Speech for the 23rd Australasian Tax Teachers Association Conference

Tax is more than numbers – but it is also more than tax

The interrelationship between tax law and other areas of law, and the consequences on teaching, drafting and interpreting tax laws

Justice Michelle Gordon, Federal Court of Australia

For the last 20 or so years "specialisation" of the professions has been the mantra. We are told by economists and others that specialisation increases efficiencies. At some level, we all benefit from specialisation. The medical profession is probably the most concrete example – it is now possible to consult a doctor who specialises in a very small aspect of the human body. The ever increasing narrowness of specialisation has resulted in knowledge becoming centralised and held by fewer. In my professional life I suspect that specialisation potentially reached its fulcrum when a client involved in a R&D dispute with the ATO secured the services of an expert whose sole, and I mean sole, expertise was applicable royalty rates for computer software intellectual property. Another's expertise was Indian Sandalwood seeds.

This increasing narrowness of specialisation has not come without cost. And no less importantly, it has not left legal education, the profession, and the Courts unaffected.

When I read the title for this conference, "Tax is more than numbers", it got me thinking. Tax is more than numbers, but it is also more than tax. I stopped to consider the impact other areas of law, economics and human endeavour have on my work as a judge who hears so called tax cases and tax appeals.

I have previously written of the myopic culture and specialisation that exists in the tax profession[1]. Associate Professor Paul Caron's article 'Tax Myopia, or Mamas Don't Let

[1] Justice Michelle Gordon, 'Trends in tax advice and litigation – what to do when it all turns on a word or two' (2009) 38 *Australian Tax Review* 202 at 207.

Your Babies Grow Up to Be Tax Lawyers'[2] examines specialisation of tax lawyers as a result of education and professional groupings and describes how it creates a culture of myopia and irrationality in certain areas. Caron begins by focusing on tax education in American law schools and the complexity of the subject which stops tax law from becoming a generalist course[3]. I agree. Specialisation in tax begins at an early stage in the law schools and in the business schools and it continues in the profession.

Caron argues that specialisation (together with inherent complexity) leads to specialised and ascetic views in tax law, which leads to even more complexity. As a concrete example, he examines the use of legislative history in statutory interpretation and concludes that the adopted approaches to statutory construction of the tax law in the United States are both inconsistent and crude by comparison to the rich literature on statutory construction[4]. He attributes these outcomes to a species of specialisation of the tax profession which has in large part wholly ignored trends in statutory construction[5]. The effects of this, according to Caron, are crude and inconsistent approaches to statutory interpretation resulting in ineffective application of the law and thus more complexity.

Another effect of specialisation and myopia in the tax profession is the inability, failure or refusal to embrace the particular facts of a problem. Each case is dependent on the evidence led and the facts found. It seems that every word of every decision is analysed by the tax profession as though it is written in stone and carries legislative force. It does not. Disputed and disputable issues based on such interpretations are unhelpful at best and detrimental at worst. As Caron concludes, such myopic interpretations are both inconsistent and crude by comparison to the rich literature on statutory construction.

The need to think outside of the tax sphere is reinforced by a number of recent Australian tax cases. Although the cases inevitably raised tax issues, the fundamental issues which underpinned the cases were other and disparate areas of the law.

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2 Paul L Caron, 'Tax Myopia, or Mama's don't let your babies grow up to be tax lawyers' (1993) 13 *Virginia Tax Review* 517.

3 Caron argues that most law students take the basic income tax course, however '[m]ost have their initial distaste for tax confirmed and … [avoid] all other professional contact with tax during (and after) law school': Caron at 521.

4 Caron, n 2 at 541.

5 Caron, n 2 at 538.

Take the very recent High Court Decision of *Aid/Watch Incorporated v Commissioner of Taxation*[6]. The case concerned whether an incorporated association (Aid/Watch) was a "charitable institution" for the purpose of obtaining exempt status under the *Income Tax Assessment Act* 1997 (Cth), the *Fringe Benefits Tax Assessment Act* 1986 (Cth) and tax concessions under the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth). The case turned on whether Aid/Watch's characterisation as "political" made it non-charitable in character. Although it was a revenue case, as the High Court said in its judgment, and I quote, "the dispute [was] occasioned not by the terms of the revenue legislation … but by the content of the general law respecting charitable purposes"[7].

Another example is the recent High Court case of *Commissioner of Taxation v Bamford*.[8] The case concerned, *inter alia*, the meaning of the words "income of a trust estate" in the *Income Tax Assessment Act* 1936 (Cth). Before considering the provisions of the 1936 Act, the Court was required to consider "the intersection between the statute and the [general] law of trusts"[9]. The Court identified that, against the background of the development of the general law of trusts, it was to be expected that the treatment of receipts and outgoings by a trustee would not necessarily correspond with that in a taxing statute such as the 1936 Act. It was not possible to advise the client and for counsel to argue the case without a detailed understanding of the law of trusts and the intended operation of the taxing act.

A further example is *Bluebottle UK Limited v Deputy Commissioner of Taxation*[10]. *Bluebottle* concerned the construction of s 255 of the 1936 Act, and whether s 255(1) required the Commissioner to assess a non-resident's tax liability before the Commissioner could require a third party to pay the tax due and payable by that non-resident[11]. At first instance and on appeal the attention "was directed principally to the proper construction and application of the relevant provisions of the 1936 Act"[12].

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6 [2010] HCA 42.
7 *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 at [27]
8 (2010) 240 CLR 481
9 (2010) 240 CLR 481 at [16].
10 (2007) 232 CLR 598.
11 For a discussion of this decision, see Justice Richard Edmonds, 'Recent tax litigation: A view from the Bench' (2008) 38 *Australian Tax Review* 79.
12 *Bluebottle UK Limited v Deputy Commissioner of Taxation* (2007) 232 CLR 598 at [14].

However, as the High Court identified, it was "not useful" to determine the questions about s 255 of the 1936 Act without first considering the effect of steps taken by the second respondent, Virgin Blue, in connection with the fixing and payment of a final dividend and the steps taken by two shareholders of Virgin Blue in relation to that dividend[13]. The case primarily turned on the *Corporations Act 2001* (Cth) and more specifically the power of directors (empowered by the company constitution) to declare or to determine payment of a dividend, and the consequences of doing so. It was only against the understanding of the law surrounding the declaration of company dividends that the application of s 255 of the 1936 Act could be considered. *Bluebottle* is now one of the leading authorities on the law of dividends and, in particular, s 254V of the *Corporations Act*.

What these cases make clear (and there are many others) is that "tax practitioners" whether they be lawyers or accountants cannot be too focussed on the interpretation of incredibly narrow statutory provisions, or specific words within those provisions, without considering other and overlapping areas of law. The cases also highlight the need to consider the broader legal, economic, commercial or (as in the case of *Aid/Watch*) public policy implications of a problem or set of facts.

Similarly, tax laws cannot be *drafted* in silos. Drafting of legislation is often the product of negotiation. As identified by French J in *Woodside Energy Ltd v FCT (No 2)*[14], while particular tax statutes may be based upon or inspired by economic theories or models, the precise terms of the statute "may reflect policy choices or political compromises inconsistent with a complete acceptance or application of the theory or model concerned"[15].

In tax cases, difficulties also often arise because Parliament often chooses words with the widest possible reach, which causes difficulties for taxpayers, the Commissioner, their advisers and the Court. *Handbury Holdings Pty Ltd v FCT* in the Federal Court[16] is a good example. In that case, the Court had to deal with generic words used by

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[13] Ibid.

[14] (2007) 69 ATR 465.

[15] (2007) 69 ATR 465 at [203].

[16] [2008] FCA 1787

parliamentary draftsman, and the Court commented on the difficulty that such words created in seeking to decipher parliamentary intention.

In *Handbury*, the issue concerned the correct construction of the phrase "at the leaving time" in s 711-45(1) of the 1997 Act. The answer would affect "the calculation of capital gains made by the applicant on the sale of issued shares in Murdoch Magazines Pty Ltd"[17]. The trial judge stated:

> When used in connection with time, for example in such phrases as "at the time of", the word "at" conveys no very precise meaning … What [was] intended by the word "at" in s 711-45(1) depend[ed] on the context in which it [was] used, including the subject matter and the legislative objects and principles.[18]

The judge went on to state that because the broad subject matter was the tax treatment of consolidated groups and leaving members and the object was to preserve the relevant alignment of head company's costs for membership interest, the phrases "just before leaving time" and "at the leaving time" were intended to refer to essentially the same time[19]. Her Honour noted that while it might be thought that different words would refer to different times, such an interpretation would not make much sense in the context in which they appeared[20]. She concluded that absent any contrary indication it would be much more reasonable to make the calculation for determining the tax liability of the consolidated group by reference to the assets in the subsidiary company just before the subsidiary left the group.

Thus, there were two problems here. First, the drafters used two different words to express the same meaning. Secondly, the use of one phrase "at the leaving time" was at best vague, if not indefinitely extensible. It was therefore difficult to decipher what exact time the section referred to.

When such issues of indeterminacy and uncertainty arise, they create difficulty for the taxpayer, the Commissioner, their advisers and the courts. But tax is not in a special category of its own – similar problems arise in all areas of statutory construction.

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[17] *Handbury Holdings Pty Ltd v FCT* [2008] FCA 1787 at [1].
[18] *Handbury Holdings Pty Ltd v FCT* [2008] FCA 1787 at [61].
[19] *Handbury Holdings Pty Ltd v FCT* [2008] FCA 1787 at [62].
[20] *Handbury Holdings Pty Ltd v FCT* [2008] FCA 1787 at [62].

The words which create the difficulty seem to have a common characteristic – they are generic words which inherently possess degrees of meanings. The difficulty is one that could easily be avoided[21].

At the drafting, and interpreting stage, the best way to ensure that tax law is clear and consistent is to look at the legislation from a variety of angles. This requires a critical analysis of what is the best interpretation. Advocates may do this by considering contrary views, which would help identify the pitfalls in their own argument or their opponents. They should stop and ask, for example, whether the intended interpretation of the relevant provision would require language to be inserted for that particular construction to be adopted or lead to absurd results. That sort of critical analysis assists in identifying the best interpretation. That kind of analysis requires practitioners to look across the silos and beyond the tax aspects of the issue before them.

Take the case of *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[22] as an example. The case concerned assessments by the Commissioner of Territory Revenue for stamp duty on two transactions by which Alcan acquired all of the shares in Gove Aluminium Ltd ('GAL'). The assessment was based in part upon the value of a Special Mineral Lease and Special Purpose Leases held by GAL and the value of its goodwill. In making the assessment the Commissioner relied upon s 56N of the *Taxation (Administration) Act* (NT), which renders the acquisition of shares in a corporation dutiable by reference to the value of its landholdings where that value exceeds 60 per cent of the value of all of its property. The High Court was required to consider two "constructional questions". One of those questions was whether the statutory definitions of "land" and "lease" in the s 4 of the Northern Territory Act were displaced by ss 56N and 56R. The majority noted that historical considerations and extrinsic materials could not be relied upon to displace the clear meaning of the text, and that consideration of the text itself is paramount.[23] However, the Court recognised that the *meaning* of the text may require consideration of the context, which in this case required an understanding of *Lord Brougham's Act* and colonial interpretation statues in Australia. Without a detailed

[21] Justice Michelle Gordon, 'Trends in tax advice and litigation – what to do when it all turns on a word or two' (2009) 38 *Australian Tax Review* 202.

[22] (2009) 239 CLR 27.

[23] (2009) 239 CLR 27 at [47].

understanding of the principles of insolvency, the history of the abolition of Crown Priority and the applicable provisions of the *Corporations Act 2001* (Cth), it would not have been possible to identify *all* possible constructions of the relevant tax provisions and then select the best interpretation from those possibilities.

So, if tax law cannot be practiced, drafted or interpreted in a vacuum, how should it be taught?

The interaction between tax law and other areas of law, and the difficulties that it poses for legal education, is not new. In 1960, Professor Charles Lowndes, of Duke University, considered the question of whether tax law should be taught in courses on taxation, or whether the taxation transactions that fall into other fields of law be taught in causes dealing with those fields. He identified that it could be "insurmountable" for the average law school to teach tax law among other subjects. He stated:

> If tax law is distributed among other courses in law school, this means that the instructors who teach these other courses will have to be tax experts. This is too much of a burden on a law faculty. The difficult part of being a tax expert does not lie in the initial expenditure of energy that is necessary to learn tax law, but in the constant exertion that is necessary to keep up with the changes in the tax law and to stay an expert[24].

I agree with Professor Lowndes' comments on the ever-changing tax law; it poses a difficulty to teachers, practitioners and judges alike. The tax legislation is amended more than any other legislation. In 2009 alone, there were 23 amendments to the 1997 Act and 13 amendments to the 1936 Act. But the case law is decided years after the events. Decisions on tax law, perhaps more than most areas of law, are occasionally determined in the basis of statutory provisions that have since been repealed. But that begs the question, why is it that tax law changes so often? Would the ever-changing nature of tax law be reduced if, at the drafting stage, the focus was less specialised? Alternatively, is it a problem at the interpretation and application stage, where specialisation isolates interpretation of tax statute, from other, non-tax statutes?

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[24] Charles LB Lowndes, 'Problems encountered teaching tax law: tax law encountered in other fields of law' (1960) 13 *Journal of Legal Education* 481 at 482.

Professor Lowndes identified the benefits of teaching tax law progressively throughout the degree. Two of the benefits identified by him are worth highlighting:

1. First, students would be more conscious of the tax implications of a transaction if their attention is called to these implications when they are studying the transaction; and

2. Secondly, if tax law that is encountered in other fields of law is taught in the courses dealing with those fields, it will normally be presented to students in the form of practical problems rather than as an analytical recital of legal rules.

Those observations are equally applicable to the profession. What the review of the so called tax cases makes clear is that specialist knowledge of tax law, or a particular subset of tax law, is of limited utility if it is not coupled with a broader understanding of other areas of law and human endeavour. The Supreme Court of the United States summarised the issue aptly when it stated that "no other branch of the law touches human activities at so many points"[25].

What then are the implications for you as the teachers of tax? You will note that I did not say the teachers of tax law.

Teaching institutions (schools, universities and the like) have taught and continue to teach in silos – by subject matter. The number of subjects taught has increased dramatically over the years. As a consequence, the content or breadth of individual subjects has in some respects narrowed. I accept that on the whole, teaching institutions are good at teaching in these silos. But what teaching institutions often don't do is examine or even enquire about the cross over between these silos.

It must be recalled that this was not always the way. About 20 years ago, to secure an honours degree there was a form of assessment across subjects. An oral exam which could and did examine across the subjects studied. It required students to think about a number of subjects at the one time. It was not perfect. But contrast that with the position

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[25] *Dobson v Commissioner of Inland Revenue,* 320 US 489, 494-495 (1943)

today – students on the whole prepare a thesis on some narrow specialised area within of the law often with little, if any, consideration of other areas of the law.

I have spent a little time looking at the issue of cross assessment. I spoke to professors of law at two Australian universities. I looked at the existing overseas experience and current academic research. A number of matters became apparent.

Common or cross assessment is not new. There is no single way of teaching or assessing across silos. I discovered at least five different forms of assessment that might fall under the umbrella of "common assessment". There will be others.

The first I identified was a common factual problem distributed to say four subjects with the intention that the students identify the analytical divides in a problem according to the subject matter involved, with marking to be done by each of the four subject teachers. The objective was straightforward - to ensure that the so called boundaries around the "subject matter" in the course guide were just one dimension, and usually an artificial dimension. The common problem being used as just one mechanism to seek to redress some of the imbalance created by the individual silos created and reinforced by the drive to specialisation of the last few decades.

The second form of common assessment was more straightforward and I suspect less labour intensive. The concept was an end of semester seminar but with a twist. At the end of a semester, a problem was distributed which was then tackled by four panellists, each so called "specialists" in their respective field. The example provided to me was entitled "The Constitutional Recognition of Indigenous People". The panel would comprise a constitutional lawyer, a property lawyer, a contract lawyer and a legal theorist. One only has to stop to think about the different aspects or perspectives that each would bring to the problem. Again, another attempt to demonstrate that approaching a particular problem cannot be viewed through the prism of one subject matter but inevitably through a number of prisms. The issues that will be identified will vary depending upon the prism.

The third form of common assessment involved drafting course outlines directed across boundaries or, to use the modern jargon, across spaces. Can I give you three distinct examples. I teach tax litigation in the Masters Course at Melbourne University.

The original course was designed by Justice Tony Pagone. It has been developed over the years. It seeks to cover a dispute between a taxpayer and the Australian Taxation Office from before the issue of the assessment up to and including any appeal to the High Court of Australia. It follows the entire course of the dispute with the ATO, its pitfalls and side streets. It includes legal drafting, debt recovery, evidence, legal professional privilege. It teaches a number of non litigious aspects of what a practitioner is likely to encounter or should at the very least consider when acting for a client. It seeks to teach the old home truth that every step you take from the first time you encounter the Commissioner until the end is not only likely to affect, but will inevitably affect, the end result. It seeks to teach that knowing, for example, what s 177C of the 1936 Act says and means is just a small part of the role of a tax practitioner and that each step cannot be looked at in isolation.

There are other, better examples. A subject entitled “Deals” is taught at this university by Mr Andrew Godwin. It covers everything from how contracting parties deal with each other, how they negotiate with each other, the risks that parties face and how they minimise those risks, how the parties document their deals and so on. It teaches in a space which is inhabited not only by the law of contract but includes drafting, negotiation, structured finance and risk management. The final example is the subject of “Human Rights and Global Justice”, an undergraduate subject for non-law students, taught at this university by Associate Professor Alison Duxbury. It teaches human rights across the domestic, national and international spheres. In the modern world, a problem in this area creates issues in all jurisdictions – think of Julian Assange as just one prime example.

The fourth and fifth forms of common or cross assessment are probably the most concrete. It is now common practice for universities to teach private law by reference to obligations, contracts, trusts and remedies - a proper reflection that the private law cannot be seen in silos. Finally, some law schools have sought to introduce a more “holistic” approach to legal education by integrating professional skills requirements into the law degree. So, for example, a student in a Civil Procedure course may have to do a mock interlocutory application to set aside a default judgment. The primary purpose of the assessment would be to do assess the student’s knowledge of the Court procedure,

however the legal principles justifying the default judgment (such as principles of contract), would also be required.[26]

In the United States, extensive research supports the view that "modern legal education must, for contextual and other practical reasons, involve interdisciplinary elements"[27]. In 1987, Judge Richard Posner of the United States Court of Appeal for the Seventh Circuit, wrote an article in the Harvard Law Review entitled "The Decline of Law as an Autonomous Discipline". Citing the varying views of legal philosophers (citing Dworkin on the one hand and Bork on the other) as an example, he stated:

> We now know that if we give a legal problem to two equally distinguished legal thinkers chosen at random we may get completely incompatible solutions; so evidently we cannot rely on legal knowledge alone to provide definitive solutions to legal problems.[28]

He further stated that with the aging of the United States' Constitution and the expansion of statute relative to common law, "lawyers and judges are increasingly engaged in a form of inquiry – the interpretation of unclear texts – for which conventional legal training with its emphasis on the analysis of judge-made doctrine, does not prepare them well"[29]. He concluded that recognition that the law is increasingly an interdisciplinary field has many implications, including:

1. Economists, statisticians and social sciences should have a more prominent role in legal reform;
2. Judicial opinion which "exaggerates the autonomous elements in legal reasoning" should be replaced by a more candid engagement with the realities of the decision.

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26 The University of Adelaide and Bond University are examples of universities that have integrated legal skills programs: see Anne Hewitt, 'A critique of the assessment of professional skills' (2008) 17 *Legal Education Review* 143 and Bobette Wolski, 'Why, How and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate Law Curriculum' (2002) 52 *Journal of Legal Education* 287.

27 Anthony Luppino, 'Minding more than our own business: educating entrepreneurial lawyers through law school-business school collaborations' (2007) 30 *Western New England Law Review* 151 at 157.

28 Richard A Posner, 'The decline of law as an autonomous discipline' (1987) 100 *Harvard Law Review* 761 at 767.

29 Posner, above n 28 at 777.

Similarly, in 1999 Professor Janet Weinstein wrote an article discussing the "coming of age" of the law and the importance of interdisciplinary education in law practice. Quoting from *The Learner in Education for the Professions*[30], she stated:

> A profession, like an individual, has come of age when it has developed a capacity for interdependent relationships, notable qualities of which are readiness to give and take without anxiety and without need to dominate or to suffer loss of identity.

Can lawyers handle the "loss of identity" that might flow from a more interdisciplinary focus? Notwithstanding the proliferation of what has been described as "law and" interdisciplinary studies in the US (such as law and medicine, law and sociology etc), actual interaction by law students and the law faculty with students and faculty from other disciplines in the same classroom at the same time remains infrequent.[31] Some have attributed this to the administrative difficulties, such as timetabling. Others have suggested that it may be more based on "turf protection" – that is the reluctance on the part of law professors to have their "academic freedom" intruded upon.[32] Perhaps it is somewhere in the middle of those two. In my view, the development of the "law and" disciplines should be embraced.

Weinstein makes the point that people are not one-dimensional, nor are their problems[33]. I agree. Interdisciplinary work helps to clarify for students (and practitioners) how the rules develop and should be developed.[34] When one considers the cases of *Bluebottle, Bamford* and *Aid/Watch*, it is apparent that any resolution of those problems required a broader understanding of legal, commercial and economic principles.

There is an identifiable trend - a move away from study with a narrow focus to a broader perspective which better reflects the fact that life does not occur in silos. If life does not occur that way, why should we teach it that way? What then is the impact for the

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30 Charlotte Towle, *The Learner in Education for the Professions* (1954) at 19 quoted in Janet Weinstein, 'Coming of age: recognising the importance of interdisciplinary education in law practice' (1999) 74 *Washington Law Review* 319 at 319.

31 Luppino, above n 27 at 159.

32 Luppino, above n 27 at 175.

33 Weinstein, above n 30 at 319.

34 John Sexton, 'Out of the Box thinking about the training of lawyers in the next millennium' (2001) 33 *University of Toledo Law Review* 189 at 197.

teaching of tax? If tax is more than numbers and more than tax, do we teach and assess across the silos? If not, should we?

The further work currently being undertaken into the possibility of creating practical connections across subject areas through the use of common learning resources and assessed or non-assessed learning tasks is, in my view, of critical importance. It is important in the teaching of most law subjects. I suspect it is critical in tax, especially if the Supreme Court of the United States was correct when it stated that "no other branch of the law touches human activities at so many points"[35].

A curriculum which embraces a more integrated approach across the subject silos is a goal. I don't doubt that it is a difficult task. However, I regard it as a critical one. What I know is that:

- the professions need practitioners who understand tax law;
- the professions needs practitioners who understand that tax law pervades most of life's problems;
- the professions needs practitioners who recognise that although a client turns up with a tax problem, often the first issue to be answered is not a tax question but the resolution of an issue concerning a different area of human endeavour.
- the professions need practitioners who understand that tax is more than numbers and often more than tax.

Students who appreciate the multi-faceted and interconnected nature of the law and the impact it has on tax will be better practitioners. It is a skill which needs to be developed. In my view, the development needs to start as soon as possible in the training of practitioners. The role you play in educating young practitioners is vital. It shapes the future of the professions. It shapes and affects the quality of the work that the clients receive and the assistance the Courts receive. I encourage each of you to continue to strive to embrace a more integrated approach to the teaching of tax.

Thank you

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[35] *Dobson v Commissioner of Inland Revenue,* 320 US 489, 494-495 (1943)