.

Now, some sections of society benefited greatly from that increased incidence of taxation and the social welfare programmes which it funded; and it may be assumed that they were in favour of it. But other sections of society were necessarily relative losers; and, even if they agreed with the aims of social welfare policy, many were not overly enamoured of making do with less in the interests of advancing others.

As a result, during the second half of the twentieth century, there arose in this country a new phenomenon of a relatively large number of people taking active steps to minimise their exposure to taxation; and, just as significantly, at least for a couple of decades,

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8 Reinhardt and Steel, "A brief history of Australia's tax system" in Commonwealth of Australia, *Economic Roundup*, (2006) at 3.

9 Reinhardt and Steel, "A brief history of Australia's tax system" in Commonwealth of Australia, *Economic Roundup*, (2006) at 3.

of the courts in this country, like the courts in England, being strongly inclined to support them in that endeavour.

In an approach which Lord Devlin later castigated as equivalent to a Victorian bill of rights favouring the liberty of the individual, the freedom of contract and the sacredness of private property, the courts took upon themselves the role, as they saw it, of protecting the citizen from the excesses of government seizure of their money<sup>10</sup>.

In England, those developments were most famously epitomised in Lord Tomlin's enunciation in 1936, in *Inland Revenue Commissioners v Duke of Westminster*<sup>11</sup>, of the idea that every man is entitled, if he can, "to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be"; and if he succeeds in ordering them so as to secure that result, then, "however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax".

In this country, that doctrine arguably reached its apotheosis, a little over 40 years later, during the tax avoidance industry years of

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<sup>10</sup> Devlin, *The Judge*, (1979) at 15; see also Cooper, "The Political Economy of Taxation and the Roles of the High Court", (1993) 23 *Western Australian Law Review* 101 at 103.

<sup>11</sup> [1936] AC 1 at 19.

the Barwick court, culminating in *Federal Commissioner of Taxation v Westradars Pty Ltd*<sup>12</sup>.

Ultimately, though, as these things tend to do, the pendulum swung back the other way. Following the 1973 oil price shock and the Whitlam years, the social and political environment of the late 1970's proved to be distinctly different to the feeling of the 1950's and 1960's or even the first half of the 1970's.

As we know, the demand for government revenue continued to grow as governments of both persuasions adopted and strained to implement an expanded range of social welfare and nation-building policies. There was a generally higher level of expectation within society of what governments should provide. Social attitudes about paying tax began to alter; even amongst those who had once thought it only right to attempt to avoid as much tax as possible. And with that came a slew of legislative developments, and a shift in judicial attitudes, responsive to an increasingly broad-based consensus that things needed to change.

In terms of statutory developments, the signal alteration was of course the enactment of Pt IVA of the *Income Tax Assessment Act 1936* (Cth)<sup>13</sup>. Its ramifications are essayed in Justice Pagone's

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<sup>12</sup> (1980) 144 CLR 55.

<sup>13</sup> See *Income Tax Laws Amendment Act (No 2) 1981* (Cth).

admirable work on tax avoidance in Australia<sup>14</sup>. The *Taxation (Unpaid Company Tax) Assessment Act* 1982 (Cth) also stands out as an extraordinary statutory response to practices which, in a previous decade, might have gone unremarked. And, as we moved into the 1980's and embraced financial deregulation, there was, too, the creation of new taxes, like fringe benefits tax<sup>15</sup> and capital gains tax<sup>16</sup>, albeit with significant compensatory alterations to the progressive tax scale<sup>17</sup>, the abolition of Div 7 tax<sup>18</sup> and the adoption of dividend franking<sup>19</sup>.

In terms of changing judicial attitudes, perhaps the most profound occurred almost immediately upon Sir Harry Gibbs' appointment as Chief Justice following the retirement of Sir Garfield Barwick. As others have observed, it was no coincidence that Sir Garfield was leading counsel for the losing taxpayer in *Newton v Federal Commissioner of Taxation*<sup>20</sup>; that Lord Denning wrote the

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14 Pagone, *Tax Avoidance in Australia*, (2010).

15 *Fringe Benefits Tax Assessment Act* 1986 (Cth).

16 *Income Tax Assessment Amendment (Capital Gains) Act* 1986 (Cth).

17 See, eg, *Income Tax Rates Act* 1986 (Cth); *Income Tax Act* 1986 (Cth).

18 See *Taxation Laws Amendment Act (No. 2)* 1987 (Cth).

19 *Taxation Laws Amendment (Company Distributions) Act* 1987 (Cth).

20 (1958) 98 CLR 1.

opinion of the judicial committee of the Privy Council which denied Sir Garfield the win in that case; and that Sir Harry and Lord Denning regarded each other with the utmost professional admiration. Comparison of the reasons in *Federal Commissioner of Taxation v Gulland*<sup>21</sup>, published shortly after Sir Harry's appointment as Chief Justice, with the reasons in *Slutzkin v Federal Commissioner of Taxation*<sup>22</sup> which were published only shortly before it, provides a graphic reminder of the contrast.

But still, you might say, how does all that explain why we who are here tonight are interested in tax while many of our colleagues who practise in other areas of our respective professions are not?

Some of you will have read Ronald Dworkin's book *Justice for Hedgehogs*<sup>23</sup>. For those of you who are unaware of Dworkin, he was one of the great legal philosophers of our time; and for those of you who have not read *Justice for Hedgehogs*, it was one of Dworkin's last works (and arguably his finest), in which he propounded an epistemology of justice by reference to the one big thing that there is to know. Hence the title, *Justice for Hedgehogs*: being an allusion to Isaiah Berlin's invocation of the Greek parable of

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21 (1985) 160 CLR 55.

22 (1977) 140 CLR 314.

23 Dworkin, *Justice for Hedgehogs*, (2011).

the fox, who knew many things, and the hedgehog, who knew one great thing.

In order to answer the question of why some of us are interested in tax, whereas our colleagues are not, I borrow from Dworkin.

Those who are interested in tax are interested because the one great thing they know is that tax is interesting. And, without venturing too far into the epistemology of that insight, they know it is interesting because, whatever their individual philosophies about paying tax, and in whatever aspect of tax they may choose to practise, history reveals to them that to be involved in tax is to be involved in an area of the law which majorly affects the shape of society as it changes and develops over time.

That takes me to the second of the two questions for tonight; which concerns the role that the High Court is likely to play in the future development of tax law in this country.

As those of you who are of counsel are aware, the *Judiciary Act* 1903 (Cth) requires the High Court when considering whether to grant an application for special leave to have regard to whether the application involves a question of law that is of public importance, either because of its general application or otherwise, or whether a decision of the High Court, as the ultimate court of appeal, is

necessary to resolve differences of opinion between different courts, or within the one court, as to the state of the law<sup>24</sup>.

In terms, that sounds simple enough, but in practice it tends to be a little more complex; and, as some of you also know, in the past it has been something of a movable feast. Over time, names and faces alter and with that attitudes change.

A quarter of a century ago, the High Court appeared to have had enough of tax cases; or, as generation Y might now say, it was "like totally over them". In 1991, in *Federal Commissioner of Taxation v Westfield Ltd*<sup>25</sup> ("*Westfield*"), Chief Justice Mason laid down that thenceforth the Full Court of the Federal Court of Australia would be the final court of appeal in tax cases subject only to the most limited exceptions which his Honour described as raising a question of "fundamental principle".

Three years later, in *Deputy Commissioner of Taxation v NSW Insurance Ministerial Corporation*<sup>26</sup>, his Honour hammered the point home with a refusal of special leave on the basis that the matter was said to raise only a question of statutory construction which involved no question of general principle and about which there was

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<sup>24</sup> *Judiciary Act* 1903 (Cth), s 35A.

<sup>25</sup> (1991) 22 ATR 400 at 402.

<sup>26</sup> (1994) 68 ALJR 616.

room for legitimate differences of opinion. Thus the position remained for close to the next two decades, albeit with a measure of dissatisfaction in a number of quarters.

Dr Paul Gerber, who for years was a leading member of the Tax Board of Review and later a Deputy President of the Administrative Appeals Tribunal, led the charge of discontent. In a letter to the Editor of the *Australian Law Journal* in October 1991<sup>27</sup>, he encapsulated the general level of dissatisfaction with the High Court's disdain of tax cases by pointing out that it was within living memory that the High Court had applied an approach to statutory interpretation which reduced some sections of the *Income Tax Assessment Act 1936 (Cth)* to a "virtual meltdown", but which the High Court had since conceded was outmoded, with the result that some leading cases had already been reversed, or their impact seriously curtailed, and others were likely to require re-examination. Meanwhile, however, the "old" law remained binding on the Commissioner of Taxation, the Administrative Appeals Tribunal and the Federal Court. Thus, Dr Gerber queried, why it was that the only court of appeal in the land which could protect itself from unmeritorious appeals by the simple device of refusing special leave, saw the need to anoint the Federal Court as the final court of review in taxation matters.

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<sup>27</sup> Gerber, "Letter to the Editor", (1991) 65 *Australian Law Journal* 632.

Two years after that, in a swingeing commentary on the High Court's failure to engage with the economic foundations of income tax and fundamental issues of tax policy<sup>28</sup>, Professor Cooper, observed, even more acerbically, that it was arguable that little consequence should be attached to what the High Court did in taxation decisions: not only, as the professor put it, because the Parliament invariably stepped in to remedy the deficiencies created by the High Court's mistakes but also, as he remarked, because the High Court had abandoned the field to the Federal Court<sup>29</sup>.

Still, as I say, times and faces do change and with them so do attitudes. Sir Anthony Mason was, and is, an extraordinarily fine jurist and he was surely one of the greatest Chief Justices of the High Court to date. But his interest in taxation appears to have been finite. By contrast, Justice Gummow was, and is, an extraordinarily fine jurist whose interest in tax presents as relatively unbounded. Thus, perhaps unsurprisingly, it was he who seems most to have influenced the High Court to re-engage with tax as an area of the law which demands the High Court's involvement.

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28 Cooper, "The Political Economy of Taxation and the Roles of the High Court", (1993) 23 *Western Australian Law Review* 101.

29 Cooper, "The Political Economy of Taxation and the Roles of the High Court", (1993) 23 *Western Australian Law Review* 101 at 115.

The writing first appeared on the wall in 2009 in an exchange between Justice Gummow and counsel during the course of the application for special leave in *Bruton Holdings Pty Ltd (In Liquidation) v Commissioner of Taxation*<sup>30</sup>. After counsel had dutifully acknowledged that the Full Federal Court was generally regarded as the final court of appeal in tax matters, Justice Gummow replied that he did not believe that any court apart from the High Court was the final court of appeal in anything, and that any idea that the Federal Court should be regarded as the final court of tax appeal was gone. His Honour added exegetically that no one was immune from the High Court's possible gaze and attention "[l]et alone [in] revenue matters which are of enormous importance to the country as a whole and therefore to this Court".

Evidently, if I may say so with profound respect, his Honour was a hedgehog.

Three years later, in 2012, McNab and Schultz published a compilation of statistics which they concluded was enough to show that the High Court had started to shift away from the attitude to tax cases expressed in *Westfield*<sup>31</sup>.

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30 [2009] HCATrans 138.

31 McNab and Schultz, "The High Court's approach to taxation special leave applications", (2012) 46(7) *Taxation in Australia* 311 at 311-313.

Now, a further three years on, some additional research undertaken by my associate, Ms Sarah Spottiswood, robustly confirms that trend.

In 2010, special leave to appeal was granted in six tax cases; and, given that the High Court was then deciding about 50 appeals a year, it meant that more than 10% of the appeals decided in the year were tax appeals<sup>32</sup>. In 2011, special leave to appeal was granted in four tax cases, which was close to 10% of the appeals for that year<sup>33</sup>, and in 2012 the number was similar with five cases<sup>34</sup>. In

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32 *Travelex Ltd v Commissioner of Taxation* (2010) 241 CLR 510; [2010] HCA 33; *Commissioner of Taxation v Anstis* (2010) 241 CLR 443; [2010] HCA 40; *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539; [2010] HCA 42; *Commissioner of State Taxation v Cyril Henschke Pty Ltd* (2010) 242 CLR 508; [2010] HCA 43; *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348; [2010] HCA 44; *TEC Desert Pty Ltd v Commissioner of State Revenue* (2010) 241 CLR 576; [2010] HCA 49. See also *Commissioner of Taxation v Bamford* (2010) 240 CLR 481; [2010] HCA 10 which was granted special leave in 2009: [2009] HCATrans 284.

33 *Commissioner of Taxation v BHP Billiton Ltd* (2011) 244 CLR 325; [2011] HCA 17 which was granted special leave in 2010: [2010] HCATrans 229; *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2011) 244 CLR 97; [2011] HCA 35 which was also granted special leave in 2010: [2010] HCATrans 323; *Queanbeyan City Council v ACTEW Corporation Ltd* (2011) 244 CLR 530; [2011] HCA 40; *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* (2011) 245 CLR 446; [2011] HCA 41.

34 *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue* (2012) 245 CLR 338; [2012] HCA 6 which was granted special leave in 2011: [2011] HCATrans 215; *Commissioner of Taxation v Bargwanna* (2012) 244 CLR 655; [2012] HCA 11 which was also granted special leave in 2011: [2011] HCATrans 211; *Commissioner of Taxation v Qantas Airways Ltd* (2012) 247 CLR 286; [2012] HCA 41; *Mills v Commissioner of Taxation* (2012) 250 CLR 171; [2012] HCA

Footnote continues

2013, special leave to appeal was granted in only one tax case<sup>35</sup>, but in 2014 the number was back to four<sup>36</sup> and, when these figures were put together earlier this year, one tax decision had already been handed down<sup>37</sup> and special leave to appeal had been granted in two additional tax cases<sup>38</sup>, which meant we were then still tracking at close to, if not more than, ten per cent per annum.

Based, therefore, on the objective evidence, the idea that the Federal Court should be regarded as the final court of appeal in tax matters is a thing of the past. As Justice Gummow observed during the *Bruton Holdings* special leave hearing, just as revenue matters are of enormous importance to the nation, so also are they of such importance to the High Court.

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51; *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55.

35 *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523; [2013] HCA 16.

36 *Thiess v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12 which was granted special leave to appeal in 2013: [2013] HCATrans 239; *Howard v Commissioner of Taxation* (2014) 253 CLR 83; [2014] HCA 21 which was also granted special leave to appeal in 2013: [2013] HCATrans 269; *Federal Commissioner of Taxation v MBI Properties Pty Ltd* (2014) 89 ALJR 138; 315 ALR 32; [2014] HCA 49; *Commissioner of State Revenue (Victoria) v Lend Lease Development Pty Ltd* (2014) 254 CLR 142; [2014] HCA 51.

37 *Ausnet* (2015) 89 ALJR 707.

38 *Commissioner of Taxation v Australian Building Systems Pty Ltd (In Liquidation)* [2015] HCATrans 82; *Macoun v Commissioner of Taxation* [2015] HCATrans 112.

Of course, that does not mean that every tax case that is put up for special leave is bound to result in a grant. Unfortunately, we do not have unlimited capacity and choices have to be made. Sometimes, applications which are in many respects apparently meritorious must be rejected. But, at the same time, there is also a measure of consistency.

Based again on Ms Spottiswood's analysis of the last five years' tax cases in the High Court, it emerges that there are seven factors which are of the greatest significance in obtaining special leave. They are: (1) where the point sought to be argued has not previously been considered by the High Court<sup>39</sup>; (2) where there are one or more dissenting judgments in the court below<sup>40</sup>; (3) where the matter involves a point of law on which there is a conflict of authority<sup>41</sup>; (4) where there is real doubt about the correctness of the decision below<sup>42</sup>; (5) where the case raises a novel issue<sup>43</sup>;

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39 See, eg, *Thiess* [2013] HCATrans 239; *Howard* [2013] HCATrans 269; *Commissioner of State Revenue v Lend Lease Development Pty Ltd* [2014] HCATrans 185.

40 See, eg, *Mills v Commissioner of Taxation* [2012] HCATrans 185; *Commissioner of Taxation v Unit Trend Services Pty Ltd* [2012] HCATrans 361; *Commissioner of Taxation v Unit Trend Services Pty Ltd* [2013] HCATrans 46.

41 See, eg, *Commissioner of Taxation v MBI Properties Pty Ltd* [2014] HCATrans 76 ("*MBI Properties*"); *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2010] HCATrans 323; *Queanbeyan City Council v ACTEW Corporation Ltd* [2011] HCATrans 83.

42 See, eg, *MBI Properties* [2014] HCATrans 76; *Commissioner of Taxation v Bargwanna* [2011] HCATrans 211; *Port of Portland Pty Ltd v Victoria* [2010] HCATrans 108.

(6) where the case involves a matter which is conceived to be of significant public importance<sup>44</sup>; and (7) where the case involves the construction of legislation which has application to other legislation<sup>45</sup>. I venture to think that Dr Gerber would have approved of those developments.

Finally, may I add that those of you who are of counsel should be familiar with Justice Hayne's masterful 2004 paper on making a special leave application and the special leave factors that are of real importance<sup>46</sup>. The majority of counsel may also be familiar with Justice Kirby's insight into the process which was published in 2007<sup>47</sup>. The seven significant criteria which I have identified in the last five years' tax cases are all discussed at some length in those publications. Accordingly, if you are preparing for a special leave application in a tax matter for the first time, or even if you are an old

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<sup>43</sup> See, eg, *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCATrans 58; *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue* [2011] HCATrans 215.

<sup>44</sup> See, eg, *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCATrans 36; *Mills* [2012] HCATrans 185; *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCATrans 186 ("*Consolidated Media*").

<sup>45</sup> See, eg, *Mills* [2012] HCATrans 185; *Consolidated Media* [2012] HCATrans 186.

<sup>46</sup> Justice Hayne, "Advocacy and Special Leave Applications in the High Court of Australia", paper delivered for Victorian Bar Continuing Legal Education, Melbourne, 22 November 2004.

<sup>47</sup> Justice Kirby, "Maximising Special Leave Performance in the High Court of Australia", paper delivered at the University of New South Wales Faculty of Law, Sydney, 13 August 2007.

hand, you might well find that those essays repay close and careful attention.

In conclusion, ladies and gentlemen, I must enter a caveat and at the same time I should like to issue you an invitation.

The caveat – which I am bound to enter in the interests of propriety – is that I am not here to solicit special leave trade. The High Court has enough on its hands as matters stand and, in any event, it is not the way we do business.

The invitation, however, is to be under no illusions. For the time being at least, the days when the High Court was not interested in tax are over. If an application for special leave to appeal in a tax matter meets the criteria for the grant of special leave, it will be granted.

Thank you all very much for your attention.