THE RHETORIC OF TAX INTERPRETATION – WHERE TALKING THE TALK IS NOT WALKING THE WALK

MARK BURTON

Dr Mark Burton is a Senior Lecturer in Law in the Law School at the University of Canberra

‘There is a distinction – and there may be a divergence – between what Judges say they are doing, what they think they are doing, and the most accurate objective description of what they actually are doing’. 1

I INTRODUCTION

Despite concerted attacks from, most notably, the realist and critical legal studies ‘schools,’ liberal legalism remains the dominant legal discourse in the Australian community. For the purposes of this article liberal legalism may be understood to maintain that the exercise of coercive power by the state 2 is just when authorised by rules of general application promulgated by the sovereign law making body. 3 According to this liberal theory of justice, determinate rules ensure that the law is purely prospective in its application, thereby enabling taxpayers to structure their affairs to maximise their pleasure returns under a system with predictable rules. 4

In the realm of taxation jurisprudence adherence to this liberal legal discourse of legal determinacy is pervasive. In the secondary legal literature judges and commentators debate the respective merits of ‘literalism’, ‘purposive interpretation’ and/or a quest for certainty founded upon communal

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2 For an overview of the rationale for the existence of the state under liberal political theory see Duncan Kennedy, ‘Legal Formality’ (1976) Journal of Legal Studies 351. Briefly, the existence of the state is justified upon contractarian grounds (Hobbes, Locke), upon the basis of legal positivism (Austin, Bentham, Kelsen, Hart) or under an economic rationale (Mill, Coase, Posner).

3 See, for example, Australia, An Assessment of Tax (1993) xx.

4 For the purposes of this paper, I refer to this depiction of statutory rules as the ‘determinacy thesis’.

In his earlier work, H.L.A. Hart, for example, suggested that positivism proposes that ‘a legal system is a “closed logical system” in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies or moral standards.’ (my emphasis) H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 Harvard Law Review 601-602. Unger suggests that the strong definition of formalism entailed the ‘belief in the availability of a deductive or quasi-deductive method capable of giving determinate solutions to particular problems of legal choice.’ R. Unger, The Critical Legal Studies Movement (1986), 1. Unger notes that there are few adherents of this version of formalism today, and suggests that a more modern version of formalism can be defined as ‘a commitment to, and a belief in the possibility of, a method of legal justification that contrasts with open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary.’ (Critical Legal Studies Movement, 1).
morality.\(^5\) In general, even the pragmatic reviews of tax interpretation suggest that the courts should adopt an interpretive approach which is founded upon the metwand of some, presumably finite and determinate, body of principle such as economic theory.\(^6\) The common theme of this enormous body of literature is the thesis that statute law should, and can, if written properly, convey a determinate meaning which is available to those who use the right interpretive method.\(^7\)

As a relative latecomer to this well ploughed jurisprudential field of statutory interpretation, there is good reason to question whether I have anything new to add on this topic. However, the purpose of this article is to question the relevance of the determinacy thesis outlined above.\(^8\) Whilst accepting that the determinacy thesis is an appealing theory of law in a first best world, it is doubtful whether such normative accounts are of any benefit in our second best world where semantic indeterminacy prevails.\(^9\) I therefore wish to offer an alternative descriptive account of tax interpretation, founded

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Although Grbich sees problems with the application of economic principles to the resolution of tax disputes, he suggests that such a model offers greater social benefit than the ‘legalist’ model: Y Grbich, ‘Is economics any use to tax lawyers? Towards a more substantial jurisprudence to replace legalism’ (1980) 12 *Melbourne University Law Review* 340. For a more overt recommendation that the tax base should be redefined in terms of Simons’ concept of income, see Jeff Waincymer, ‘If at first you don’t succeed … Reconceptualising the income concept in the tax arena’ (1994) 19 *Melbourne University Law Review* 977, 1019. For a fascinating insight into this debate and an interesting discussion of the decision in *Eisner v Macomber* 252 U.S. 189 see H Cairns, ‘A Note on Legal Definitions’ (1936) 36 *Columbia Law Review* 1099. Cairns argues that the legal institution seeks rules which are functional rather than necessarily consistent with theory applicable in other realms such as economics. Thus, he argues, the economic concept of income is irrelevant to framing a workable ‘income’ tax.

\(^7\) Prebble argues that the income tax is inevitably complex because the concept of income is mired in legal concepts rather than the ‘real’ economic world: John Prebble, ‘Income taxation: a structure built on sand’ (2002) 24 *Sydney Law Review* 301. Quaere whether profits do, indeed, ‘exist in the natural world’ (at 310) as a ‘profit’ is itself an artificial construct and has no intrinsic objective value (as it does not necessarily measure my ability to acquire goods and services because that ability will be affected by a host of subjective factors, such as my relative ability to drive a hard bargain). Even if Prebble’s critique of the income tax is justified those within the domain of liberal legal theory would assert that an income tax built upon the quicksand of legal fictions could still produce determinate results if crafted with sufficient care. One significant rhetorical aspect of the determinacy thesis is the suggestion that law is like a science – hence the emphasis upon the ‘legal method’ drummed into successive generations of budding lawyers upon the basis that correct application of ‘the method’ will lead inexorably to legal truth (on the assumption that science is the epitome of rational thought – see Paul Feyerabend, *Against Method*, (revised edn, 1988); Alan Chalmers, *What is this thing called science?* (2nd edn 1982)).


in the pragmatic interpretive tradition. This article, then, does not offer a normative account of statutory interpretation because I fall into the ‘postmodern camp’ which accepts that any normative account is ultimately founded upon subjective assumptions and is therefore susceptible to criticism for failing to meet the criteria founded upon alternative (subjectively derived) standpoints.\(^\text{10}\)

The thesis of this article is that the perceived separation of the political and legal realms, described as the ‘rule of law’ and embodied in the accounts of determinate statutory interpretation, offers an inaccurate description of what judges do when they interpret tax legislation.\(^\text{11}\) Following a consideration of the portrayal of the determinacy thesis by some judges in their extra-curial writing, the article challenges this mainstream account of tax interpretation by offering an alternative descriptive account of the judicial practice of statutory interpretation. This alternative account draws upon the concept of rhetoric, or the art of persuasion. Arguing that the meaning of taxation law is contingent, the article suggests that the function of a judge is to develop a compelling argument for a particular interpretation rather than the judge searching for the ‘right’ interpretation.\(^\text{12}\) In developing an argument for a particular interpretation the judge will rely upon various rhetorical devices.\(^\text{13}\) The article sets out a rudimentary categorisation of rhetorical devices relied upon by the judiciary when grappling with our taxation law. The article concludes with a consideration of the institutional reforms which might be expected to flow from the adoption of this alternative account of the interpretive process.

II WHAT ‘OFF DUTY’ JUDGES SAY THAT THEY DO – JUDICIAL PRAGMATISM OR RIGHT ANSWERS?

Over the past decade a number of ‘off duty’ Australian judges have been willing to share their views upon what they do when interpreting statutes. In general, it is fair to say that four approaches to the interpretation of legislation are described in these extra-curial statements. These views reflect the ongoing debate with respect to the question of whether judges exercise a broad interpretive discretion or do arrive at the ‘right’ legislative meaning when interpreting legislation.

A Pragmatism

The first approach adopts a pragmatic theory of interpretation in that it accepts that there is no ‘right answer’ for a particular interpretive problem. Rather, the role of the judge is described in terms of a discretion to select from any number of possible alternative interpretations of the relevant statutory text. The exercise of this discretion is unconstrained by principle, being influenced by subjective

\(^{10}\) Of course, postmodernist discourse would also challenge claims to a universally truthful descriptive account such as the account presented here. It is beyond the scope of this paper to engage with this strong counterclaim. Suffice to say, that I argue that knowledge is ultimately founded upon the ability to persuade others to accept the weight of the argument and so the purpose of this paper is essentially a rhetorical one – the purpose will be achieved if the reader puts the paper down and says ‘yes, that is a convincing account of the practice of tax interpretation’.


\(^{12}\) Hans Blumenberg summed up the rhetorical position that we routinely find ourselves in when he observed ‘Lacking definitive evidence and being compelled to act are the prerequisites of the rhetorical situation’; Hans Blumenberg, ‘An Anthropological Approach to the Contemporary Significance of Rhetoric’, trans Robert Wallace in Kenneth Baynes, James Bohman and Thomas McCarthy (eds), *After Philosophy: End or Transformation?* (1987), 441.

judicial conceptions of ‘justice’. At times various judges have conceded the merits of this description of the judicial approach to statutory interpretation. Thus, for example, Justice Hill states:

> And while the rules of interpretation may not be contentious as such, their application to the statute and then the application of that statute as interpreted to the given facts will give the judge much judicial discretion to reach a conclusion which he or she perceives to be just. And the possible width of that discretion will operate to make an adviser’s task even more difficult in predicting an outcome.\(^\text{14}\)

In similar vein, Justice Kirby states:

> The view that the judge, construing the Constitution or an Act of Parliament (or other legislative instrument), merely has to look long and hard enough to find the "intention" of the relevant Parliament, has given way to an increasing awareness that talk of “intention” is liable to be misleading; that the process of construing ambiguous language is a complex one; and that the search is really one for the preferable, or more consistent, meaning which achieves the purpose of the law derived from the text and structure of the instrument stating it. In many cases, particularly of legal instruments written in the English language, there is inescapable ambiguity. Somebody has to cut the Gordian knot. In our form of society, that somebody is ultimately, usually, a judge. Sometimes there is no clear, perfect and unarguable resolution of the ambiguity. The judge must simply offer the preferred result with reasons to explain why it, rather than alternatives, has been preferred.\(^\text{15}\)

The suggestion that judges create meaning has occasionally also been made verbally by judges. Thus, for example, Geoffrey de Q Walker records:

> At a gathering in Canberra in 1984 a High Court justice, who is a member of the usual majority on that court, said in front of several witnesses who included the writer that sociological and economic theories were of use in adjudication because they could be used to ‘dress up’ a conclusion already reached on other grounds.\(^\text{16}\)

The recognition of judicial discretion in the interpretive domain suggested by these statements is heresy to those who maintain that the judge is merely the conduit for a determinate legislative message.\(^\text{17}\) It must therefore be questioned whether the three judges intended to go so far as to adopt a pragmatic account of statutory interpretation. While the oral statements of judges may be explained away as idle chat, the written statements extracted above require closer scrutiny.

Justice Hill suggests that the judge must seek a ‘just’ result. Although many argue that justice is a subjective concept, many others argue that justice has an objective meaning (formal justice, utilitarian justice, or justice according to finite moral norms (universal or specific to a particular culture)). It is possible that Justice Hill is adopting the latter understanding of ‘justice’, in which case his statement would be consistent with the determinacy thesis.

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\(^\text{14}\) DG Hill, ‘How is tax to be understood by Courts’ (2001) 4 The Tax Specialist 226 at 233.


\(^\text{16}\) Walker, above n 5, 429 (n 48).

\(^\text{17}\) Walker, above n 5.
Justice Kirby’s statement may also be understood as an endorsement of the determinacy thesis. Although the latter part of the extract clearly envisages an interpretive discretion, this is prefaced by the comment that the search is really one for the preferable meaning which achieves the purpose of the law. One interpretation of Justice Kirby’s observation, then, would be that the purpose of the law is the bedrock upon which any resolution of textual ambiguity in a statute may be resolved.\textsuperscript{18}

It is therefore unclear whether Justices Kirby and Hill would endorse the postmodern account of adjudication suggested by Sampford:

This analysis of the judges’ position suggests a new way of arguing for judges. They could seek to demonstrate that traditional techniques of legal interpretation produce conflicting answers and hence demonstrate the existence of the choice. Then they could state their reasons, in terms of values and political theory, for choosing the way they do.\textsuperscript{19}

Sampford’s account therefore contemplates unconstrained judicial discretion in deciding cases – a view which appears inconsistent with the suggestions of constraint imposed by ‘justice’ and ‘legislative purpose’.

B  \textit{Legislative purpose}

This narrow reading of the ‘pragmatic’ statements of Justices Kirby and Hill respectively is also supported by their reliance upon a purposive theory of interpretation to reaffirm the view that judges do arrive at the ‘right answer’. This purposive theory of statutory interpretation represents the second judicial description of statutory interpretation.

While many judges and commentators refer to ‘the purposive approach’ there are in fact three purposive approaches discernible in the literature.\textsuperscript{20} These approaches differ upon the critical issue of the nature of the purpose which is considered to be the object of the interpretive process:

1. The actual subjective purpose of the legislature;\textsuperscript{21}

2. The ‘counterfactual purpose’ – that is, a consideration of what Parliament would have intended had they considered the application of the statute to a particular set of circumstances.

\textsuperscript{18} Despite his acceptance of judicial law-making, Justice McHugh maintains that one factor that a judge must take into account is the need to maintain the rule of law’: McHugh, above n 15, at 48. This seems to suggest that McHugh’s concept of judicial law making is closely circumscribed; a suspicion confirmed by his statement that ‘if the social or economic consequences of extending or modifying liability are problematic, the extension or modification should not be made. Courts are not law reform commissions. … They do not have the resources to undertake a comprehensive survey of permanent social values or the social or economic ramifications of judicial changes to the law and, even if they did, that exercise is incompatible with their constitutional function.’ (at 48).

\textsuperscript{19} Sampford, above n 11, 275.


\textsuperscript{21} See, for example, DG Hill, ‘A Judicial Perspective on Tax Law Reform’ (1998) 72 Australian Law Journal 685 at 692 (‘if earlier legislation has been the subject of court clarification and the terms of that legislation are repeated in consolidating legislation it is presumed that Parliament intended to use the terms in the way which is consistent with the earlier case law.’ (emphasis added))

\textsuperscript{22} Some refer to this branch of purposive construction as ‘imaginative reconstruction’; William N Eskridge et al, \textit{Legislation and Statutory Interpretation}, (2000) at 218-20.
This type of purpose may be referred to by Justice Hill in the following passage:

If there is more than one possible construction open, think about the consequences which flow from each and ask what was it more likely that parliament intended. In doing this you will be doing just what the courts will have to do if the matter comes before them and your answer will most likely be right’,

3. The objective purpose of the legislation (as part of the entire legislation of a jurisdiction, in its entirety or the objective purpose of each particular provision within an Act of Parliament).

The earlier extract from Justice Kirby’s article indicates his resort to the purpose of the statute (drawing a distinction between the intention of parliament and the purpose of the statute), a steady navigational reference point to which he returns later in his article. Reflecting upon the fact that he has found himself in the minority in a number of cases, his Honour notes:

Doubtless in some cases I have just been wrong. At least, that is what the majority has held. But in other cases, where there is a genuine difference of view on the meaning of the words taken in their context, I suspect that the difference may (at least occasionally) be explained by reference to the more insistent demand that I feel to ascertain, and give effect to, the legislative purpose as I see it in the language under consideration.

A similar approach to discerning the legislative purpose by examining the statutory text in its context was expressed by Sir Ivor Richardson. While conceding that tax legislation was innately complex and that his ‘scheme of the legislation and purpose’ approach would not always provide the right answer, his Honour suggested that such an approach was ‘likely’ to produce the right answer.

C Legal Hermeneutics

The third approach to statutory interpretation referred to in some of the judicial writing questions both pragmatic and purposive methods of statutory construction. Instead, this approach maintains that judges confronted with legislative ambiguity take account of community standards when deliberating upon the meaning of a statutory text. These judges and other commentators argue that judges must have recourse to fundamental communal moral norms in ‘making’ law in some sense. For example, Sir Anthony Mason opined:

No one would suggest nowadays that statutory interpretation is merely an exercise in ascertaining the literal meaning of words. Statutory interpretation calls for reference not

23 DG Hill, ‘How is tax to be understood by Courts’ (2001) 4 The Tax Specialist 226 at 234.
24 Which might include reference to ‘fundamental’ legislative purposes, such as maintaining the integrity of the political system: see Max Radin, ‘Statutory Interpretation’ (1930) 43 Harvard Law Review 863 at 867.
26 Sir Ivor Richardson, ‘Appellate Court Responsibilities and Tax Avoidance’ (1985) 2 Australian Tax Forum 3, 9; see also Sir Ivor Richardson, ‘Reducing Tax Avoidance by Changing Structures, Processes and Drafting’ in G Cooper, above n 6, 327.
only to the context, scope and purpose of the statute but also to antecedent history and policy as well as community values.\(^\text{27}\)

Similarly, Sir Ivor Richardson observed that ‘the interpretation approach taken inevitably depends on judicial attitudes and the perceptions judges have of community values, as well as on any statutory directives.’\(^\text{28}\) Further, in an article penned in 1995 Justice Hill referred to community expectations on several occasions, before observing:

> If the community expects the High Court to take a different course from that which it now does, whether in taxation or other matters, it is for the community (not politicians) to make the Court aware of that. Court decisions, if they are to be widely accepted, need to be built on community standards.\(^\text{29}\)

This represents a tacit adoption of Ronald Dworkin’s hermeneutic approach to statutory interpretation.\(^\text{30}\) According to this view, reference to the literal meaning and/or the purpose of legislation is incapable of describing the process of statutory interpretation. Rather, a hermeneutic theory holds that legislation is interpreted with the purpose of continuing the legislative story initiated by the legislature – one which is in accordance with the moral norms embedded in the authorised legal texts (ie statutes and case law). This hermeneutic process is furthered by finding the interpretation of the legislation which achieves the best fit with these authoritative legal materials.\(^\text{31}\)

D  **Textualism**

The fourth approach is what might be described as textualist. While I have adopted the textualist label, this approach is often described by the judges as literalism. It is somewhat incongruous with the concept that the word ‘literalism’ appears to have assumed at least three meanings in the primary and secondary literature.\(^\text{32}\)

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For criticism of this approach generally see Paul Finn, ‘Of Power and the People: Ends and Methods in Australian Judge-Made Law’ (1994) 1 Judicial Review 255.

In the more recent literature this theory of language is reflected in the suggestion that the Australian community needs to collaboratively construct meaning for the purposes of taxation law by engaging in ‘regulatory conversations’: J Braithwaite, *Making Tax Law More Certain: A Theory*, (Working Paper No 24, Centre for Tax System Integrity, Canberra, 2002).

\(^\text{28}\) Sir Ivor Richardson, ‘Reducing Tax Avoidance by Changing Structures, Processes and Drafting’ in G Cooper, above n 6, 327 at 330.


\(^\text{31}\) This idea of ‘best fit’ was referred to by Kirby P, as he then was, in *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1995) 96 ATC 4098 at 4101.

\(^\text{32}\) It seems that there is little express consideration of the varying streams of literalism in the primary or secondary literature in Australia, as most authors refer to ‘literalism’ apparently upon the assumption that it has just one denotation.
‘Literalism’ is sometimes taken to refer to the purported practice of interpreting legislation according to the ‘literal’ meaning of the words. Appealing for its apparent simplicity, this approach is founded in formalist language theory which maintains that each word has an assigned and finite meaning. Judicial interpretation of tax legislation, according to this theory of language, is merely a matter of joining the dots which, presumably, virtually anybody with a dictionary could do.

Secondly, literalism has sometimes been modified by the adjective ‘strict’, although it is unclear what this adjective adds to the literalist concept as literalism appears to be an absolute. Nevertheless, the concept of ‘strict literalism’ developed the connotation of reading the legislation narrowly (even artificially narrowly) and therefore often has assumed pejorative connotations if someone is described as a ‘strict literalist’.

Finally, literalism is taken to refer to the practice of identifying the meaning of the legislative text, which may entail consideration of the statutory context of particular provisions and relevant common law assumptions regarding the interpretation of legislation. Thus, in what is taken to be one of the classic Australian statements of the literalist approach, Higgins J stated:

The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it: and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we that the result to be inconvenient or impolitic or improbable.

The reference to interpreting the legislation as a whole is significant here, as it clearly recognises the significance of the statutory context to the interpretive process.

Perhaps owing to the pejorative connotations of the third understanding of ‘literalism’, few if any contemporary judges expressly avow a ‘literalist’ stance. However, many contemporary judges

It should also be noted that Krever seems to define literalism as a formalist approach to the characterisation of the material facts of a case: Krever, above n 5, at 476-7. Although a formalist characterisation of the facts and what purports to be a literalist approach to statutory interpretation are often deployed together, they are separate aspects of the interpretive process. Interpretation entails identifying the meaning of the legislation, while the characterisation of the facts (on a substantive or formal basis) is the first step of the process of applying the legislative meaning to the facts of a particular case. Accordingly, I have not considered this formalist characterisation of the facts of a case, which Krever describes as literalism, in my discussion of statutory interpretation.


33 The classic judicial statement of which may be seen in The Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB 64 at 71.

34 See, for example, John Ward, De Rothschild v Lawrenson [1994] British Tax Review 250.

35 FCT v Westraders Pty Ltd (1980) 144 CLR 55 at 80 per Murphy J.

36 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129 at 161-2; with the exception of the concluding clause, this statement of principle was accepted as a correct statement of the law by Mason and Wilson JJ in Cooper Brookes (Wollongong) Pty Ltd v FCT 81 ATC 4292; (1981) 147 CLR 297 at ATC 4305.

appear to adopt a textual approach to statutory interpretation falling within the third understanding of ‘literalism’ outlined above. These judges maintain that the terms of the legislation are the focus of statutory interpretation and the consideration of matters beyond the four corners of the legislation is irrelevant. Even some judges who appear to adopt one of the other three theories of statutory interpretation appear to concede that such a textualist approach has its place in the judicial skill set. Thus while Lord Steyn apparently endorses an activist approach to adjudication in the case of statutory interpretation, he notes that ‘fiscal legislation may sometimes require a stricter approach than social welfare legislation’. Similar reservations about a creative interpretative approach are also noted by the former Chief Justice of the High Court of Australia, Sir Anthony Mason:

In the case of statutes which impinge upon fundamental values, it is possible to say that an unambiguous and unmistakeable expression of intention is required to justify an interpretation which trenches upon the values. To insist upon the expression of such an intention is to enhance the legislative process by compelling those who introduce legislation to make plain to the legislature what the effect of the legislation will be.

Perhaps a more overt expression of a textualist approach may be seen in Justice Hill’s article of 2001, where he defends the ‘literalist’ approach that he adopted in deciding the CPH matter.

Indeed, some recognition of this textualist approach may even be found in the statements of Justice Kirby. For example, in the earlier extract from his 1999 article he suggests that his views may differ from those of his brethren because of the ‘more insistent demand that I feel to ascertain, and give effect to, the legislative purpose as I see it in the language under consideration.’ This implies that the statutory text is at least the primary focus of the judge when ascertaining the legislative purpose.

E Pragmatism or determinacy? What off duty judges conclude

The preceding overview of extra-curial judicial discussion of statutory interpretation supports the proposition that, when they do take the opportunity to express their views on this topic, judges generally endorse one or more versions of the determinacy thesis. Despite some recognition of pragmatic theories of statutory construction which hold that judges ‘make it up as they go’, judges seem to resile from such radical pragmatism and accept that communal morality, the legislative text and/or the legislative purpose are the bedrock upon which a theory of interpretive certainty may be founded. Moreover, some of the judges suggest that the two main sources of interpretive certainty

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40 Hill, ‘How is Tax to be Understood by Courts’, above n 5, at 232-3. His Honour then carries on noting that the difference of opinion with the Full Federal Court reflects the scope of judicial discretion with respect to statutory interpretation.
41 Kirby, above n 25 at 19; in the same way, Sir Ivor Richardson appears to sheet his purposive construction home to the ‘scheme of the legislation’ which is to be gleaned from the statutory text: Richardson, above n 26.
determinacy are purposive interpretation and textualism, even going so far as to say that the case law reflects a pendulum-like oscillation between these two ‘extremes’. ⁴²

Regardless of whether there is a swinging interpretive pendulum, according to this secondary literature judges exercise only a limited discretion when interpreting legislation. In any particular case, it seems, a judge chooses between just three possible alternative approaches to the interpretive task. Furthermore, these three approaches are referred to in terms which suggest that each interpretive approach supports just one interpretation. Thus, for example, the reference to ‘the community’, ‘the’ legislative purpose or ‘the’ literal meaning indicates that, once a judge has selected one of the three ‘authorised’ interpretive methods, it is a relatively straight and narrow path to the ‘right’ interpretation of the relevant legislation.

III  WHY TALKING THE DETERMINACY TALK PREVAILS

As already noted, the same judges that adopt these alternative formulations of the determinacy thesis also appear to suggest that the determinacy thesis is a fiction.⁴³ A fiction which is appealing for its neat categorisation of institutional functions and its reassuring depiction of rule certainty is a fiction nonetheless. However, as noted above, these suggestions are but faintly suggested and no judge appears to develop a comprehensive account of pragmatic adjudication – the suggestions of pragmatism are always compromised or undercut by reliance upon some formulation of the determinacy thesis. This begs the question of why judges are so reluctant to pursue their occasional assertions of judicial pragmatism to their logical conclusion – some form of broad judicial discretion. Why is it that the judges always appear to return to the determinacy fold?

While talking with a federal court judge some years ago, the judge freely admitted that judges make law. In reply, I asked why it was that judges did not say this in their judgments. The judge replied ‘because we wouldn’t get away with it’. Why is this judge, and presumably others, constrained to live this Sartrean bad faith? My argument is that statements such as this suggest that we have been beguiled by our own rhetoric – we want to believe the rule of law and its determinacy thesis. Indeed, it would be an interesting process to analyse the rhetorical devices embodied within the concepts of the determinacy thesis and the rule of law. The elements of this discourse which strengthen its rhetorical appeal include:

1. its foundation in an essentially liberal world view which appeals to many members of an essentially liberal society:
   a. reference to the rights of the individual against the oppression of the state;
   b. the proposition that an individual should be allowed the freedom to maximise their personal wealth within a framework of legal rules with clear application and an independent umpire (the judiciary) remote from the influence of the political realm; and

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⁴³ See the material referred to above under the heading ‘Pragmatism’.
2. the appeal to the rhetoric of science – the ‘science of law’ is embodied in the concept of the legal method – judges apply this method with metronomic consistency and arrive at the ‘right’ answer.44

These elements combine to tell an appealing story which we want to believe. One does not have to go far to find instances of arbitrary oppression of individuals/sub-communities and we want to believe that such oppression cannot happen in ‘our’ world in Australia ‘because we have the rule of law’. The underlying theme of the vast amount of literature advocating adherence to the rule of law is that it will keep the devil of anarchy/arbitrary oppression at bay. The rule of law is taken as an article of faith which must be repeated loudly and often – presumably to drown the voices of dissent. It is therefore unremarkable that questioning key tenets of the rule of law, such as the determinacy thesis, almost invariably provokes a strong response from those who want to believe the fiction.45

And yet, here I am proposing that we reconsider what it is that judges do when they interpret legislation. I believe that such a reconsideration is necessary because of the fact that the various determinacy theories do not offer a persuasive descriptive account of legal practice. Further, I believe that adherence to the determinacy thesis is impeding progress towards a more realistic approach to statutory interpretation and statutory drafting.

IV EXPLANATORY VALUE OF THE DETERMINACY THESIS – DO JUDGES WALK THE TALK?

One question which, in my view, has never been satisfactorily answered is why, if the law is determinate, so many supposedly rational members of the community would expend substantial sums of money on litigation if the answer was ‘there’ all along. If they had a skilled lawyer well versed in the dark art of statutory interpretation, surely they should receive infallible advice regarding the meaning of the law. Of course, it is expected that some taxpayers will want to have their day in court no matter what. However, it is also the case that most who litigate and those who advise them honestly believe that they are right, and yet one side must walk away with the crushing realisation that they were ‘wrong’ all along.

Furthermore, the fact that some litigants insist upon having their day in court does not explain the embarrassing frequency with which judges disagree upon the nature of the ‘right’ answer.46 As the


46 Despite Hercules’ ethereal legal skill, Dworkin concedes that past Herculean judges will have made mistakes (Law’s Empire, 271) without elaborating upon how such mistakes could emanate from such a judge. At this point Dworkin would have to concede that his account is no more than an ideal (at least from his perspective) vision for law, rather than an accurate descriptive account of ‘law in action’. For example, Dworkin does consider what underpins the judgments of non-Herculean real judges. Even if a real judge shares Dworkin’s ideal vision for the law, even Dworkin concedes that there is a world of difference between the ideal vision and reality. If a real judge does not have Hercules’ capacity, to what extent do arbitrary considerations influence the mind of the judge in making judgment? Dworkin leaves this critical question unanswered and therefore confines his vision for law to the mythical realm.
high priests of the legal order, judges’ judgments are supposedly the embodiment of the legal method which should lead us to the right answer – and yet so often so many judges are ‘wrong’. Despite the fact that judges are so frequently ‘wrong’, no one sincerely suggests that judges are incompetent merely because their peers disagree with them. No one calls for their dismissal because they have not applied accepted legal doctrines:

By the time a disputed case gets there [ie to a court], there is usually a choice to be made between two competing approaches to the law. Often, neither is indisputably correct – witness the numerous 4:3 decisions in our highest court. Talented, civilised and highly trained lawyers differ on the meaning to be given to words, whether of statutes enacted by Parliament of past judgments of courts of high authority. Judges, as it seems to me, must be more then mere technicians.47

The fact that so many seem to be so wrong about the meaning of the law does not comprise a knockdown argument warranting rejection of the alternative formulations of the determinacy thesis. Lawyers clearly are human and it is possible, for example, that they do fall into error on such a regular basis that it is not considered a ‘sackable infringement’ to be wrong about the meaning of the law. But if to be human is to be wrong about the law on occasion, how do we know that the limited cases that do ascend to the pinnacle of the court hierarchy are rightly decided? After all, High Court judges are human too. Is the determinacy thesis a mythical ideal or is it descriptively accurate? To consider this question further it is appropriate to examine the theoretical merits of the variants of the determinacy thesis.

It is beyond the scope of this paper to consider in detail the vast literature dealing with language theory in general and statutory interpretation in particular. However, it is necessary for the sake of the argument presented in this paper to raise some of the key problems with the alternative versions of the determinacy thesis referred to by the judges in their ‘off duty’ writing.48

A The explanatory value of textualist accounts

1 ‘Literalism’ or ‘strict literalism’

The ‘literalist’ approach has been criticised upon a number of grounds, including:

1. a literal theory of interpretation which focuses upon dictionary meanings has been criticised for its failure to specify which dictionary is authoritative.49 Even if one dictionary is selected as authoritative, almost invariably a number of different meanings will be provided;50

2. a formalist theory of meaning fails to account for the dynamic nature of language – meanings change with time (raising the question of which edition of the authoritative dictionary should prevail) and the same word will have different meanings within different sub-cultures in a community (such that the selection of one dictionary as authoritative may be perceived as arbitrary). One need only consider the contemporary usage of the word

49 Eskridge, Frickey and Garrett, supra, n 48, at 233.
50 A point recognised by Justice DG Hill, supra, n 42, at 686.
‘gay’ to recognise the fluidity of meaning.\(^{51}\) This means that a judge must make a choice between, for example, the ‘technical legal meaning’, the ‘ordinary meaning’ and even the ‘commercial’ meaning of statutory terms. The existence of such choice denies the literalist claim to legal determinacy founded simply upon ‘the meaning of the words’;

3. the exclusion of the importance of the context of a statement in determining its meaning. At least since the work of Wittgenstein\(^ {52}\) it has been generally accepted that meaning depends in part upon context – allowing a baby sitter to teach your children a ‘game’ does not necessarily mean you have authorised tuition in gambling ‘games’.

Although some parts of legislation refer to ‘objective’ phenomena,\(^ {53}\) invariably the meanings of some statutory words within any provision will vary depending upon their context – and the judge must decide which aspect of the context should be given the greater weight.\(^ {54}\) As Lord Diplock observed, ‘words mean whatever they are said to mean by a majority of the appellate committee dealing with the case, even though a minority might think otherwise’;\(^ {55}\)

4. many challenge literal interpretation upon the basis that a speaker will not necessarily say what they intend. True, legislation is theoretically the product of close scrutiny by Parliament and so legislative ‘slips of the tongue’ should be rare or non-existent. However, given that words do not have one finite meaning, and hence given the importance of the context of a legislative statement in identifying the most appropriate meaning, to exclude what the speaker thought they intended is to omit consideration of an important aspect of the ‘meaning calculus’;\(^ {56}\) and

5. The fact that a literalist approach would, if it achieved its promise, be one way of achieving formal justice but would not necessarily achieve substantive justice. From a normative perspective, then, it is argued that literalism does not enjoy universal support as a political theory.\(^ {57}\) Further, as a descriptive account, the emphasis upon formal justice elides\(^ {58}\) the frequent reference to notions of substantive justice in the course of judgments.\(^ {59}\)

\(^{51}\) Gay can mean ‘happy’, refer to a homosexual male or, more recently, be used when describing something as weak or ineffectual (‘that is so gay’).


\(^{53}\) Such as time, age, value denominated in particular currency and such like. This is not to say that the statutory reference to such objective ‘phenomena’ means that the interpretive process is *necessarily* closed – as it is possible for such expressions of ‘objective’ rules to be nonsensical (adjudged from any number of perspectives including legislative purpose [however defined], public policy, etc). Of course, this second level question is irrelevant from the literalist standpoint, as correcting legislative error is not the task of a judge:


\(^{55}\) *Carter v Bradbeer* [1975] 1 WLR 1203 at 1205-6.

\(^{56}\) See, for example, Eskridge et al, op cit n 22 at 225.


\(^{58}\) For a discussion of the rhetorical force of elision see below under the heading ‘Elision’.

\(^{59}\) See the text below under the heading ‘Substantive Justice v Formal Justice’.
These criticisms suggest that, leaving to one side the question of whether literal interpretation makes for an appealing political theory of adjudication, a literalist theory does not withstand close scrutiny. Indeed, vagaries of ‘literal meaning’ were demonstrated in the course of the Consolidated Press Holdings litigation\(^60\) where different judges purported to apply a ‘literal interpretation’ of the same provision but disagreed upon the result.\(^61\)

2. The Explanatory Value of Purposive Theories

A theory of legislative determinacy founded upon subjective purpose is unattractive for a number of reasons:

1. At the most basic level, intentionalist communication theory is founded upon the view that the speaker develops a finite intention with respect to a particular topic. The speaker’s psyche is portrayed as a determinate and fixed phenomenon conveyed in the speaking act. However, psychoanalytic theory raises questions with respect to this portrayal of the ‘essential self’ by portraying the deep divisions within the subject.\(^62\) According to this understanding of the human psyche, the individual is constantly engaged in an internal dialogue which never reaches the point of complete self knowledge.\(^63\) The corollary is that self-knowledge, and hence a finite intention formed with the legislative mind, is a dubious proposition at best;

2. Intentionalist theory presupposes that a speaker’s purpose can be prelingual and this prelingual intention is then ‘put into words’. According to purposive theory, the speaker’s objective is to make the words fit the pre-lingual intention. A good speaker will achieve this outcome, while for others the recipient will need to double check by comparing the message with the speaker’s pre-lingual intention. However, how does one ascertain the pre-lingual intention?\(^64\) Even if the speaker is asked to express their intention with respect to a particular speaking act, acceptance of the vagaries of language begs the question of how the expression of an intention escapes from the imprecision of language; and

3. When talking about legislation, the shortcomings of intentionalist communication theory are exacerbated by the fact that the ‘author’ of legislation is all or some part of Parliament. Constructing authorial intention in this context is highly artificial and hardly a basis for legal determinacy.\(^65\)

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\(^{60}\) *CPH Property Ltd v FCT* 98 ATC 4983; *FCT v Consolidated Press Holdings Ltd* 99 ATC 4945 (Full Federal Court); *FCT v Consolidated Press Holdings* 2001 ATC 4343.

\(^{61}\) Thus, the Full Federal Court observed that ‘the constructional choice which encompasses zero foreign source income is open upon a literal reading of the section. In this regard we respectfully differ from his Honour's view that this is “a construction which the literal language of s 79D does not bear”’ 99 ATC 4945 at 4964. See the discussion of the CPH litigation in DG Hill, supra n 5, 232-3. Also note that the High Court agreed with the decision of the Full Federal Court: *FCT v Consolidated Press Holdings Ltd* 2001 ATC 4343.


\(^{64}\) A problem conceded by ED Hirsch, *Validity in Interpretation* (1967) at 173.

\(^{65}\) See, for example, Ronald Dworkin, *Law’s Empire* (1986), 318-20; and W David Slawson, ‘Legislative History and the Need to Bring Statutory Interpretation under the Rule of Law’ (1992) 44 *Stanford Law Review* 383. For early
4. Communication theory also questions whether, if there is such a phenomenon as the speaker’s intention, it should determine the meaning of a statement. According to this theory, the role of the recipient of a statement is passive as there is no need to construct meaning from the statement. In terms of political theory, this begs the question of why the intention of an earlier Parliament should govern the contemporary life world, given that the legislative intention may have been formulated in a context of different social values.

The shortcomings of a subjective purpose approach have lead some to suggest the counterfactual purposive approach. However, the counterfactual approach to statutory interpretation suffers from many of the shortcomings of the subjective purposive approach. If psychoanalytic theory is accepted, the constructing one finite hypothetical purpose entails a leap of faith which almost invariably will lead to an arbitrary determination of what ‘the legislative purpose’ was. Further, whose hypothetical purpose is relevant here and what evidence will lead the reader to a finite resolution of the interpretive issue?

The third purposive approach escapes from the shortcomings of subjective purpose theories by focusing upon the objective purpose of the legislation. Rather than worrying about what particular legislators had in mind when passing legislation, this approach examines the objective evidence in authorised materials with a view to inferring the legislative intention. This approach seems to take for granted that there is a core of determinate meaning to be gleaned from the authorised texts from which legislative interstices may be closed by analogical reasoning. This approach to statutory interpretation is open to challenge upon two grounds:

1. It may be seen that this theory adopts literalist theory in order to lay the foundations for the objective legislative intention. However, if the criticisms of a literalist theory of meaning are accepted, the existence of this objective legislative foundation is open to question;

2. If a literalist theory is accepted, the objective purpose theory must explain why the legislative text should be supplemented

3. The theory suggests that the known legislative scheme provides sufficient insight into the framework of the parliamentary intention as to provide a firm footing for the inductive extrapolation. However, many recognise that the income tax legislation embodies varying degrees of rationality, or irrationality, as the case may be.66 As eloquently noted by many other authors, the income tax is riddled with lacunae, inconsistencies, special legislative ‘deals’ pandering to specific interest groups and so forth.67 Ascribing a rational legislative scheme to a parliament which sanctions such labyrinthine legislation is an act of faith which borders on the irrational.

For example, it is doubtful that a purposive approach would lend much to the elaboration of the meaning of ‘ordinary income’ for the purposes of section 6-5 as that provision amounts to an abdication by the legislature in favour of allowing the judiciary to apply often irrelevant doctrines gleaned from a range of sources in defining a core element of the income tax base. For reasons which go to the core structure of the legislation, it is also consideration of manipulation of the legislative record in order to ‘create’ a legislative purpose see Alfred Conrad, ‘New Ways to Write Laws’ (1947) 56 Yale Law Journal 458 461-2.

Cf Lord Millett, ‘Construing Statutes’ (1999) 20 Statute Law Review 107 where it is suggested that the general scheme of income tax legislation is ‘tolerably clear’.

66 In this regard the vast public choice literature is relevant – for an introduction to which see Daniel Farber and Philip Frickey, Law and Public Choice: A Critical Introduction (1991).
doubtful that a purposive approach would be of much assistance in interpreting the provisions within Part IVA.\textsuperscript{68}

With respect to statutory provisions of more limited scope, a schematic purpose approach which accepts a literalist theory of meaning confronts the problem of identifying those circumstances where the legislative text will be supplemented in order to close a perceived gap in the legislation. What evidence will warrant the conclusion that there is a gap in the legislation and how can a court be sure that such a gap was unintended? Reference to the case law suggests that this objective purpose approach is a matter of judicial discretion rather than providing a strong foundation for the determinacy thesis. The legislation considered by the High Court in \textit{Ryan v FCT}\textsuperscript{69} and \textit{Consolidated Press Holdings}\textsuperscript{70} provided two examples of legislation which arguably invited ‘judicial legislation’, and yet the High Court did not expressly adopt the objective purpose approach in either case.\textsuperscript{71}

In response to these shortcomings of a broadly framed objective purpose approach, some argue that the relevant objective purpose is the purpose of each specific provision.\textsuperscript{72} However, this does not escape the assumption that the language of the relevant provision (and the associated extrinsic materials) conveys a determinate meaning. This more narrow objective purpose test is therefore difficult to differentiate from literalist theory other than for the fact that it seems to countenance reference to extrinsic materials that many ‘literalists’ would reject.

3 The explanatory value of the plain meaning of statutory words (given their context)

The perceived shortcomings of ‘strict literalism’ have led many judges and language theorists alike to search for an alternative foundation for determinate meaning.\textsuperscript{73}

One such alternative has been found in a compromise between literalism, Wittgenstein’s context theory and purposive theory which also accommodates appeals for a judge to arrive at interpretations which accord with substantive justice. According to this interpretive theory, the ascertainment of legislative meaning entails an examination of the words of a particular statutory provision in their context with a view to identifying the legislative intention. This approach is reflected in the joint judgment of Brennan CJ, Dawson, Toohey and Gummow JJ in \textit{CIC Insurance Ltd v Bankstown Football Club Ltd}:\textsuperscript{74}

\textsuperscript{68} The purpose of Part IVA is generally considered to be the negation of ‘tax avoidance’, but as noted by Passant and others, the definition of tax avoidance is problematic in the context of income tax legislation which is not unified by a coherent income concept: John Passant, ‘Tax avoidance in Australia: Results and prospects, (1994) 22 Federal Law Review 493.

\textsuperscript{69} \textit{Ryan v FCT} 2000 ATC 4079.

\textsuperscript{70} \textit{FCT v Consolidated Press Holdings Ltd} (2001) 179 CLR 625; 2001 ATC 4343.

\textsuperscript{71} These cases are briefly considered below.

\textsuperscript{72} J Waincymer, ‘The Australian Tax Avoidance Experience and Responses: A Critical Review’ in Cooper, above n 6, 247: “It is submitted that the proper approach to a purposive analysis of the \textit{Income Tax Assessment Act} is to consider the purpose of the particular provision under examination. To do so will ordinarily require a consideration of the purpose of the generic type of provision as opposed to the purpose of the Act as a whole.” (at 260). The reference to the ‘generic type of provision’ is unclear — many statutory provisions will represent a unique reconciliation of competing objectives/interests and so recourse to a generic provision (the existence of such a universal must also be open to doubt) is problematic.

\textsuperscript{73} For a referential theory of language see JS Mill, \textit{A System of Logic} (1947), 48-9. For a formalist theory of language see F de Saussure, C Bally and A Sechehaye (eds), \textit{Course in General Linguistics} (1966) 67ff.

\textsuperscript{74} (1997) 187 CLR 384.
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. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd* [(1986) 6 NSWLR 363 at 388], if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. 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 to the legislative intent.  

This statement of interpretive doctrine is a masterpiece in rhetorical discourse as it incorporates virtually all theories of meaning. There is something for everyone here:

1. A ‘literalist’ would be happy to see that the concept of the ‘literal meaning’ has survived and even appears to have the upper hand in the absence of countervailing evidence;

2. Those advocating purposive theories will be pleased to note that the ultimate objective is the identification of meaning which accords with the ‘legislative intent’;

3. Legal pragmatists will be happy to see that the High Court concedes that pragmatic considerations may influence the selection of an appropriate meaning (‘inconvenience or improbability of result …’); and

4. Those hoping for accommodation of their concern that the Courts interpret statutes with an eye to substantive justice will also be pleased to see an apparent recognition of their concerns (‘inconvenience’).

However, as with any compromise of competing absolutes this statement of principle unwinds if the competing threads are teased out and the rhetorical rope unwound:

1. The reference to ‘legislative intent’ is vague and provides an insubstantial foundation for legal determinacy;

2. The tension between ‘literal’ meaning and ‘legislative intent’ is unresolved – what does one do in the case of drafting error where the legislature has left the judge with little interpretive space?

3. While reference to context is included, it should be noted that the reference to examples of contextual factors is an inclusive list. Are there any limits to this context? To put this another way, is the relatively circumscribed list of ‘extrinsic materials’ referred to in the *Acts Interpretation Act 1901* (Cth) s 15AB otiose?

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75 Ibid at 408. In support of the latter part of this statement, their Honours cited the decision of Mason and Wilson JJ in *Cooper Brookes (Wollongong) Pty Ltd v FCT* 81 ATC 4292; (1981) 147 CLR 297 at 320-1.

76 For discussion of the shortcomings of purposive language theory see above under the heading ‘The explanatory force of purposive theories’.
Some extra-curial statements by judges suggest that reference to a broad range of contextual factors including economic and social outcomes will be warranted. How is such evidence to be admitted and what qualifications do judges hold to assess, for example, econometric projections?

4. From what standpoint(s) are ‘inconvenience’ and ‘improbability of result’ to be judged? At the micro level or at the macro level? At the micro level, it will be ‘inconvenient’ for a taxpayer if they have to pay more tax and it will be ‘inconvenient’ for a government if it does not extract additional tax revenue from the taxpayer. At the macro level inconvenience or improbability of result might be judged from any number of perspectives – economic theory, sociological theory (ie systems theory), social psychology, substantive justice, formal justice and so forth. Is there any limit to the type of evidence that may be lead in advocating a particular interpretation?

These unresolved internal contradictions and ill-defined concepts mean that the High Court’s statement of principle is a weak foundation for a theory of determinate statutory meaning.

4 The explanatory power of hermeneutic theories of interpretation

Even the more refined hermeneutic theory of Dworkin proposes judicial excavation amongst ‘authorised’ legal texts in order to unearth the relevant communal convictions. Under any of these alternative accounts of the determinacy thesis the interpretation of tax legislation is supposedly an instance of the rule of law in action – judges are merely the intermediaries between the sender of the legal message (Parliament) and a limited number of its recipients (those subjects who can afford to litigate upon the meaning of tax legislation).

Ronald Dworkin offers a ‘right answers’ thesis in which he suggests that an ideal judge (Hercules) is able to arrive at a right answer. However, Dworkin concedes that real judges do not have the time nor the skill to achieve the normative perfection that Dworkin describes: ‘[Hercules] does what they [ie ‘real judges’] would do if they had a career to devote to a single decision; they need, not a different conception of law from his, but skills of craft husbandry and efficiency he has never had to cultivate’. Such a concession to the constraints experienced by any judge suggest that, despite his suggestion that his is a descriptive as well as a normative account of legal practise, Dworkin’s account is remote from the real world.

V SEARCHING FOR AN ALTERNATIVE DESCRIPTIVE ACCOUNT - LAW AS RHETORIC

The preceding discussion with respect to the theoretical merits of alternative formulations of the determinacy thesis can only serve to heighten our suspicions that there is no determinate legal

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77 See, for example, McHugh, above n 15 at 48-9.

78 For this reason McHugh’s seems to delineate a very circumscribed role for judicial law-making: see McHugh, above n 18.

79 Dworkin, above n 30, 337ff.

80 Ibid, 265.

81 For the suggestion that institutional constraints are a sorely neglected aspect of legal interpretive theory and that incorporation of institutional constraints into interpretive theory suggests that a formalist interpretive approach adopted by generalist courts might generally be justified see, for example: Cass Sunstein and Adrian Vermeule, Interpretation and Institutions, (John M Ohlin Working Paper No 156 (2nd series), University of Chicago, 2002) (available at http://www.law.uchicago.edu/Lawecon/workingpapers.html). The assumption, of course, is that there is such a thing as a formal legal meaning. The preceding discussion suggests that the existence of such a construct is open to challenge.
meaning applied by the courts in resolving tax disputes. So if the judges are not doing what they say they are doing, applying determinate legal meaning, what are they doing?

It is beyond the scope of this article to revisit the massive amount of literature with respect to communication theory more generally and the debate within the ‘legal’ community with respect to the ramifications for alternative communication theories. Suffice to say that in an earlier article I have attempted to set out a theory of interpretation which questions the merits of the determinacy thesis as a descriptive account. Further, I argued that judges assume a law-making function whenever they interpret legislation because they invariably exercise a discretion when determining the interpretive approach to be adopted in a particular case.82 Finally, I have argued that the judge as lawmaker is a rhetorician, adopting rhetorical devices and discourses in order to win support for her/his particular interpretation. The fact that any judgment will necessarily be built upon rhetoric explains why judgments are so frequently overturned on appeal – the majority of an appellate court simply adopts alternative rhetorical devices and discourses which lead the court to a different conclusion.

The rhetorical devices and discourses used by any judge will often be similar to the rhetorical devices used by the lawmaker when making the legislation, but this does not mean that there need be an identity between the two. This similarity of rhetorical devices may be traced to the fact that, generally speaking, the same interest groups will have an interest in the formation and application of a particular piece of legislation. Thus, for example, in the context of tax legislation it is clear that some key constituencies include the various sectors of the ‘business’ community – small business, large business, the farming sector (agribusiness and small farmers) as well as the social welfare lobby groups who seek to represent low income earners and socially disadvantaged sectors of the community. Often tax legislation will represent a compromise between such (often) competing constituencies and the government of the day will strive to garner support for its legislative proposal by persuading interested members of the community that the legislative reform is for the social good. Clearly here there is a considerable role for the art of rhetoric.

When tax legislation is brought to court it almost invariably, or always, embodies a compromise which leaves the way open for alternative interpretations of the nature of that compromise. Whether done consciously or subconsciously, a judge embarks upon the process of interpretation with a view to persuading any reader of his or her judgment that their judgment arrived at the ‘right’ answer. Rather than applying law and arriving at the ‘right’ answer, the judge is searching for rhetorical devices which will ensure the success of her/his particular interpretation. It may be seen that this account of statutory interpretation is very close to the pragmatic account described by some judges in an extra-curial context.83

The purpose of this article is to take this depiction of statutory interpretation beyond the theoretical realm by developing a taxonomy of rhetorical devices applied by the courts in deciding Australian income tax cases. By developing this taxonomy, it is hoped that the future analysis of tax case law will recognise the contingent nature of the process of statutory construction. Rather than such case analyses proceeding upon the assumption that the outcome in a particular case is the right answer, case analyses would consider why the judicial reasoning appears convincing and consider what alternative conclusions were available had the court adopted differing rhetorical devices. Thus, it is

83 See the material referred to above under the heading ‘Pragmatism’.
hoped that the future analysis of case law would focus not only upon the text of the judgment, but what the judgment ignored.

By reorienting the analysis of the adjudication of tax cases it is hoped that material benefits could be achieved in terms of the simplification of the Australian income tax legislation, an enhanced legitimacy of the courts and the adoption of a more systematic approach to statutory interpretation.

VI RHETORIC – THE POOR COUSIN IN THE SEARCH FOR TRUTH?

Whether or not it is accepted that the use of rhetorical devices by judges leads to the conclusion that judges are law makers, a study of the rhetorical devices commonly employed by Australian judges in tax cases has not been undertaken. It is beyond the scope of this paper to consider the philosophical debate that has raged for two millennia regarding the role of rhetoric in the search for truth. Suffice to say that although Plato and Socrates considered that the study of rhetoric would enhance philosophic discourse in the quest for truth, the study of rhetoric subsequently fell into disrepute as it was considered to be the deceptive art of the Sophists.

Given that the use of rhetoric is often labelled as sophistry and hence anathema to the quest for truth, a discussion of the rhetoric of law inevitably provokes a response from those who maintain the sanctity of the rule of law and the determinacy thesis. However, it should be remembered that I am seeking to present a descriptive account of tax interpretation rather than a normative account. If the determinacy thesis is to hold as a descriptive account, it needs to explain the existence of rhetorical devices in the tax case law. It would be far too ambitious to hope to chart all of the rhetorical devices and discourses used by judges in tax cases. However, in the next part of this paper I wish to identify what I consider to be some of the more significant rhetorical devices used in the taxation case law. By doing so, I will also illustrate how recourse to such devices strengthens the rhetorical effect of judgments but undermines the assertion that judges arrive at a particular conclusion by applying the legal method drummed into successive generations of law students.

A Substantive justice v formal justice

Given that the raison d'etre of the law is to manifest justice in the community there will invariably be disputes about what constitutes justice. On occasion judges in tax cases rely upon a rhetorical appeal to substantive justice in support of their particular conclusion. Thus, for example, in the Full Federal Court decision in Placer Pacific Management Pty Ltd v FCT, Davies, Hill and Sackville JJ concluded in a joint judgment that the taxpayer should be allowed to claim a deduction under ITAA 1936 s 51(1) with respect to a compensation payment made to a customer of a business formerly carried on by the taxpayer. Their Honours suggested that their conclusion ought to be adopted because it was the just and equitable result:

On the facts of the present case the occasion of the loss or outgoing ultimately incurred in the year of income was the business arrangement entered into between Placer and NWCC for the supply of the conveyor belt which was alleged to be defective. The fact that the division had subsequently been sold and its active manufacturing business terminated does not deny deductibility to the outgoing. A finding to the contrary would lead to great inequity. Many businesses generate liabilities which may arise in the considerable future. Such liabilities are sometimes referred to as "long tail liabilities". To preclude deductibility

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84Placer Pacific Management Pty Ltd v FCT 95 ATC 4459.
When those liabilities come to fruition on the basis that the active trading business which
gave rise to them had ceased would be unjust. 85 (emphasis added)

This statement derives considerable force from the unargued proposition that the application of the law should produce a result which is substantively fair. However, for other judges such appeals to substantive justice are merely nonsense on stilts. For example, in Ryan v FCT 86 Gleeson CJ, Gummow and Hayne JJ observed:

Although put in various ways, the taxpayer's contention was that it was “unjust” or “incongruous” or “absurd” if a taxpayer assessed to $1 tax could not be reassessed after the expiration of three years from the date on which the tax was due and payable, but a taxpayer who had been told by the Commissioner that nothing was owed, “remained at risk” without any limit of time.

19. There are several features of this contention that should be noted. First, it assumes that the Act adopts as a general policy or overall intention that "certainty and finality" be reached after a time. But the question for decision is “What are the circumstances in which an amended assessment may lawfully be issued?” That question is not answered by asserting the existence of any “policy” or "general intention” unless that policy or intention is to be found reflected in the provisions of the Act. Appeals to general notions of "fairness" or "justice" do no more than attempt to mask the absence of any foundation in the legislation for the conclusion which is asserted. 87

By contrast to the statement in Placer Pacific, the majority decision in Ryan achieves considerable rhetorical power from its reliance upon the depiction of the law as a finite bulwark against subjective notions of fairness.

It is evident from the preceding two extracts that some judges believe that there is a competition between competing visions of justice which dictates that a judge must make a critical choice between these competing visions in the course of adjudicating upon a matter. Further, it is clear

85 Ibid, at 4464.
86 Ryan v FCT 2000 ATC 4079.
87 Ibid, at 4083-4. As an aside which I leave for another day, this raises the question of the standing of the oft cited statement of Mason and Wilson JJ in Cooper Brookes (Wollongong) Pty Ltd v FCT 81 ATC 4292; (1981) 147 CLR 297:

On the other hand, when the judge labels the operation of the statute as “absurd”, “extraordinary”, “capricious”, “irrational” or “obscure” he assigns a ground for concluding that the Legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.

Quite obviously questions of degree arise. If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.

If recourse to ‘fairness’ is illegitimate, it is unclear whether this dictum remains relevant today, given that the statement in Ryan was made by a majority of the High Court but did not expressly refer to the decision in Cooper Brookes.
from the disagreement within the High Court in Ryan’s case that the adoption of either vision of justice can be used to justify strikingly different outcomes in a particular case.\(^8^8\)

This conflict between approaches predicated upon substantive justice on the one hand, and formal justice on the other, has troubled many judges over the centuries past\(^8^9\) and has also spawned a vast amount of secondary literature amongst proponents of the competing views.\(^9^0\) However, from the perspective of law as rhetoric, it can be argued that the debate about which critical perspective ought to be adopted by a judge, substantive justice or formal justice, is misguided. Both conceptions of justice have merit and there is no universally accepted grundnorm for determining which should prevail in particular cases. To an audience aware of the rhetorical devices deployed by judges, a good judgment would expressly consider this chestnut and set out reasons for why one of the two approaches should prevail in the particular case at hand.

**B Common sense**

An appeal to common sense is a powerful rhetorical device as the speaker assumes to herself the power of a fundamental truth to which all of the community would agree. An appeal to common sense, then, is one means of asserting the power of a univocal community:

Common sense is a value which reflects the community’s current thinking on a subject. It has nothing to do with a legal doctrine. Moreover, common sense views change as the community’s knowledge and understanding of a subject change.\(^9^1\)

To challenge a ‘common sense’ proposition a person must first rebut the imputation that they are a social outcast who lives outside the domain of socially accepted norms – and hence a person whose voice should not be heard. The realm of ‘common sense’ is a no-go zone for minorities and those raising a dissonant voice. Implicitly, the onus shifts to the challenger to show why they should be heard. The rhetorical force of the ‘common sense’ trope therefore stems from the fact that it diverts attention from the speaker and what the speaker says to an assessment of the person who would challenge the speaker. The power of the device of common sense is reflected in the errors of judgment attributed to common sense – at one time it was, for example, a matter of common sense that the earth was flat and that the earth was too heavy to move. Yet when a speaker relies upon ‘common sense’ we collectively forget such errors and believe that common sense affords a strong foundation for logical exposition.

On a regular basis judges make reference to common sense.\(^9^2\) For example, in *FCT v Cooling*\(^9^3\) Hill J (Lockhart and Gummow JJ concurring on this point) supported his conclusion that the lease incentive payment was assessable upon the footing that it accorded with common sense:

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\(^8^8\) Note the dissenting opinion given by Kirby J.  
\(^8^9\) For a recent expression of this tension see DG Hill, above n 29 at 29: ‘There will often be a tension between the need for certainty or predictability in the law, on the one hand, and the need for a just result, on the other. Justice requires that like cases are treated alike, just as it requires that a fair result be reached.’  
\(^9^2\) A search for ‘common sense’ in the CCH tax cases database reveals 394 references to this concept dating back to 1969, although there are multiple references to the concept in particular cases. Further, it should also be noted that there may be double counting by virtue of the fact that a judgment may refer to an earlier decision in which common sense was mentioned, although the later decision may not necessary adopt the common sense trope. A search for
In my view the transaction entered into by the firm was a commercial transaction; it formed part of the business activity of the firm and a not insignificant purpose of it was the obtaining of a commercial profit by way of the incentive payment. *This result accords with common sense.* The firm had the alternative of paying less rent and therefore obtaining a smaller tax deduction for its outgoings or paying a higher rent (assuming its lessor (Bengil) passed on the rental holiday), and therefore obtaining a larger tax deduction but receiving an amount in the form of assessable income.\(^94\) (emphasis added)

Here Hill J was referring to the fact that the taxpayer’s firm was, in effect, ‘purchasing’ what he (the taxpayer) hoped was a non-assessable amount by incurring deductible expenditure (the additional rental payment). While it can be accepted that judicial sanction of such an arrangement would not comply with tax policy (or common sense), most would also accept that tax legislation does not necessarily incorporate sound tax policy. For example, allowing taxpayers to purchase lowly taxed capital gains with fully deductible expenditure in the form of negatively geared investments is hardly sound tax policy. The courts have never adopted a common sense approach to negatively geared investments (which they might have done by interpreting the apportionment rule in the general deduction provision in a different fashion). Justice Hill’s appeal to ‘common sense’ must therefore be seen as a rhetorical device designed to garner support for his conclusion. The courts have not adopted the same ‘common sense’ approach to other transactions, so why should Mr Cooling have been treated differently?

More recently, the Full Federal Court was called upon to determine whether an accruals basis taxpayer had derived an amount with respect to the supply of goods in circumstances where the obligation to make the payment is the subject of a ‘bona fide’ dispute between the parties to the contract.\(^95\) This raised the question of whether evidence of the accounting treatment of such disputed amounts should be adopted for the purposes of interpreting the meaning of ‘derived’. Earlier case law had supported the conclusion that such evidence was not determinative of the issue, although it could be taken into account. Referring to the evidence of the accounting treatment of such amounts, Hill and Heerey JJ justified their reliance upon such evidence upon the footing that it accorded with ‘common sense’:

> It is clear that the accounting position as stated by Professor Walker accords with common sense. Where the whole or part of the consideration for the sale of a commodity or goods is not the subject of dispute then clearly income is to be recognised to the extent of the undisputed amount as soon as the commodity or goods is or are delivered. Where, on the other hand, the whole or part of the consideration is the subject of a bona fide dispute, the disputed amount is not recognised as being an asset of the vendor so as to take the place of the stock previously on hand. Non recognition will particularly be the case where the value of the claim cannot be reliably estimated. Indeed, if a company accounted otherwise, its accounts would clearly not give a full and true view. One has only to consider the question whether a company in the position of the taxpayers here could properly treat there as being a

\(^{93}\) ‘commonsense’ in the same database discloses 181 references dating back to 1969, not all of which are in the same cases revealed under the ‘common sense’ search.

\(^{94}\) *FCT v Cooling* 90 ATC 4472.

\(^{95}\) Ibid at 4484-5.

\(^{95}\) *BHP Billiton Ltd v FCT* 2002 ATC 5169.
profit brought to account at the time gas was delivered out of which it could declare dividends to understand the difficulty of any other approach.  

At the conclusion of their joint judgment, Hill and Heerey JJ once again referred to the common sense of their conclusion when noting that it was consistent with the treatment of disputed amounts in other jurisdictions.

C Opposing perspectives - Substance vs legal form

Reference to the substance of the case could be considered to be a subset of the rhetoric of common sense. Judges refer to the substance of the case when appealing to the popular misconception of the law which holds that the legal worldview is ‘artificial’ or founded upon fictions. Thus, for example, in *Thorpe Nominees Pty Ltd v FCT* Lockhart J (Sheppard J concurring on this point) concluded:

Viewed as a matter of substance rather than form it is plain, in my opinion, that the source of the income in question is Australia not Switzerland. The activities in Switzerland were obviously part of a prearranged plan, which if not prearranged in every detail was at least prearranged in all important respects with only a few loose ends to be determined. Switzerland was selected as a place outside Australia, there being no particular reason for Switzerland as opposed to some other place outside Australia other than the favourable income tax rates offered by the Canton of Glarus. The Canton of Glarus was selected because of those favourable income tax rates at a time when it appears to have been thought that the beneficial tax rate afforded by sec. 23(q) of the Assessment Act would form the basis of the scheme. In that sense Switzerland was but an accident in the selection of an international scene for an essential step in the plan. It would give undue weight to matters of form to regard Switzerland as the source of the income in question. Having regard to the practical realities of the situation and the substance of the matter, the real source of the income in question was Australia.

Here Lockhart J appeared to reject the artificiality of legal doctrines, which focus upon the legal form of a transaction, in favour of the practical ‘substance’ of the case. In doing so, his Honour apparently accepted that there is an objective factual substance which can be distilled for the purposes of applying the law but which is generally ignored by the courts.

Once again, the implicit appeal to the common sense of characterising the facts upon the basis of their practical substance makes this rhetorical device superficially appealing. However, one need only state this to recognise the nonsense of it. When adopting a ‘substance’ approach, judges are effectively saying ‘we are happy to live in what we accept is the ethereal world of formal legal artificiality most of the time, but today I want to descend from Plato’s cave and deal with the concrete facts of the case for a change’.

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96 Ibid at 5184.
97 Ibid at 5187.
98 Of course, there are many who suggest that any worldview is necessarily contingent as it is founded upon subjective considerations of what is important. Thus, for example, some suggest that the ‘science’ of economics is grounded upon the reality of universal truths, while law is based upon the shifting sands of a fictional worldview.
99 *Thorpe Nominees Pty Ltd v FCT* 88 ATC 4886.
100 Ibid at 4894. In *Reuter v FCT* 93 ATC 5030 the Full Federal Court did not refer to the substance of the case, they adopted a similar preparedness to discount the legal form of the transaction in favour of the ‘obvious’ characterisation of the facts (at 5037).
This merely begs the questions:

1. Why are judges generally happy to inhabit a world which, on occasion, they describe as artificial?; and

2. What makes judges switch from one world view as opposed to another if it is not the fact that the favoured world view offers stronger rhetorical appeal?

Although Lockhart J justifies recourse to the substance of the facts in *Thorpe Nominees* upon the basis that focussing upon the legal form of the transactions would be artificial, he does not explain why a substance approach is not adopted universally.

**D Formalism**

The decision in *Thorpe Nominees* may be contrasted with the decision of the Full Federal Court in *FCT v Lamesa Holdings BV.*\(^{101}\) In *Lamesa* the Full Federal Court was called upon to decide whether a non-resident holding company, which initially held all of the shares in an Australian company which was at the head of a multi-tier chain of Australian companies, held ‘real property’ for the purposes of Article 13 of the Australia/Netherlands double taxation agreement. Article 13 set out an inclusive definition of ‘real property’, which stated that real property shall include:

… shares or comparable interests in a company, the assets of which consist wholly or principally of direct interests in or over land in one of the States or of rights to exploit, or to explore for, natural resources in one of the States.

The Full Federal Court rejected the Commissioner’s invitation, expressed in alternative ways, to adopt a substance approach in this case:

> It seems to us quite consistent with rational policy that the Agreement was intended to assimilate as realty only one tier of companies rather than numerous tiers. Separate legal personality is a doctrine running not only through the common law but the civil law as well. No suggestion is made to the contrary. That is consistent with the plain and quite unambiguous language which the Agreement has employed. When legislation speaks of the assets of one company it invariably does not intend to include within the meaning of that expression assets belonging to another company, whether or not held in the same ownership group.\(^{102}\)

Given that the key issue was whether the Australian holding company held a ‘direct’ interest in the assets of its subsidiary companies, and given that the interpretation of treaties is purportedly undertaken in a more liberal manner than might apply to the interpretation of domestic legislation,\(^ {103}\) it might have been expected that the Full Federal Court would have dwelt upon the meaning of ‘direct interest’. That is, there was some merit in the Commissioner’s argument that Lamesa held shares in a company which held a ‘direct interest’, interpreted in the sense of substantive control as opposed to direct ownership, in the mining leases at the end of the corporate chain.

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\(^{101}\) 97 ATC 4752.

\(^{102}\) Ibid, xx.

\(^{103}\) For an elaboration of the principles purportedly applied in the interpretation of treaties see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 71 ALJR 381, 394-7 per McHugh J.
A formalistic approach will not always serve the interests of the taxpayer. In some cases the courts have struggled to justify a decision which has little to commend it in terms of logic. In *FCT v Cooper*,\(^\text{104}\) the taxpayer was a professional footballer who was advised to eat particular foodstuffs by the team coach (this advice was prompted by the taxpayer who was seeking a tax deduction for the additional food he was obliged to consume). The taxpayer demonstrated that in previous seasons he had struggled to maintain a sufficient body weight for him to remain in the first grade team – he earned less income if he was relegated to the second grade team.

In rejecting the taxpayer’s claim for a deduction for the additional food and drink which he consumed, the majority of the Full Federal Court drew a very narrow description of the taxpayer’s income earning activities by focusing upon the taxpayer’s contractual obligations. Hill J observed:

> The income-producing activities to be considered in the present case are training for and playing football. It is for these activities that a professional footballer is paid. The income-producing activities do not include the taking of food, albeit that unless food is eaten, the player would be unable to play. Expenditure on food, even as here "additional food" does not form part of expenditure related to the income-producing activities of playing football or training.\(^\text{105}\)

As noted in the dissenting judgment of Wilcox J, this is an unduly narrow description of the taxpayer’s income earning activities. Reference to any credible sports training textbook supports the view that rest and nutrition are a vital part of any athlete’s training regime.\(^\text{106}\)

\[E \quad \text{Individual vs the state}\]

On occasion judges will refer to the contradiction inherent within liberal society – the tension between the freedom of the individual and the regulatory power of the state. Thus in the oft-cited judgment of Barwick CJ in *FCT v Westraders*,\(^\text{107}\) Barwick CJ observed that ‘again, the freedom to choose the form of transaction into which he shall enter is basic to the maintenance of a free society.’\(^\text{108}\) In the equally oft-cited riposte to this assertion, Murphy J rejoined by stating:

> It has been suggested, in the present case, that insistence on a strictly literal interpretation is basic to the maintenance of a free society. In tax cases, the prevailing trend in Australia is now so absolutely literalistic that it has become a disquieting phenomenon. Because of it, scorn for tax decisions is being expressed constantly, not only by legislators who consider that their Acts are being mocked, but even by those who benefit. In my opinion, strictly literal interpretation of a tax Act is an open invitation to artificial and contrived tax avoidance. Progress towards a free society will not be advanced by attributing to Parliament meanings which no one believes it intended so that income tax becomes optional for the rich while remaining compulsory for most income earners. If strict literalism continues to prevail, the legislature may have no practical alternative but to vest tax officials with more

\(^{104}\) *FCT v Cooper* 91 ATC 4395.

\(^{105}\) Ibid, 4414. Lockhart J adopted similar reasoning at ATC 4403.


\(^{107}\) *FCT v Westraders* (1980) 144 CLR 55.

\(^{108}\) Ibid at 61.
and more discretion. This may well lead to tax laws capable, if unchecked, of great oppression.\footnote{Ibid at 80.}

It may be that the High Court was echoing the approach of Murphy J when it accepted, in \textit{FCT v Spotless Services Ltd}\footnote{96 ATC 5201, 5206.} that ‘taxes are what we pay for a civilized society’. To similar effect, in his dissenting judgment in \textit{Trust Company of Australia Ltd v Commr of State Rev (Qld)}\footnote{2003 ATC 4427.} Kirby J rejected the proposition that there was a presumption against double taxation, relying in part upon reference to ‘the larger needs of government’.\footnote{Ibid at 4440.}

\section{F Floodgates}

In many cases judges rely upon the floodgates argument as a justification for their decision. Denigrating the alternative by promoting the fear of the unknown in the form of countless claims is one way for the judge to portray their decision as appropriate. Thus, for example, in \textit{Handley v FCT}\footnote{81 ATC 4165.} Murphy J rejected the taxpayer’s claim for deductions with respect to his home office and relied in part upon the proposition that to allow the claim would only encourage more (perhaps difficult) cases:

\begin{quote}
Acceptance of the taxpayer's claim could lead to curious or even absurd results. Many lawyers, to the annoyance of their domestic partners, do a lot of legal reading in the bedroom. Also there is much scientific and anecdotal evidence in favour of the view that intellectual work goes on subconsciously as well as consciously, even during sleep. Perhaps the next claim would be for deducting part of the upkeep of the bedroom, or even a claim for part of the upkeep of the garden in which a barrister thinks about the conduct of cases whilst resting or strolling.\footnote{Ibid, 4173.}
\end{quote}

From an alternative standpoint, it might be argued that tax policy and substantive fairness require that the true costs of producing income are recognised and so the cases to which Murphy J referred may well justify some deduction if appropriate evidence was provided. While the prospect of a burgeoning growth in such claims may threaten the revenue, a legal formalist would merely suggest that it is for the legislature to express the rules with sufficient clarity in order to rule such claims either ‘in’ or ‘out’.\footnote{89 ATC 524.}

\section{G Alternative world views}

\subsection{1 Plain meaning}

Although it is often noted that there is rarely a ‘plain’ meaning of a particular term, judges regularly assert that their respective judgments are founded upon the plain meaning of the statutory text. A strong version of this approach was adopted by Hartigan J in \textit{Case W58},\footnote{89 ATC 524.} where he (perhaps somewhat optimistically) declared that the terms of Part IVA of the ITAA 1936 were unambiguous:
I am of the view that the primary source is the statute itself. The words of the statute are plain. I cannot use the Minister’s words to displace the plain language of Parliament. I refer to the words of Mason C.J., Wilson and Dawson JJ. in Re Bolton, Ex parte Beane (1987) 162 C.L.R. 514 at p. 518: “The words of a Minister must not be substituted for the text of the law.”\textsuperscript{116}

Similarly, as noted above in the discussion of Lamesa Holdings, the Full Federal Court relied upon what it considered to be the ‘plain and unambiguous’ language of the double tax agreement. Although the majority in the High Court in Ryan v FCT\textsuperscript{117} did not expressly refer to the plain meaning of the legislation, their decision upholding a seemingly irrational distinction between taxpayers who are obligated to pay even a small sum of tax and taxpayers who receive a nil assessment was implicitly, at least in part, founded upon the assertion that the plain meaning of the legislation necessitated this outcome:

At the very least, language is strained by saying that tax becomes "due and payable" on a particular date in circumstances where the Commissioner has issued a document informing the taxpayer that the Commissioner has determined that the taxpayer owes no amount for tax. No amount of teasing of the words of s 170(3), or of the words of s 204, can reduce, let alone eliminate, that strain. Whatever may be the elasticity of the expression "the date upon which the tax became due and payable", it does not, and cannot, accommodate the case where no tax is due and payable. Nor do the words of s 204, when read and understood in their context, enable any such accommodation.\textsuperscript{118}

Such assertions that statutory terms are unequivocal elide the possibility of statutory polyvalence and thereby obviate the need for the judge to expose the process of choosing between often equally meritorious interpretations.

By way of contrast, one year later the High Court considered the meaning of section 79D in FCT v Consolidated Press Holdings Ltd.\textsuperscript{119} Once again, this case raised the old question of whether Parliament said what it meant, or perhaps more correctly, said what a person would attribute to a presumably rational parliament. Section 79D as it then stood quarantined foreign income deductions on a pro rata basis to the extent that they exceeded ‘the amount of a class of income derived by a taxpayer in a year of income from a foreign source.’ One issue that arose in that case was whether CPH fell within section 79D, given that CPH had not derived foreign source income in the relevant year.

At first instance Hill J held that section 79D did not apply to CPH, in part because it could not be said that CPH had derived an ‘amount’ of foreign source income. His Honour referred to the ordinary and natural meaning of the provision, and in particular to the word ‘amount’. The Full Federal Court rejected this approach, concluding that the reference to an amount of foreign source income was adjectival and so the provision could apply where the taxpayer had not earned any foreign source income in a particular year:

For a given deduction related to a class of foreign income, the lesser the amount of the income, the greater the excess of the deduction over it. Therefore the greater will be the

\textsuperscript{116} Ibid at 533-4.

\textsuperscript{117} Ryan v FCT 2000 ATC 4079.

\textsuperscript{118} Ibid at 4083 para 15.

\textsuperscript{119} FCT v Consolidated Press Holdings Ltd (2001) 179 CLR 625; 2001 ATC 4343.
proportion of that deduction not able to be claimed as an allowable deduction. That is to say, the less the foreign source income for a given deduction, the greater the amount of the deduction that is quarantined. But if the section does not touch the case of zero income in the relevant class then, when the income diminishes to zero, the whole of the deduction becomes potentially allowable against non-foreign source income. On the construction for which ACP contends, the case of zero foreign source income creates a singularity or discontinuity which annihilates the operation of s 79D. There is no requirement in logic nor reason in policy why this should be so.\textsuperscript{120}

In a unanimous joint judgment the High Court agreed with the Full Federal Court after stating:

When regard is had to the legislative context, it is not impossible to apply the words of s 79D to a case where, in a given year, income has not yet begun to be derived or, indeed, where, in the events that happen, no income is derived. And it is possible to identify the class and source of prospective or potential income, bearing in mind the necessity to know enough about such income to conclude that s 51(1) would apply. There is no apparent legislative policy to be served by distinguishing, in s 79D, between a small amount of income and a case where income has not yet commenced to flow. Although the taxpayer’s argument on this point has considerable force, the meaning given to s 79D by the Full Court is to be preferred.\textsuperscript{121}

2 Legal world view

At times the mythology of law invades judgments and the idea of the law as an abstract domain ruling the everyday world from afar is referred to in supporting a particular interpretive approach. This is a powerful rhetorical device because it suggests that the law is able to abstract itself from the mundane and, by rising above the everyday world, the law is able to crystallise the legal principles governing the mundane world. The force of this rhetorical device is also enhanced by the fact that it reserves the right of judgment, and hence of critical appraisal of judgment, to those ‘within’ the legal domain.\textsuperscript{122}

One example of this approach can be seen in the decision of the High Court in \textit{FCT v James Flood Pty Ltd.}\textsuperscript{123} There the High Court rejected the argument that the meaning of ‘incurred’ ought be determined mechanically by reference to commercial and accounting practice. In a Delphic statement the High Court noted that:

It may be going too far to say that he must have come under an immediate obligation enforceable at law whether payable presently or at a future time. It is probably going too far to say that the obligation must be indefeasible. But it is certainly true that it is not a matter depending upon “proper commercial and accountancy practice” rather than jurisprudence. Commercial and accountancy practice may assist in ascertaining the true nature and

\textsuperscript{120} \textit{FCT v Consolidated Press Holdings Ltd} 99 ATC 4945 at 4964.

\textsuperscript{121} Ibid, at ATC 4358.

\textsuperscript{122} In times past, the capacity to criticise judges’ judgments was limited even to ‘insiders’ by virtue of the legal custom of refraining from criticising judgments. Although this custom has diminished, the rhetorical device of reserving the law to the lawyers remains.

\textsuperscript{123} \textit{FCT v James Flood Pty Ltd.} (1953) 88 CLR 492.
incidence of the item as a step towards determining whether it answers the test laid down by s 51(1) but it cannot be substituted for the test.\textsuperscript{124}

This seems to suggest that the Court believed that the legislative test stood independent of commercial and accounting practice, but that commercial and accounting practice was relevant to determining the meaning of the test.

3 Practical/business standpoint

However, by contrast to the approach adopted in cases such as \textit{James Flood}, on occasion judges will also claim that the correct interpretation is to be found by adopting a ‘practical’, ‘commercial’ or ‘business’ standpoint. This approach is a rhetorically strong device for reasons exactly opposite to the rhetorical force of the rhetoric of a remote legal standpoint. According to this rhetorical ‘spin’, the law is ‘grounded’ in the real world and therefore better placed to make ‘common sense’ decisions. The law, perhaps like a good monarch, is ‘of the people’ rather than an inhabitant of a remote, fairytale world.

This rhetorical device is a recurrent theme in tax judgments. Thus, in \textit{Nathan v FC of T}\textsuperscript{125} Isaacs J considered the source of dividends and observed:

\begin{quote}
The Legislature in using the word 'source' meant, not a legal concept, but something which a practical man would regard as a real source of income. Legal concepts must, of course, enter into the question when we have to consider to whom a given source belongs. But the ascertainment of the actual source of a given income is a practical, hard matter of fact.\textsuperscript{126}
\end{quote}

In \textit{Hallstroms Pty Ltd v FC of T}\textsuperscript{127} Dixon J as he then was said:

\begin{quote}
What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process.\textsuperscript{128}
\end{quote}

Similarly, in \textit{Arthur Murray (NSW) Pty Ltd v FCT}\textsuperscript{129} the High Court stated that:

\begin{quote}
The ultimate inquiry in either kind of case, of course, must be whether that which has taken place, be it the earning or the receipt, is enough by itself to satisfy the general understanding among practical business people of what constitutes a derivation of income. A conclusion as to what that understanding is may be assisted by considering standard accountancy methods, for they have been evolved in the business community for the very purpose of reflecting received opinions as to the sound view to take of particular kinds of items. This was fully recognized and explained in \textit{Carden’s Case} (1938) 63 CLR 108, especially in the judgment of Dixon J.; but it should be remarked that the Court did not there do what we were invited to do in the course of the argument in the present case, namely to treat the issue as involving
\end{quote}

\textsuperscript{124} Ibid at 506.
\textsuperscript{125} \textit{Nathan v FC of T} (1918) 25 CLR 183.
\textsuperscript{126} Ibid at 189-90.
\textsuperscript{127} \textit{Hallstroms Pty Ltd v FC of T} (1946) 72 CLR 634.
\textsuperscript{128} Ibid at 648.
\textsuperscript{129} \textit{Arthur Murray (NSW) Pty Ltd v FCT} (1965) 114 CLR 314.
nothing more than an ascertainment of established book-keeping methods. A judicial decision as to whether an amount received but not yet earned or an amount earned but not yet received is income must depend basically upon the judicial understanding of the meaning which the word conveys to those whose concern it is to observe the distinctions it implies. What ultimately matters is the concept; book-keeping methods are but evidence of the concept.\(^{130}\)

\[H\] \hspace{1cm} \textbf{Elision}

‘Elision’ refers to the omission of parts of a book. By elision I mean the rhetorical device of selective presentation of arguments – the omission of alternative accounts which would threaten the seemingly ineluctable progression towards the judicially identified ‘right answer’. In a different context, Judge Harold Leventhal used a metaphor which describes the device of elision. ‘The trick’, the Judge said, is to look over the heads of the crowd and pick out your friends.\(^{131}\) It is the elusive nature of elision, the fact that the judge does not expressly say anything, which generates the rhetorical force of this device. The reader is lead through a line of reasoning without reference to countervailing interpretations – the result being that the conclusion is presented as the only possible interpretation of the statutory language.

For example, in the recent Full Federal Court decision in \textit{Commissioner of Taxation v Amway of Australia Ltd}\(^{132}\) the Full Federal Court (Hill, Sundberg and Kenny JJ) unanimously held in a joint judgment that virtually all of the costs of providing travel, accommodation, meals and drink to the taxpayer’s sales agents at a leadership seminar met the requirements of the former ITAA 1936 s 51(1) and, further, were not precluded from deductibility by the former ITAA 1936 s 51AE. In the course of arriving at this decision the Full Court was required to consider the meaning of ‘entertainment’ for the purposes of s 51AE(3) of the ITAA 1936. Having noted the definitions of ‘entertain’ and ‘entertainment’ provided in \textit{The Macquarie Dictionary}, the Court observed that ‘in modern Australian usage it may be said that the concept of “to give pleasure” and “hospitality” underlie the meaning of the word “entertainment” when used in connection with matters such as food and drink.’\(^{133}\) It is doubtful that the Court’s reference to ‘hospitality’ adds anything here as the \textit{Shorter Oxford English Dictionary} indicates that hospitality means ‘the reception and entertainment of guests, visitors, or strangers’. The Court continued by stating that the purpose of the person providing food or drink is irrelevant to determining whether or not food or drink is ‘entertainment’. Given that the core of ‘entertainment’ is ‘to give pleasure’ it is clear that this is correct – it is the subjective experience of the recipient that is central to the concept of entertainment.

The Court continued by suggesting that the identification of entertainment:

\begin{quote}
‘involves a matter of characterisation. What is required is that regard be had to the essential character of what is provided. Regard will need to be had to all the relevant circumstances such as the locale where the food or drink is provided, the quality of the food or drink, the occasion for its provision, its cost and its nature. Clearly expenditure on the gala dinner would be entertainment. Indeed counsel for Amway did not suggest otherwise. By contrast
\end{quote}

\footnote{130}{Ibid at 318.}

\footnote{131}{Scalia, above n 37, at 36.}

\footnote{132}{\textit{Commissioner of Taxation v Amway of Australia Ltd} 2004 FCAFC 273.}

\footnote{133}{Ibid at para 60.}
the provision during a working session by an employer of sandwiches or coffee and tea to an employee would not be.\footnote{Ibid.}

Clearly, the Full Federal Court accepted that ‘entertainment’ can be differentiated from that which is mundane – thus mere sustenance will not comprise entertainment. Further, the extract indicates that the Court propounded an objective test for determining whether or not the recipient had received ‘pleasure’ in the way of food or drink – the relevant circumstances referred to (although not an exclusive list) suggest that the Court had in mind ‘relevant objective circumstances’.

This approach to differentiating entertainment from the mundane appears to be founded upon the Platonic proposition that everything has a fundamental essence. Arguably, however, the concept of entertainment focuses not upon the essence of things (such as food or drink), but upon the recipient’s subjective experience of those things. In many cases a glass of Dom Perignon will ‘give pleasure’ and so constitute ‘entertainment’, but a glass of Dom Perignon will not be entertainment if taken by a teetotaller who feels constrained by the rules of etiquette to sip (with veiled distaste) a toast at a business/formal function.

If the recipient’s pleasure is at the heart of ‘entertainment’, then in the absence of any statutory rules elaborating upon how the existence of entertainment is to be inferred from objective factors (cf ITAA 1936 s 177D), the focus of the inquiry should be upon the recipient’s subjective experience. Here the Full Federal Court appears to have adopted an approach to the characterisation of entertainment which was not supported by the definition of the term that the Court was purporting to apply. This elision of the focus upon the recipient’s pleasure is understandable from a pragmatic perspective. A statutory test which focused upon the subjective experience of the recipient would be unworkable - tax administrators and tax advisors alike prefer to rely upon objective factors when determining whether a statutory requirement is satisfied. For this reason the Court’s preparedness to elide the subjective element of ‘entertainment’ has merit from a pragmatic perspective, but the legal method of statutory interpretation generally ignores pragmatic considerations.\footnote{Although note that in \textit{Cooper Brookes (Wollongong) Pty Ltd v FCT} (1981) 35 ALR 151 Mason and Wilson JJ observed that where legislation is ambiguous the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention’.}

\textbf{I Neutrality}

An alternative approach to the concept of substantive fairness is to assert that like taxpayers should be treated alike. While this concept of equity falls short of notions of substantive fairness which would see unequals treated unequally (ie reverse discrimination) it is closer to the concept of legal formality which maintains that all are equal before the law.

In \textit{FCT v Mount Isa Mines Ltd; Mount Isa Mines Ltd v FCT}\footnote{\textit{FCT v Mount Isa Mines Ltd; Mount Isa Mines Ltd v FCT} (1991) 21 ATR 1294; 91 ATC 4154.} the Pincus and Ryan JJ relied upon this concept of neutrality in allowing as a deduction the cost of the taxpayer’s mineshafts. In \textit{Mount Isa Mines} the taxpayer operated a mine in which a deep vertical shaft had been sunk in order to gain access to the ore body, with horizontal shafts constructed for the purpose of exploiting the ore body. It was accepted that the cost of sinking the vertical shaft was of a capital nature as it was constructed merely for the purpose of gaining access to the ore body.

However, at the same mine the taxpayer had also utilised sloping tunnels, called ‘declines’, in following the ore body. Although the decline followed the ore body downwards, the decline was
excavated approximately thirty metres from the ore body. The nature of this decline was therefore
distinguishable from the passageways excavated by the taxpayer in *Denison Mines*. In their joint
judgment Pincus and Ryan JJ described the nature of the decline thus:

The decline in question was dug, not vertically, but at a slant and in what was described as a
“flat S” shape. The purpose of digging the decline was to follow down a particular rich
body of nickel ore. The tunnel constituting the decline was dug in such a way that trucks
could be driven down it to be loaded with ore won by the miners and, of course, driven back
up again. At intervals along the decline, mining operations would take place by digging out
to the ore body and then making use of a procedure called “stoping”. That involves making
a substantial chamber in the ore body by repeatedly blasting ore from the roof and walls of
the chamber. The ore thus dislodged is loaded mechanically into trucks.\textsuperscript{137}

In their joint judgment Pincus and Ryan JJ noted that the characteristics of the taxpayer’s decline
that distinguished it from the type of mineshaft considered in the earlier British case law were:

1. That the decline was not excavated in one push, but rather was excavated over a number of
   years in an ongoing process of small, incremental extensions; and

2. “the decline was not dug as an asset to be used in the mine as a whole, but was made in the
   process of getting access to the particular part of the ore to be mined “in the near future”\textsuperscript{138}

Their Honours concluded that the cost of constructing the decline was of a revenue nature, placing
emphasis upon the fact that the decline was progressively constructed for the purpose of gaining
access to ore that was to be mined in the near future.

Underlying this decision is the concern of the majority judges to maintain neutrality between
different forms of mining. Had their Honours held that the cost of excavating the decline was of a
capital nature, it was possible that underground mines would be treated disadvantageously under the
income tax law by comparison to open cut mines. This aspect of the judgment is apparent from the
consideration of the Canadian case of *Johns-Manville Canada Inc v R*.\textsuperscript{139} In *Johns-Manville
Canada* the taxpayer operated an open-cut mine. As the ore body was excavated the open-cut pit
deepened, necessitating the purchase of bordering of neighbouring land and the excavation of
material in order to maintain a safe slope on the sides of the mine pit. The issue in this case was
whether the cost of acquiring the neighbouring land and excavating the material was of a capital or
of a revenue nature.

In concluding that the expenditure was of a revenue nature, the Supreme Court of Canada noted in
passing that:

In the mining industry, where the undertaking is underground mining with the associated
assets such as vertical shafts and horizontal transportation elements not created directly by
the removal of commercial ore, the tax treatment of capitalization is invoked. On the other

\textsuperscript{137} Ibid at ATC 4,166.
\textsuperscript{138} Ibid at ATC 4,169.
hand, open pit or strip mining requiring none of these fixed facilities leads to the attribution of the associated expenditures to the revenue account.\textsuperscript{140}

In an apparent rejection of this statement, the joint judgment of Pincus and Ryan JJ in \textit{Mount Isa Mines} observed:

If that is the law to be applied in this country, then there would be a disinclination to open underground mines as opposed to open-cut (or “open-cast”) mines, the former being subject to a tax disadvantage. In broad terms, a question which arises is whether mining by decline method should be assimilated to open-cut mining, for tax purposes.\textsuperscript{141}

\textbf{J \ Combos} \textbf{inations of rhetorical devices}

Of course, a more powerful rhetorical device combines multiple tropes, thereby multiplying the persuasive power of the device. Such combinations are common in judicial decisions. Thus, for example, in \textit{Hepples}\textsuperscript{142} Deane J endorsed the opinion of Rich and Dixon JJ in \textit{Anderson}\textsuperscript{143} to the effect that a tax must be imposed in plain terms. His Honour continued, suggesting that such a proposition was a matter of common sense:

It is supported by strong reasons in both law and common sense. For one thing, statutes imposing taxation derogate from the ordinary rights of the citizen in that they represent a compulsory exaction of money. For another, the framing of the provisions of such legislation is essentially within the control of government. Indeed, in so far as provisions of the Act are concerned, it would seem that, particularly in relation to technical matters, the content and drafting of such provisions may, on occasion, reflect the advice and views of officers of the Australian Taxation Office itself (see e.g., Boucher, “Living with Tax Reform — The Taxation Office Approach” (1988) 22 \textit{Taxation in Australia} 652, at p 653). In circumstances where the heavy burden of legal costs is likely to constitute an insurmountable obstacle to the challenge by the average taxpayer of an assessment in the courts and where successive administrations have allowed the Act to become a legislative jungle in which even the non-specialist lawyer and accountant are likely to lose their way in the search to identify the provisions relevant to a particular case, the least that such a taxpayer is entitled to demand of government is that, once the relevant provisions are finally identified, a legislative intent to impose a tax upon him or her in respect of a commonplace transaction will be expressed in clear words. So to say is not, of course, to deny that complicated and even obscure taxation provisions may be necessary either to deal with technical situations or to prevent the avoidance of tax by artificiality of form or other device. However, it could not realistically be suggested that there would be any difficulty at all in plainly expressing a legislative intent that an amount received by an employee as consideration for a promise to refrain from competing with his or her employer or divulging or using the employer’s information after the termination of the employment should be included in the employee's assessable income for income tax purposes.

Here Deane J offers a compelling array of rhetorical devices in support of the ‘narrow’ approach to statutory construction which he appears to endorse: common sense, the rule of law and the perceived unconscionability of allowing the government any leeway in circumstances where it has

\begin{itemize}
  \item \textsuperscript{140} Ibid, 229.
  \item \textsuperscript{141} \textit{FCT v Mount Isa Mines Ltd; Mount Isa Mines Ltd v FCT} (1991) 21 ATR 1294; 91 ATC 4154 at 4168.
  \item \textsuperscript{142} \textit{Hepples v FCT} 91 ATC 4808 at 4818-9.
  \item \textsuperscript{143} \textit{Anderson v. The Commissioner of Taxes (Victoria)} (1937) 57 CLR 233 at 243.
\end{itemize}
the upper hand in terms of bargaining power because the heavy burden of legal costs is less onerous for a well resourced state.

VII RHETORICAL ANALYSIS OF TAX JUDGMENTS – RESULTS, CHALLENGES AND PROSPECTS

A What does the preceding review of the case law tell us about the judicial process?

The preceding review of the case law suggests that rhetorical devices, in the sense of recourse to discourses which carry rhetorical appeal, are a significant part of tax judgments in Australia. In support of their decisions judges routinely call upon discourses originating in generally accepted principles or concepts such as common sense, fairness (substantive fairness, formal fairness, neutrality, horizontal equity and a fair balancing of the often competing interests of the individual and of the state), business expedience and fiscal expedience (the floodgates argument). Further examination of the case law would doubtless uncover other discourses expressly referred to in the course of judgments. Moreover, studying the case law may also reveal implicit references to discourses.Indeed, even the rules of statutory construction underpinning tax interpretation are framed in rhetorically laden terms. For example, when ascertaining the ‘meaning’ of a particular statutory term the courts may have recourse to the ‘ordinary meaning’ of that term, a specific understanding of the term adopted in a particular industry or an economic sector (for example, the ‘technical legal meaning’ or ‘commercial and accounting understanding’), the meaning of the term gleaned from its specific statutory context or the meaning of the term from a ‘practical’ perspective.

All of these paths to statutory meaning are framed in terms which, when viewed in isolation, have strong rhetorical appeal. It is comforting to think that judges are one with the people in adopting the ‘ordinary’ meaning of a term (although recourse to a dictionary suggests that this referential theory of language is nonsensical, as much depends upon the context). Similarly, it is comforting to think that judges read legislation with a ‘practical’ eye (although this begs the question of from whose perspective should the practicality of legislation be determined? A ‘practical’ interpretation could mean enhancing the public revenue in order to secure the power of the state, or a ‘practical’ interpretation could mean minimising taxes in order to allow the ‘wealth generators’ in our communities to feel uninhibited in generating more wealth or a practical interpretation could be one which allows a taxpayer to escape taxation but which lays down a relatively clear precedent for prospective application.)

Leaving to one side the rules of statutory interpretation, the rhetorical devices noted in the preceding review, such as appeals to common sense, fairness, the floodgates argument and

144 It will be noted that in my preceding review of rhetorical practice I have restricted my examples to express statements of the judiciary. This is not to say that reference to rhetorical discourses may be implicit within a text – my only reason for excluding such examples is one of space. For example, in the course of its decision in the Spotless litigation the High Court noted: ‘In Australia, State and Territory stamp duty laws have been a particularly significant factor in the shaping of business transactions. However, the tax laws are one part of the legal order within which commerce is fostered and protected. Another part is Pt IV of the Trade Practices Act 1974 (Cth), which regulates or proscribes certain restrictive trade practices. In this broad sense, “[t]axes are what we pay for civilized society”, including the conduct of commerce as an important element of that society.‘ (FCT v Spotless 96 ATC 5201, 5206). This statement is suffused with the view that taxpayers must pay their ‘fair share’ of taxes in accordance with some sort of benefit theory of taxation. The relevance of this view to the interpretive issues at hand is obscure. However, it does carry strong rhetorical force in support of the argument that the anti-avoidance rules should be given a broad interpretation in combating transactions which smell of ‘tax avoidance’ (an elusive concept – see: J Passant, ‘Tax Avoidance in Australia – Results and Prospects’ (1994) 22 Federal Law Review 493; GT Pagone, ‘Tax Planning or Tax Avoidance?’ (2000) 29 Australian Tax Review 96.

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neutrality have no apparent basis in the tax legislation, yet they have clearly played a pivotal role in the course of the respective tax judgments referred to.

The fact that rhetoric has played such a significant role in Australian tax adjudication over such a long period of time, that the existence of rhetoric in judgments predates what some consider to be the scourge of judicial activism and that even judges who professed the ‘rule of law’ faith such as Dixon CJ used rhetoric in their judgments, suggests that rhetoric is intrinsic to tax adjudication.

B Responses to the depiction of the rhetoric of judgment

This begs the question – what do we do in light of this fact? For those upholding the rule of law, the response might be to argue that the cases referred to in the preceding review were mere aberrations and that the rhetorical aspects of the judgments should be ignored. However, the suggestion of turning a Nelsonian eye to such judicial indiscretions would amount to nothing less to a severe case of Sartrean bad faith. To put it another way, following the head burying example of the ostrich, I would argue that rhetoric in tax judgments is too widespread for such a selective reading of the history of Australian tax judgments to be credible.

An alternative response might be to accept that, hitherto, even the rule of law judges such as Dixon CJ have erred on the side of ‘activism’ and that all of the case law needs to be recognised as defective if the rule of law is to be applied. This is a far stronger argument in the sense that it cannot readily be knocked down. While I may point to the rhetoric interwoven within the vast body of Australian case law, and argue that rhetoric is indeed intrinsic to the act of judgment, mine is essentially an inductivist argument. ‘The last x thousand tax judgments have been riddled with rhetorical devices, so the next tax judgment will be as well’. Those wanting to hold to the rule of law would reject such inductivist logic, arguing that the past need not be a guide to the future. They would argue that the failure to attain the ideal in the past should not stop us from striving for the ideal in the future.

In response to this all that I can say is that I do not agree with the theories of language which underpin alternative formulations of the determinacy thesis and, hence, the rule of law. Those who uphold the rule of law as an ideal are, I suggest, noble dreamers because they aspire to an unattainable world in which language has a finite meaning. In earlier articles I have attempted to make some contribution to the elaboration of the argument that language is intrinsically incapable of conveying a finite meaning. But those upholding the rule of law insist that language is capable of conveying finite meaning and that we need to develop appropriate legal systems to ensure that statute law with finite meaning is enacted.

At the end of the day the debate about the achievability of the rule of law comes down to whether or not one is prepared to accept that language is capable of finite meaning and that judges are capable of discovering that finite meaning. Having scrutinised the interpretation of particular examples of tax legislation over the past three centuries, I have not found any evidence to suggest that there has ever been a period where legislation conveyed a finite meaning and that judges have merely been the oracle for such finite meaning. Rhetoric always has played a part in tax adjudication and, I suggest, always will.

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This is not to say that I am implacably opposed to the ideal of the rule of law. If a language with a finite meaning were to be achieved I would happily promote the rule of law because I believe that it offers the best reconciliation of the interests of the individual and the commonwealth. However at the moment I suggest that such a language is a remote prospect or an impossible dream.

1 The rule of law or the rule of judges? Reconsidering the role of the judge

To some the fact that rhetoric will be an intrinsic aspect of tax judgment into the future may seem a bleak prospect. The apparent nightmare of activist judges making decisions upon the insecure foundation of a whim, and justifying the decision with beguiling rhetorical devices, appears a short road to a politicised judiciary which is a hallmark of authoritarian rule. If judges are not finding the law that is ‘there’, then how can the judicial function be legitimate? If the legitimacy of the courts is jeopardised, what social institution will have the authority to protect the individual from the seemingly ever expanding powers of the state?

Despite this bleak portrayal of a world without the rule of law, I am much more optimistic about the world which we could create by recognising the rhetorical aspect of tax adjudication. After all, I suggest that I am only describing judicial practice as it currently exists and the world has not fallen in around our ears.

Given the vast literature dealing with statutory interpretation, and the enormous subset of that literature which argues that judges make law in more than an interstitial way, it is surprising that little attention has been given to what pragmatic theories of interpretation mean for statutory drafting. If judges make meaning, then what is the point of drafting legislation in an effort to constrain the judicial law making discretion? In the following paragraphs I have set out my thoughts upon the benefits that would flow if we were to expressly recognise the role of rhetoric in tax judgment, and also my thoughts about how tax administration would need to change to accommodate rhetorical practice.

2 Enhancing judicial legitimacy by embracing the rhetorical aspect of judgment?

As an academic I feel that I talk with tax practitioners far too infrequently. But when I do speak with them inevitably the recent case decisions arise in our conversations. Almost invariably the conclusion in a particular case is noted and then dismissed as an example of ‘judge x’ arriving at a conclusion based upon her/his particular worldview/subjective preferences. Generally, practitioners view such examples of subjectivity influencing the decision as a departure from the rule of law ideal and a blot on ‘Judge X’s’ copybook.

My point is that even now the legitimacy of the courts is questionable amongst the informed members of the community. Wouldn’t it be far more honest for the judiciary to accept the reality of rhetoric as part of the adjudication process? At the least, the criticism of judges for failing to uphold the rule of law would cease because such criticism would be akin to measuring one’s personality against the idealised personality of a character in a ‘feel good’ Hollywood movie – why assess one’s performance against the unattainable? After all, at times in their reflections upon the art of judging, the judges referred to earlier in this article appear to accept that the determinacy thesis is an unachievable ideal.147

146 Given the centrality of the determinacy thesis to the rule of law, rejection of the determinacy thesis necessarily entails rejection of the existence of the rule of law. Absent the rule of law it seems our society will plummet into chaos: Heydon, above n 45 at 5; Walker, above n 45; Craven, above n 45.

147 See, for example, McHugh, above n 15.
Rather than perpetuating the current misdescription of a judgment as an elaboration of absolute truth (ie enunciation of ‘the law’), it would be far more honest to recognise the role that rhetorical devices play in judgments, embrace that rhetoric and engage with it by developing a pragmatic theory of adjudication which accommodated rhetoric. What I am arguing, then, is simply that the theory of adjudication we adopt should match the current reality. This would not entail wholesale change of judicial or practitioner practises. Rather, the only significant change would be in how we describe what we have done on a day to day basis. This change in conceptualisation of the interpretive process, however, might engender some flow-on consequences which would, I suggest, be beneficial.

3 Towards a more methodical approach to judging

If the role of rhetoric was recognised there is much that we could learn from the Ancient Greeks. In those times rhetoric was considered as a method of elucidating the truth and was therefore a subject of great importance to the Ancient Greek philosophers. Arguments about ‘the truth’ were constructed by reliance upon rhetorical devices and tested in the cauldron of debate.

In a similar way alternative statutory meanings could be expressly contemplated and their merits assessed from the perspective of alternative rhetorical devices, some of which I have outlined above. It would be taken for granted that judges would be applying their best endeavours to arriving at the best interpretation (the one with the greatest rhetorical force) rather than arriving at the ‘right’ answer. Judges would overtly and systematically consider alternative interpretations of legislation, weighing the perceived merits of competing interpretations and arrive at their ‘best effort’ conclusion.

By ‘systematically’ I mean that a judgment would expressly address each key rhetorical device and explain whether or not that device was relevant to the interpretive issue at hand. Rather than a judge appearing to adopt a particular rhetorical approach (and eliding alternative approaches), judges would have to expressly explain why a particular approach (substance/form, ordinary/commercial/technical legal/practical meaning, substantive fairness, etc) was warranted and why the alternatives were rejected. As happens now, judges would make choices about which perspective should be adopted when assessing the rhetorical force of competing interpretations. For example, ‘should substantive fairness be emphasised in this case or formal fairness? What are the consequences of emphasising substantive fairness here, and what are the consequences of emphasising formal fairness?’ As was seen in the preceding discussion with respect to the discourses of substantive and formal fairness, often members of the same court appear to talk at cross purposes to each other without engaging with the alternative viewpoint. This is considered acceptable because both sides of the argument can maintain that they are right and that the other is wrong. Accepting that absolute truth in the law is a comforting but artificial construct would mean that judges with alternative viewpoints would have to engage with the other in constructive criticism – a mindset which would foster the self-critical application of alternative interpretive approaches. While such self-critical adjudication will not necessarily mean that judges will achieve unanimity upon a particular interpretation, at the least it will mean that there will be a far more rigorous debate about the respective merits of alternative interpretations.

4 Enhancing the critical appraisal of judgments/rulings/tax advice – covering the rhetorical devices on the judicial ‘wheel of fortune’

In similar fashion, express recognition of the complete array of rhetorical devices deployed in the interpretation of tax legislation would only serve to enhance the practical administration of taxation law. Tax practitioners would construct and assess alternative interpretations founded upon alternative rhetorical discourses. As already noted, this is what happens today, albeit in a less overt
fashion – alternative interpretations are assessed upon the basis that only one is absolutely right, rather than upon the basis of determining which has the greatest rhetorical force.

C Legislative change

1 Plain English drafting – determinacy dreaming?

Although it is readily conceded by many that tax legislation is complex for a multitude of reasons, \(^{148}\) one source of complexity is perceived to be the drafting style adopted. \(^{149}\) The call to rewrite taxation law in ‘simple’ English was adopted in 1996 \(^{150}\) but the commentators’ respective assessment of the simplification benefits is not flattering. \(^{151}\)

The problem with plain English drafting is that it is just another form of literalism. The assumption is that by reducing ‘the legislative intention’ to ‘prose that communicates directly and effectively with its intended audience’ \(^{152}\) a determinate legal outcome may be achieved. As noted previously, this formalist language theory has been challenged, I suggest, convincingly. \(^{153}\)

Section 6-5 has been written in simple English for several years now, and its predecessor could hardly be said to have been written in complex English. And yet section 6-5 continues to attract a great deal of interpretive scrutiny. When viewed from the perspective that any interpretation is intrinsically rhetorical, the suggestion that the redrafting of statute law in simple English will resolve semantic doubt must be rejected.

2 Rationalising tax concepts

Many commentators have also pointed to the conceptual complexity of the income tax. While some are pessimistic about the prospects for income tax simplification upon the basis that conceptual complexity is intrinsic to an income tax, others argue that there is room for improvement. One simplification strategy would include a rationalisation of the concepts around which an income tax is framed, with a view to creating a coherent income concept. Many argue that the economic concept of income would be a more coherent framework \(^{154}\) by comparison to what is commonly referred to as the trust law concept of income. \(^{155}\)

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\(^{149}\) See, for example, Law Reform Commission of Victoria, Plain English and the Law; (Report No 9, Victoria, 1987).

\(^{150}\) For a brief account of the historical background see Brian Nolan and Tom Reid, ‘Re-writing the Tax Act’ (1994) 22 Federal Law Review 44.

\(^{151}\) See, for example, Krever, ‘Taming Complexity in Australian Income Tax’, above n 5.


\(^{155}\) As Prebble notes, the authority for this proposition appears rather slim: Prebble, above n 7. However, this proposition has been repeated frequently such that it has been accepted: Graeme Cooper, Robert Deutsch and Richard Krever, Income Taxation Commentary and Materials (2nd ed, 1993) 3-6; Fiona Schaeffer, ‘The Uneasy Alliance between the judicial and economic concepts of income: the treatment of capital gains’ (1992) 5 Business and Corporate Law Journal 1.
From a law as rhetoric perspective the substitution of the economic discourse upon income can be seen as an attempt to constrain the interpretive dialogue. However, the wealth of literature considering whether there is, in fact, one concept of economic income suggests that the adoption of an ‘economic’ concept of income may not be the panacea that some suggest. Uncertainty regarding the nature of the ‘economic income’ concept will therefore engender a new rhetorical dialogue upon the ‘meaning’ of the revised income tax scheme.

Further, no one seriously suggests that a pure ‘economic’ concept of income would be practicable. A close reading of Henry Simons’ watershed work indicates that he referred to at least two ‘ideal’ concepts of income. Political compromises will invariably have to be made to take account of competing structural objectives (such as fiscal imperatives, compliance costs, etc) and such compromises will add to income tax complexity. Once again, the legislative expression of such compromises will foster rhetorical dialogue upon the nature of such compromises.

3 Purposive legislative statements

Many commentators have suggested that literalist interpretation promotes a legislative response in the form of more particular and complex legislation which seeks to paint bright lines, and this prompts tax advisors to recharacterise arrangements such that they fall outside of the bright lines. As already noted, the existence of one literal meaning of any utterance is a hotly contested issue in the field of communication theory.

Nevertheless, some argue that one path to tax simplification is the inclusion of purposive statements in the tax legislation to supplement the operative rules. Others seem to argue that we should abandon any attempt to write detailed legislative rules and just write general statements of principle, leaving the detail to be fleshed out by the executive arm of government. The earlier discussion of

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It may be the case that this concept is founded upon the views of earlier commentators; see W Strachan ‘The Differentiation of Capital and Income’ (1902) 18 Law Quarterly Review 274; W Strachan, ‘Economic and Legal Differentiation of Capital and Income’ (1910) 26 Law Quarterly Review 40; W Strachan, ‘Capital and Income (Lifeowner and Remainderman)’ (1912) 28 Law Quarterly Review 175; W Strachan, ‘Capital and Income Under the Income Tax Acts’ (1913) 29 Law Quarterly Review 163.


Henry Simons, Personal Income Taxation (1938), ch 2: Simons refers to psychic income, his formulaic income definition (at p 50) and a modified income base taking account of issues of practicality.

Alternatively, an uncompromising adherence to ‘the’ economic concept of income may engender its own complexity: Pollack, op cit n 148, 342-4.


Krever, above n 154, at 502, 504. Of course, this work builds on the more general work of many others advocating a purposive approach to statutory interpretation. For a seminal work in this field see JA Corry, ‘Administrative Law and the Interpretation of Statutes’ (1935) 1 University of Toronto Law Journal 286.

See, for example, Y Grbich, ‘Revisiting the main deduction provision: clear concepts for a mass decision-making tax system’ (1990) 17 Melbourne University Law Review 347. By blurring the ‘bright lines’ this ‘fuzzy law’ approach might, it is also suggested, that this may be a useful strategy in combating tax avoidance as tax planners would not be so confident in advising that a tax minimisation strategy was clearly outside of the tax net; Grbich, above n 159; Millett, above n 66. Given the experience in the United States, it cannot be assumed that such an approach would succeed: Pollack, above n 148 at 339.
the shortcomings of the purposive theory of interpretation indicates that either approach will not necessarily produce the legal determinacy that the commentators suggest.

The idea of including purposive legislative statements springs from the idea that there is a clear divide between the pre-lingual formation of a legislative intention and committing that intention to statutory writing. The purpose of purposive statements is therefore to enable the reader to access the pre-lingual mind of the legislature. The problem here, of course, is that it is doubtful whether there ever is a pre-lingual intention and even if there is, how can we be sure that the purposive statement accurately describes it? Purposive statements therefore confront the same interpretive challenges as confront the ‘operative’ statutory rules – they will not guarantee universal agreement upon the meaning of a particular statutory rule.\(^{162}\)

This is not to say that the provision of additional legislative commentary upon the legislative objectives of a particular statute/statutory provision is pointless. It does mean, however, that we need to reconceive what we are trying to achieve by providing such discussion. Further, the preceding discussion suggests that ‘purposive statements’ will need to be somewhat more detailed than might be appropriate for inclusion in the legislative text.

### 4 Development of extrinsic materials

It is remarkable that, more than two decades after the enactment of general purposive interpretive rules,\(^{163}\) Parliament has failed to make it easy for those interpreting legislation to identify the purpose of the legislation. To take just one example, in 1999 the Commonwealth Government decided to legislate a raft of capital gains concessions to apply to ‘small business’.\(^{164}\) Discussion of the legislative purpose of these rules in the legislation\(^{165}\) and extrinsic materials\(^{166}\) is rudimentary, to say the least. Even reference to the Treasurer’s media releases\(^{167}\) with respect to these measures is

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162 To take Krever’s example with respect to the capital gains discount, as Krever notes, the inclusion of this tax expenditure was justified by the desire to increase capital investment. Statement of this purpose would not necessarily mean that capital gains realised by the disposal of private assets would be excluded from the tax concession. For example, what if I sold a holiday home in order to invest further in a business? What if, after realising a profit on the holiday home, I retained the profit in relatively liquid investments pending the identification of a suitable business investment? How long could I refrain from making a business investment and still qualify for the concession? A broad statement of principle would not necessarily provide clear guidance here.

163 See, for example, *Acts Interpretation Act* 1901 (Cth) s 15AA.


165 Section 152-1 begins with the vague suggestion that ‘to help small business, if the basic conditions for relief are satisfied, capital gains can be reduced by the various concessions in this Division’.

166 See the explanatory memorandum accompanying *New Business Tax System (Capital Gains) Bill* 1999.

167 See Rt Hon Peter Costello, *The New Business Tax System*, (Media Release No 58, 1999); ‘Small business and primary producers to benefit from the New Business Tax System’, (Media Release No 59, 1999). These documents are not, it should be noted, expressly included in the list of extrinsic materials given in *Acts Interpretation Act* 1901 (Cth) s 15AB(2) but would nevertheless constitute ‘material not forming part of the Act’ (s 15AB(1)). It is unclear whether the Treasurer’s media releases would be admissible as extrinsic evidence, as reference to such material would need to overcome the ‘due notice’ requirement imposed under subsection 15AB(3).
vague. More needs to be done if the reforms to the interpretation of legislation, undertaken in the 1980’s, are to achieve their potential.

This reluctance on the part of statutory drafts people to develop a comprehensive extrinsic commentary upon the legislative text is understandable. The determinacy thesis demands that the legislature speak with one voice. Expressing the same idea using different words in legislative form and also in extrinsic materials magnifies the risk of actual or perceived inconsistency. Ironically the attempt to clarify the legislative meaning may only obscure it.

Recognition of the rhetorical aspect of tax adjudication, however, entails acceptance of the fact that a legislative re-write will not achieve the determinacy that some suggest. Rather, legislation is part of a continuing dialogue within a community, rather than the endpoint of the law making process. With this in mind, the legislation and/or extrinsic material might incorporate reference to alternative interpretations of the legislative compromise embodied in the legislation (founded upon varying rhetorical discourses) and explain why a particular interpretation was desirable by stating which rhetorical discourse(s) should be emphasised. The incorporation of examples into the legislative text is the first tentative step down this path. But in general the examples provided in the legislation do little to elaborate upon the interpretive discourses relevant to the interpretation of the particular provision concerned.

The proposal to modify extrinsic materials might be taken to be the purposive approach to statutory drafting dressed up in rhetorical robes. A purposive approach assumes that there is a finite purpose underlying legislation which is more or less ably expressed in the legislative text. However, the recognition of the rhetorical aspect of law entails acceptance of the fact that in most, if not all, cases legislation will attempt a compromise between competing objectives (or discourses). The difference is crucial because the rhetorical approach accepts that no statement of legislative purpose can ever produce a determinate result – all that can be hoped for is that the interpretation of any text is constrained by a consideration of the rhetorical discourses which inform the legislative text.

Some might also suggest that the incorporation of a commentary upon alternative interpretations within the legislative text and/or the extrinsic materials would expand the legislation dramatically and make it unworkable. True, the length of the legislation and/or extrinsic materials would increase, but at the same time the need to consider numerous cases, tax rulings and extrinsic materials would diminish or be superseded by the revised approach to legislative drafting. Rather than the existing interpretative materials purporting to distil the kernel of determinate meaning that is supposedly embedded within the text, the extrinsic and legislative materials would comprise a frank discussion of alternative rhetorical discourses underpinning the text. Extrinsic materials would

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168 The Treasurer merely observes that these capital gains measures ‘will further reduce impediments to investment by small businesses. Moreover, this measure will protect from tax those assets that appreciate broadly in line with inflation.’

169 For a more positive appraisal of these reforms see Patrick Brazil, ‘Reform of Statutory Interpretation – the Australian Experience of Use of Extrinsic Materials: With a Postscript on Simpler Drafting’ (1988) 62 Australian Law Journal 503, 512.


171 Thus the example accompanying ITAA 1997 s 152-105 is merely another example of stating the obvious. The far more problematic concepts mentioned in the provision, such as ‘retirement’, are not explored. For example, what if a person works part –time but considers themselves to be ‘retired’?

172 Although some suggest that the legislative purpose is expressed in the legislative text, which is tantamount to rejecting a purposive approach and upholding a textualist approach.
emerge from the fairyland. Further, the additional length of the legislation would be ameliorated by the introduction of appropriate indexing, cross-referencing and annotation. As it stands at the moment, a person wishing to ascertain the relevant law is reliant upon the vagaries of various parliamentary, commercial (if they are available) and administrative search engines in identifying relevant extrinsic materials, case authorities and administrative rulings/discussion. This is an archaic information system which has survived into the twenty first century. Tax legislation should be capable of incorporating cross references to all relevant material as well as discussion of the salient points to be drawn from that material. Much work needs to be done in bringing the concept of the statute into the era where information technology enables massive amounts of data to be stored, organised and randomly accessed.

5 Tax rulings in the rhetorical age

Whether or not you subscribe to the rule of law as a convincing political theory, the existing taxation rulings system is open to criticism from a number of perspectives. Leaving the separation of powers issue to one side, the problem with the taxation rulings system is that it creates an actual or perceived conflict of interest. It would be understandable for a tax collection agency to develop a culture of maximising tax collections rather than developing a culture of applying the law in a disinterested way. Given the possibility that the tax administration is focused upon maximising revenue, and given that there is not a determinate answer to many tax interpretive issues, it is possible that taxation rulings would be constructed with one eye on maximising the revenue.

Try as he might by thoroughly analysing the relevant legal authorities, recognising the rhetoric of law means that the Commissioner will never be able to disinfect his taxation rulings of this perceived conflict of interest. Recognition of the fact that the determinacy thesis is a myth, and that the interpretation and application of taxation law is a rhetorical process, only heightens the need for those charged with interpreting and applying the law to be free of any actual or perceived conflict of interest. Accordingly, the taxation rulings function should be undertaken by a body, judicial or quasi-judicial, which is remote from the tax collection function.

6 Penalties in the rhetorical age

Once it is accepted that adjudication of a case does not result in a declaration of the correct interpretation of the legislation (but rather a contingent view as to the best interpretation that a judge’s best effort can produce), the function of penalty provisions need to be reconsidered.

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Grbich is apparently prepared to accept the possibility of such a conflict of interest: Y Grbich, ‘Operational Strategies for improving Australian Tax Legislation’ (1990) 19 Federal Law Review 266. See also Y Grbich, supra n 160: in the course of discussing the role of tax rulings in elaborating the detailed operation of general provisions such as the former ITAA 1936 s 51, Grbich states that many of the characterisation of expense questions should be ‘based on a systematic weighing of economic and distributional issues and some very practical administrative concerns. Inevitably tax deductibility provides a subsidy, a ‘tax expenditure’ (to use the technical term in an extended sense) for the activity in question.’ (at 366). This seems to suggest that tax rulings should be framed with a view to maximising tax revenue rather than taking account of tax policy (as the economic concept of income would suggest that expenditure incurred in deriving income should be recognised – the critical question then being how to determine whether the necessary nexus between expenditure and income is satisfied.

175 In this regard the Advisory Opinions decision is crucial, as there must be a ‘matter’ (ie a ‘real’ dispute) before the judicial power of the Commonwealth may be exercised: Re Judiciary and Navigation Acts (Advisory Opinions Case) (1921) 29 CLR 257.
There are two types of penalty provisions:

1. Those which fall within the civil penalty regime within Part 2-1 of the *Taxation Administration Act* 1953; and

2. Those which deny the taxpayer the benefit of a provision which would otherwise lower the taxpayer’s tax liability (or, perhaps, increase their tax loss) for a particular income year. An example of such a provision is ITAA 1997 s 26-25, the predecessor of which was significant in the recent case of *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation*.

In that case the taxpayer was denied a deduction for some $42 million dollars of royalty payments made to a non-resident because the taxpayer had failed to withhold tax from the payments, despite the fact that the taxpayer presented a credible argument that the legislation did not necessarily dictate that such withholding was required. Such penalty provisions are particularly onerous given that they are not subject to any of the provisos found within the civil penalty regime of the TAA – there is no exclusion if the taxpayer has taken reasonable care or adopted a reasonably arguable position.

Aspects of both types of penalty provisions would need to be reconsidered. With respect to the former, the concept of a ‘reasonably arguable position’ may need reconsideration if it is accepted that the meaning of many tax rules is subject to reasonable debate, depending upon the particular rhetorical perspective from which the legislation is viewed. Adopting a self assessment system within the context of a revised theory of law which acknowledges the contingent nature of statutory ‘meaning’ while leaving taxpayers to run the gauntlet of the ‘reasonably arguable position’ test promotes non-neutrality – investors will either avoid such tax systems or will restrict themselves to ‘safe harbour’ investments. This situation is hardly conducive to an efficient international economy.

With respect to the second category of penalty provisions, such provisions should be brought within a unified penalty regime by incorporating provisos which reflect the possibility that taxpayers may quite reasonably have adopted a course of action in the honest belief that they were complying with the law. Not to do so might be warranted if the meaning of the primary obligation was determinate – but in the absence of determinate meaning the imposition of penalties is clearly inequitable.

In this regard I have had the benefit of reading a draft paper written by Professor Justin Dabner which I would commend to the reader. Dabner argues that the role of the courts needs to be reinvented by recognising the law making power of the courts and the retrospectivity of a judgment. He continues by suggesting that costs orders might be made against the tax authorities even in cases where the tax authority’s view of the law is upheld. I believe that Dabner’s paper incorporates the seeds for development of an alternative approach to the penalties and rulings systems which sits comfortably with my argument that tax judgments are intrinsically rhetorical and hence contingent.

**VIII CONCLUSION**

Adjudication upon legislation entails unravelling the competing discourses embodied in the legislation (such as equity, fiscal necessity, administrative practicality and global competitiveness). Even if it is accepted that the hypothetical ‘legislative mind’ is capable of formulating a pre-lingual compromise of these competing discourses, it must also be accepted that language is capable of accurately conveying the precise nature of that compromise. A review of some extra-curial judicial rumination upon the practice of statutory interpretation indicates that there is some disquiet with

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simplistic theories of language which underpin theories of statutory interpretation framed within the rule of law. A review of the taxation case law confirms the view that the mainstream account of the rule of law does not provide a convincing account of judicial practise and is, indeed, a powerful combination of rhetoric and wishful thinking.

In adjudicating tax cases judges are compelled to make choices between competing interpretations which have been framed from the perspectives of competing discourses (or combinations thereof). There is no critical perspective from which to assess the merits of such competing interpretations – all that the judge can do is to identify which interpretation may be constructed in the most rhetorically forceful fashion. In passing judgment, then, the judge must provide rhetorically appealing justifications for what is essentially a subjective decision; hence the judicial recourse to rhetorical devices, such as those discussed earlier in this paper. Rhetoric is an intrinsic feature of the law and of judgment. This is not a prescriptive finding but rather a descriptive fact. In an ideal world perhaps our language would be capable of conveying finite meaning such that the rule of law would be descriptively accurate. However, in our second best world we need to dispel the myth of the rule of law and reinvent our understanding of legislation by taking account of the reality of legal practise. Until this happens we will continue to live in Sartrean bad faith – the judges accept that the rule of law is a myth but are reluctant to dispel it once and for all.