

# ALONG THE ROAD TO DAMASCUS: A FRAMEWORK FOR INTERPRETING THE TAX LAW

By Michael D'Ascenzo

*This article explores the hypothesis that it is a proper judicial function to develop a coherent body of law that tries to reflect the underlying policy of relevant legislative provisions. The article promotes a purposive approach to statutory interpretation which facilitates the taking into account of "consideration of logic, common-sense and policy"; but recognises that there are limits.*

*The theme of the article is that interpretation in the tax field should evolve to be systemic rather than ad hoc, so as "to make the law work in a constructive and positively directed fashion, tempered by a thoughtful awareness of its intrinsic limits".*

The Review of Business Taxation's discussion paper, *A Strong Foundation*<sup>1</sup>, highlighted as one source of tax law complexity a "black letter law" approach to the drafting of tax legislation and stated that this was reinforced by "judicial interpretations of tax legislation that - in the absence of clear objectives and principles, either express or implied - have tended to resolve individual cases without systematically balancing wider national interests in an effective and sensibly functioning tax system."<sup>2</sup>

The purpose of this article is to argue that it is a proper judicial function to seek to develop a coherent body of law that reflects the underlying policy of relevant legislative provisions, and that such an approach is consistent with the separation of executive, legislative and judicial powers.

The Review of Business Taxation went on to add:

The judicial system therefore has an important role in the interpretation, development and application of the taxation law. Judges do not merely interpret the tax law. They are seen to create the

working law, case by case. Accordingly, judges have a critical influence in the system of working tax rules and the construction of many detailed provisions. Their constructions are important to the integrity of the tax system and its base and to the development of key tax concepts.

The business tax system operates in a continually changing business environment. In such an environment, it is not possible to draft detailed rules applying to every situation that has arisen and may arise; indeed, detailed complex rules can often frustrate the lawmakers' intention to deal effectively and fairly with business transactions generally. The preferable course is for the legislation to establish clear principles of parliamentary intent and for the courts to explain how the rules apply to particular instances.

As the law has increased in complexity, there has been criticism from some quarters that the courts have allowed aggressive tax planners to escape obligations by resorting to arrangements which exploit rigidities in a system of rules. It is a long-standing judicial principle that courts interpret legislation to give effect to the purpose of the law and this principle is now codified in interpretation of legislation.<sup>3</sup>

<sup>1</sup> Review of Business Taxation, *A Strong Foundation* (November 1998).

<sup>2</sup> Ibid 35. See also J McMillan, *Law and Administration - Conflicting Values*, Public Service and Merit Protection Commission Seminar, Canberra (31 May 2000) 5-6: "Judicial values are aptly captured in a number of traditional legal concepts, chiefly adversarial paradigm, by which courts focus on the impact of a decision on the plaintiff in court, without any broader concern with issues of horizontal equity."

<sup>3</sup> Review of Business Taxation, above n 1, 44-45.

One may sometimes criticise the drafters of tax legislation.<sup>4</sup> The fact remains that the drafting of legislation is a difficult task.<sup>5</sup> As one commentator has pointed out, "[u]nfortunately, it is just not possible for the legislative drafter to cover all possible factual situations. The more the drafter tries to do so, the more complex and prolix the legislation will become and, almost invariably, the less clear the meaning of the legislation will become."<sup>6</sup>

This is particularly so for taxation which is a complex subject and its complexity is reflected in the legislation. "So no matter how detailed, the legislation can never be a complete code. Accordingly, its application depends on the relationship between the legislation and accounting principles and practices; on the exercise by the commissioner of his statutory powers and responsibilities; and on the approach of the courts in construing and applying tax legislation."<sup>7</sup>

Resignment to the proposition that effective implementation of the tax law is possible only with an all-knowing and infallible legislator (which does not exist in reality),<sup>8</sup> is likely to lead to a sub-optimal, and in some cases dysfunctional

operation of the community's tax laws.<sup>9</sup>

The goal should of course be well developed and principle based legislation providing greater integrity, simplicity and certainty.<sup>10</sup> However, this has to be supported by a coherent and rational application of the law. The tax administration bears a heavy responsibility in this regard. There is also much to be said for the view that "[j]udges, as final arbiters in the implementation process, should thus assume responsibility for ensuring that legislation is as coherent as possible."<sup>11</sup>

Understanding this reality, the courts have taken purposive approaches to the interpretation of statutes or have intervened to fill a gap in the legislation, where they have considered that there was good reason to do so, taking into account "considerations of logic, common-sense and policy."<sup>12</sup> Courts have preferred alternative constructions, or have had regard to underlying issues even where "incautious expression" does not appear to deal with them.<sup>13</sup> This is particularly so where a literal approach would produce a result that would be "incongruous, contrary to the objects of the Act, capricious or irrational"<sup>14</sup> or "where the ordinary meaning is manifestly absurd, or unreasonable such that

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<sup>4</sup> See, for example, *Hepples v FC of T* 91 ATC 4808.

<sup>5</sup> DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (4th ed, 1996) 2-4.

<sup>6</sup> RC Allerdice, "The Swinging Pendulum: Judicial Trends in the Interpretation of Revenue Statutes", (1996) 19(1) *UNSW Law Journal* 162, 164. See also SW Bowman, "Interpretation of Tax Legislation: The Evolution of Purposive Analysis" (1995) 43(5) *Canadian Tax Journal* 1183.

<sup>7</sup> ILM Richardson, "Appellate Court Responsibilities and Tax Avoidance" (1994) 2(1) *Australian Tax Forum* 4.

<sup>8</sup> F Vanistendael, "Judicial Interpretations and the Role of Anti-Abuse Provisions in the Tax Law" in GS Cooper (ed), *Tax Avoidance and the Rule of Law* (1997) 133. Nevertheless, Vanistendael concludes at p 152, "when there is clearly no legal basis for taxation in the text of the law, there is no reason for the courts to legislate judicially."

<sup>9</sup> See, for example, *FC of T v Westraders Proprietary Ltd* (1980) 144 CLR 55, 59 and *Investment and Merchant Finance Corp Ltd v FC of T* (1971) 125 CLR 249, 265.

<sup>10</sup> Note the proposals for a "principle-based structure" to the tax law (Review of Business Taxation, *A Tax System Redesigned* (July 1999) 129-130); and for the use of "general principles in preference to long and detailed provisions" (Treasurer, *Tax Reform, Not a New Tax, a New Tax System* (August 1998) 149).

<sup>11</sup> N Brooks, "The Responsibility of Judges in Interpreting Tax Legislation" in GS Cooper (ed), above n 8, 107.

<sup>12</sup> See for example, *Collector of Customs v AGFA-Gevaert Limited* 96 ATC 5240 and *FC of T v Consolidated Press Holdings Limited (No 1)* 99 ATC 4945, 4964.

<sup>13</sup> See JD Davies, "Commonwealth Government Disputes: Observations from the Outside", Management of Disputes Involving the Commonwealth Seminar organised by the Attorney General's Department, 22 April 1999. See also *Cooper Brookes (Wollongong) Pty Ltd v FC of T* 81 ATC 4292 ("*Cooper Brookes*").

<sup>14</sup> *Cooper Brookes* 81 ATC 4292, 4296, 4299 and 4306.

Parliament could hardly have intended that result, so that some other meaning should be preferred"<sup>15</sup> or "where the literal or grammatical meaning gives rise to an injustice, or even in some cases to an anomaly or inconvenience, which may mean that Parliament did not intend that meaning to prevail";<sup>16</sup> or where the words are susceptible to an alternative construction and that construction is "more consonant with good sense" and the "commercial realities"<sup>17</sup> of the situation or more in accord with "logic and policy".<sup>18</sup>

Responsible and measured judicial approaches and interventions of this nature allow the tax system to operate with a sense of equity and efficiency, and promote substantive equality of treatment.<sup>19</sup> They reflect an acceptance of the

responsibility to ensure that if "the courts can identify the target of parliamentary legislation their proper function is to see that it is hit; not merely to record that it has been missed."<sup>20</sup>

This, in my opinion, should be no less true for tax statutes than it is for other legislation, although the judicial standing of any special status attributable to fiscal provisions is unclear.<sup>21</sup> As a matter of policy, there is of course the heavy onus of balancing individual rights against the interests of the community. However, the characterisation of taxes as a compulsory exaction of money seems at odds with the reference to taxes as what we pay for civilised society.<sup>22</sup> In addition, the penalty provisions in the *Income Tax Assessment Act 1936* (Cth) ensure that taxpayers are not subject to culpability

<sup>15</sup> *Saraswati v The Queen* (1990) 172 CLR 1, 22 (per McHugh J).

<sup>16</sup> *Hepples v FC of T* 91 ATC 4808, 4829 (per McHugh J) and *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (per Brennan CJ, Dawson, Toohey and Gummow JJ); but compare with *Cooper Brookes* 81 ATC 4292, 4296 (per Gibbs J) and *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161-162 (per Gibbs J).

<sup>17</sup> *Marbut Gunnensen Industries Pty Ltd v FC of T* 82 ATC 4182, 4189 and 4192.

<sup>18</sup> *FC of T v Consolidated Press Holdings Limited (No 1)* 99 ATC 4945, 4964 (per French, Sackville and Sunberg JJ).

<sup>19</sup> RT Smith, "Interpreting the Internal Revenue Code: A Tax Jurisprudence", *Taxes: The Tax Magazine* (September 1994) 551.

<sup>20</sup> Lord Diplock, "The Courts as Legislators" in *The Lawyer and Justice* (1978) 274 (cited by Merkel J in *Richardson v FC of T* 97 ATC 5098, 5113). See also P Kirby, "Statutory Interpretation and the Rule of Law - Whose Rule, What Law?" in D Kelly (ed), *Essays on Legislative Drafting* (1988) 92 where his Honour opines that the need for intervention arises because the law has "necessarily been expressed in brief and general language that cannot foresee all of the circumstances to which that language will have to apply" and that a purposive approach can fill "at least the minor gaps in the statutory language in a way which achieves, and does not frustrate, the apparent overall policy of the legislation".

<sup>21</sup> Kirby P in *DFC of T v Chant* 91 ATC 4734, 4737 said "[the *Income Tax Assessment Act*] is just another statute of the Federal Parliament"; and in *Commr of Stamp Duties (NSW) v Commonwealth Funds Management Ltd* 95 ATC 4756, 4759-4760, his Honour said that "revenue legislation is no longer treated as special...The court's duty is simply to try to work out what parliament was getting at when it enacted the provisions in dispute."; and in *Chief Commissioner of Stamp Duties (NSW) v Buckle* 96 ATC 4098, 4101 he said, "the principle of construction which favoured the taxpayer against the revenue...has now been abandoned." See also, Mason and Wilson JJ in *Cooper Brookes* 81 ATC 4292, 4307; A Mason, "Taxation Policy and the Courts" (1990) 2(4) *CCH Journal of Australian Taxation* 40, 42: "the general rule for ascertaining legislative intent should apply to revenue as well as other statutes"; RC Allerdice, above n 6, 166 and 179, "the same rules of construction apply to revenue statutes as to other statutes"; and from a different perspective, ML Perez, "Wielding the Axe on Australia's Tax Laws" (October 1992) *Australian Business Law Review* 362, 364. However, while *Partington v The Attorney General* (1869) 4 LR 4 HL 100, 122, *Heward v The King* (1906) 3 CLR 117, 127-128, *Chandler & Co v The Collector of Customs* (1907) 4 CLR 1719, 1735 and *Anderson v Commissioner of Taxes (Vic)* (1937) 57 CLR 233, 239 and 243 preceded Mason and Wilson JJ's observations in *Cooper Brookes*, Deane J comments in *Hepples v FC of T* 91 ATC 4808, 4818-4819 that "the basic 'principles of statutory construction' of taxing provisions remain those identified and explained by Rich and Dixon JJ in their joint judgement in *Anderson v Commissioner of Taxes (Vic)* (1937) 57 CLR 233, 243" post dated *Cooper Brookes*. See also DC Pearce and RS Geddes, above n 5, 236; G Hill, "A Judicial Perspective on Tax Law Reform" (1998) 72 *The Australian Law Journal* 689; and AH Slater, "Sham and Substance", (1999) 28 *Australian Tax Review* 214-215.

<sup>22</sup> *FC of T v Spotless Services Ltd* 96 ATC 5201, 5206 quoting Holmes J in *Compania de Tabacos v Collector of Inland Revenue* (1927) 275 US 87, 100.

penalties if they exercise reasonable care and, for large adjustments, have a reasonably arguable position.<sup>23</sup>

Most commentators would now agree that tax legislation is as amenable to statutory interpretation as any other, and that context and statutory purpose are matters of primary importance.<sup>24</sup> Even those that might argue for the retention of a presumption against the revenue as a "last resort" possibility recognise that such a rule is inappropriate "where tax avoidance is involved and where the substance of relevant transactions is concealed by artificialities of form."<sup>25</sup> This is a reflection that it is unlikely that Parliament intended "free riders" in relation to taxable activities "to the detriment of the general body of taxpayers."<sup>26</sup>

It has been argued that "a failure of the Courts to exercise a responsible role in assuring the integrity of the Code as an organic whole is ... more likely to undermine the self assessment character of the tax system, since it leads to the attitude that the tax law is a game, in which the well-advised win, and the others pay taxes. That attitude is destructive."<sup>27</sup> There is no doubt that the way the tax laws are interpreted by the courts is, and should be, a key ingredient to the establishment of community norms.

The purposive approach to statutory interpretation, and responsible judicial intervention, are supported by traditional rules of "common sense" such as the "mischief rule"<sup>28</sup> which applies at least in relation to remedial legislation or remedial provisions, and the "golden rule"<sup>29</sup> that is applicable where there is absurdity, repugnance or inconsistency. They are also consistent with the direction of Parliament in s 15AA of the *Acts Interpretation Act 1901* (Cth) to have regard to the purpose or object of the Act.<sup>30</sup>

To the extent that the intention of Parliament can be equated to the legislative purpose, the question necessarily arises as to how the legislative purpose is to be ascertained.

While the task remains the ascertaining of the meaning of the words which the legislature has used, "regard must be had to the background of the amendment to determine what the amendment was designed to achieve and, where possible, an interpretation adopted which secures this purpose."<sup>31</sup>

Courts do refer to extrinsic material to understand the statutory background<sup>32</sup> or to show the mischief which the statute was designed to remedy,<sup>33</sup> but under common law principles,

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<sup>23</sup> Introduced by *Taxation Amendment (Self Assessment) Act 1992*; cf Hill, above n 21, 689.

<sup>24</sup> See, for example, Slater, above n 21, 124

<sup>25</sup> See *Hepples v FC of T* 91 ATC 4808, 4818 (per Deane J).

<sup>26</sup> See *IRC v McGuckian* [1997] 3 All ER 817, 824 (per Lord Styne) where his Lordship discerns a shift in the United Kingdom away from literal and formalistic methods of construction to a contextual and purposive approach, with the emphasis being on identifying the purpose of the statute and giving effect to it.

<sup>27</sup> Smith, above n 19, 555. See also Brooks, above n 11, 107. On a related point, Sir Anthony Mason, "Future Directions in Australian Law" (1987) 13 *Monash University Law Review* 149 has observed that "purposivism is more attractive because it emphasises substance over form." See also R Krever, "Murphy on Taxation" in JA Scutt (ed), *Lionel Murphy: A Radical Judge* (1987) 129.

<sup>28</sup> *Heydon's Case* (1584) 3 Co Rep 72.

<sup>29</sup> *Grey v Pearson* (1857) 6 HLC 61.

<sup>30</sup> Sections 15AA and 15AB of the *Acts Interpretation Act 1901* (Cth). See also Pearce & Geddes, above n 5, 27.

<sup>31</sup> See Hill, above n 21, 687 and 690.

<sup>32</sup> See, for example, *Peabody v FC of T* 93 ATC 4104, 4110 and *Newcastle City Council v GIO General Ltd* (1997) 149 ALR 623, 642 (per McHugh J).

<sup>33</sup> See, for example, *FC of T v Whitfords Beach Pty Ltd* 82 ATC 4031, 4040-4042 and *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 141 ALR 618, 634-5.

extrinsic materials were not generally used to divine intention.<sup>34</sup>

Paragraph 15AB(1)(a) of the *Acts Interpretation Act 1901* (Cth) allows a court to consider extrinsic material to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act. "So, even if the language of the section is quite clear and unambiguous resort may be had to the extrinsic materials either to confirm the ordinary meaning was intended or to provide the context in which the legislation has been enacted."<sup>35</sup>

In a formal sense, s 15AB has its limits.<sup>36</sup> It does not permit recourse to extrinsic material for the purpose of departing from the ordinary meaning of the text unless either the meaning of the provision to be construed is ambiguous or obscure or if its ordinary meaning leads to a result that is manifestly absurd or is unreasonable.<sup>37</sup>

As words often carry within themselves an inherent ambiguity, it is arguable that s 15AB

might operate widely where problems of interpretation arise.<sup>38</sup>

Independently of s 15AB, the modern approach to statutory interpretation permits recourse to extrinsic material which forms part of the legal and historical context of the relevant provision.<sup>39</sup> However, as a general rule, extrinsic material cannot be used to construe a legislative provision unless the construction of the provision suggested by the material is reasonably open.<sup>40</sup>

Section 15AA of the *Acts Interpretation Act 1901* (Cth) provides:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

The extent to which s 15AA modifies the common law is unclear.<sup>41</sup> What is clear is that the section requires no ambiguity or inconsistency for its operation:

<sup>34</sup> See *South Australian Commissioner for Prices and Consumer Affairs (SA) v Charles Moore (Aust) Ltd* (1977) 139 CLR 449, 461 and *Davis v Johnson* [1978] 1 All ER 1132.

<sup>35</sup> Hill, above n 21, 686.

<sup>36</sup> See *Newcastle City Council v GIO General Ltd* (1997) 149 ALR 623, 641-643 (per McHugh J). See also *Barwick v Law Society of New South Wales* [2000] HCA 2, 96 (per Kirby J).

<sup>37</sup> See *Re Australian Federation of Construction Contractors: Ex parte Billings* (1986) 68 ALR 416, 420. Section 15AB(1)(b) of the *Acts Interpretation Act 1901* (Cth) allows reference to extrinsic material to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or unreasonable.

<sup>38</sup> C Enright, *Legal Research and Interpretation* (1988) 237.

<sup>39</sup> *Newcastle City Council v GIO General Ltd*, (1997) 149 ALR 623, 642 (per McHugh J).

<sup>40</sup> *Ibid.*

<sup>41</sup> According to Pearce & Geddes, above n 5, 24: "It was generally accepted that the purposive approach applied only when an attempt to apply the literal approach produced an ambiguity or an inconsistency." This is consistent with the views of Dawson J in *Mills v Meeking* (1990) 169 CLR 214, 235. Nevertheless, Mason, above n 21, 41-42 refers to *FC of T v Lutovi Investments Pty Ltd* 78 ATC 4708, 4713 and *FC of T v Student World (Australia) Pty Ltd* 78 ATC 4040, 4048 as cases where the court had departed from the plain words construction in applying a specific tax avoidance provision, favouring instead the purposive construction of that provision. See also D Dawson, *The Role of the High Court in Interpreting Tax Legislation*, Tax Institute of Victoria State Convention (10-12 September 1998) 101, who expressed the view that s 15AA altered the traditional approach to statutory interpretation only modestly; and see also *CPH Property Pty Ltd v FC of T* 98 ATC 4983, 4995 (per Hill J). In the Northern Territory, which is the only Australian jurisdiction in which the common law approaches still apply, Kearney J in *Peninsula Group Pty Ltd v Registrar-General for the Northern Territory* (1996) 136 FLR 8, 12 has commented that "it is arguable at common law, as it now stands, that a purposive approach may be adopted even where the meaning of the words in the statute appears clear on their face; that is, the common law may have reached the point now enshrined in modern statutory provisions such as s 15AA."

The requirement that a court look to the purpose or object of the Act is thus more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule of construction. The mischief or purpose rule required an ambiguity or inconsistency before the courts could have regard to purpose ... The approach required by s 35 [of the *Interpretation of Legislation Act 1984* (Vic)] needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction.<sup>42</sup>

It is also clear that the relevant purpose may be a specific purpose underlying a section or part of an Act even though s 15AA refers to the purpose of the Act.<sup>43</sup>

In my opinion, the significance of s 15AA is to put beyond doubt that a court may look beyond the four corners of the statute to find a reason for giving a wider or narrower interpretation to its words, and that this is an obvious part of ascertaining the true meaning of the words used.

Accordingly, the words of an Act should be interpreted in the light of the legislative purpose ascertained having regard to the context in its widest sense so as to prefer a competing interpretation which is more in accord with logic and policy.<sup>44</sup> A statement of this approach can be found in *CIC Insurance Ltd v Bankstown Football Club Ltd*:

The modern approach to statutory interpretation (a) insists that the context be considered in the

first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy ... Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms with the legislative intent.<sup>45</sup>

It has been said that under "s 15AA a court may consider the purpose and object of statute in order to determine whether there is more than one possible construction. But if there is only one possible construction, then it is the construction that must be given to the statute."<sup>46</sup> However, while caution is required,<sup>47</sup> even in such a case there may still be scope for departure from the words, either by ignoring the words in the statute or by reading into the statute words which are not there. This may be the case where an omission and how it should be remedied is otherwise clear,<sup>48</sup> or where the court is convinced that the parliamentary intention could not have been to use the words in their ordinary signification.<sup>49</sup> As Gibbs CJ said in *Cooper Brookes*:

There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and that the canons of construction are not so rigid as to pre-

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<sup>42</sup> *Mills v Meeking* (1990) 169 CLR 214, 234-235 (per Dawson J). See also *Saraswati v R* (1991) 172 CLR 1, 21 (per McHugh J, with whom Toohey J agreed).

<sup>43</sup> *Mills v Meeking* (1990) 169 CLR 214, 243 (per McHugh J) and 235 (per Dawson J).

<sup>44</sup> *FC of T v Consolidated Press Holdings Limited (No 1)* 99 ATC 4945, 4964 (per French, Sackville and Sunberg JJ).

<sup>45</sup> (1997) 187 CLR 384, 408 (per Brennan CJ, Dawson, Toohey, and Gummow JJ).

<sup>46</sup> D Dawson, above n 41, 101. See also *Newcastle City Council v GIO General Ltd* (1997) 149 ALR 623, 639 (per McHugh J).

<sup>47</sup> See *CPH Property Pty Ltd v FC of T* 98 ATC 4983, 4996 (per Hill J). See also *Byrnes v The Queen* [1999] HCA 38 in the context of a penal statute and a matter involving the potential deprivation of liberty.

<sup>48</sup> See *Jones v Wrotham Park Estates* [1980] AC 74, 105 (per Lord Diplock) and *Cooper Brookes* 81 ATC 4292, 4315 (per Aickin J in dissent).

<sup>49</sup> See *Birmingham v Corrective Services Commission of NSW* (1988) 15 NSWLR 292, 302 (per McHugh J). See also *Newcastle City Council v GIO General Ltd* (1997) 149 ALR 623, 643 (per McHugh J).

vent a realistic solution in such a case.<sup>50</sup>

In any event, "[s]ince language is inherently ambiguous of its nature, there is still a large area of discretion left to the judge to depart from the literal meaning."<sup>51</sup>

Nevertheless, there are limits<sup>52</sup> and interpretation cannot be purely a subjective matter. The concept of the intention of Parliament "imposes some general, although manipulable, limitation - the subordination of the Judiciary to Parliament."<sup>53</sup>

The intrinsic limits of the law may perhaps be illustrated by a comparison of s 9-25 of *A New Tax System (Goods and Services Tax) Act 1999*, and s 84-5 of the *New Business Tax System (Alienation of Personal Services Income) Act 2000*. A narrow construction of those sections will give rise to unintended consequences. For example, s 9-25 could conceivably be construed as meaning that if some of the goods under a supply contract are delivered in Australia all of the remaining goods under that supply contract, no matter where they are delivered, are nevertheless connected with Australia. A construction which better conforms with considerations of logic, common-sense and policy would be to read the provision as allowing

for apportionment.<sup>54</sup> Having regard to the context and the terms of the section, this could be done in various ways - one of which would be to read the word "if" as referring to those goods that are actually delivered in Australia.

By contrast, s 84-5 which defines "personal services income" does not appear to work well in a partnership situation where there is no business structure and where, under a single contract, the principle work is conducted by each of the partners but the income of the partnership is mainly the reward of one partner's services. However, short of rewriting the whole section, it is difficult to find a sensible interpretation that avoids particular anomalies in those circumstances, and would not give rise to unintended consequences in relation to the operation of the provisions.

### THE ROAD FORWARD

While some may argue that the approach outlined in *CIC Insurance* does not go far enough,<sup>55</sup> the critical step in any evolution of interpretation in the field of taxation, lies, in my opinion, in the commitment to seek to develop a coherent fabric of tax law. At the appeals stage at least, this requires a consideration of the underlying issues and a focus on the impact of the

<sup>50</sup> 81 ATC 4292, 4296.

<sup>51</sup> Hill, above n 21, 691.

<sup>52</sup> See, for example, *Re Bolton; ex parte Beane* (1987) 162 CLR 514. See also *Mills v Meeking* (1990) 91 ALR 16, 31 where Dawson J said: "Section 35 [of the *Interpretation of Legislation Act 1984* (Vic)] requires a court to construe an Act, not to rewrite it, in the light of its purposes"; and *R v L* (1994) 122 ALR 464, 468-469.

<sup>53</sup> JW Barnes, "Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law - Part One" (1994) 22 *Federal Law Review* 116, 130. See also generally JW Barnes, "Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law - Part Two" (1995) 23 *Federal Law Review* 77.

<sup>54</sup> See *GST Ruling* GSTR 2000/31, paras 90 and 226.

<sup>55</sup> See Smith, above n 19, 527 and Brooks, above n 11, 93-129.

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decision on the integrity of the tax law, having regard to logic and policy.<sup>56</sup>

It would be disappointing if a longitudinal study of Australian revenue decisions were to provide no evidence of a change from a strict or literal and formalistic approach<sup>57</sup> to one that is more purposive.<sup>58</sup>

My hope is that tax law will be written in a way that exposes the underlying principles<sup>59</sup> and that interpretation in the tax field will evolve to be systemic rather than ad hoc, so as "to make the law work in a constructive and positively directed fashion, tempered by a thoughtful awareness of its intrinsic limits."<sup>60</sup>

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<sup>56</sup> See, for example, the implied criticism of the decision in *FC of T v Everett* 80 ATC 4076 by Richardson, above n 7, 14.

<sup>57</sup> Such as the approach described by Krever, above n 27, 129-140.

<sup>58</sup> See Sir Anthony Mason, "Book Review" (1983) 6 *UNSWLJ* 234, 235-236 but cf Allerdice, above n 6, 163.

<sup>59</sup> See Brooks, above n 11, 105.

<sup>60</sup> WJ Scott, "Looking Forward into the Past: Financial Innovation" (1995) 43(5) *Canadian Tax Journal* 1147, 1166.

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