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express an opinion which is in dissent from the majority judgment of the court. Part of this difference may be explained by the civil law tradition of a career judiciary who are seen as part of the voice of the state,[2] while the common law tradition views the judiciary as independent, not only from government, but from each other. The Australian High Court practice of seriatim judgments has arguably also played a role in, if not promoting, then certainly n

Justice Brennan recognised, however, that not all dissents are equal. He saw some dissenting voices as recognising the evolving standards that mark a maturing society, these being the µ« GLVVHQWV WKDW VRDU ZLWK ¶ being V« SDVVLRQ DQG dissents that, at their best, straddle the world of literature and law ¶

and the consequences of the interpretation of the statutes, may have the potential to generate a greater degree of disagreement between members of the judiciary than may

cases concerning the validity of taxation laws. Within the first category were cases applying a wide range of taxes to individual circumstances, such taxes including, but not being limited to, income tax, customs and excise tax, stamp duty, sales tax, probate and estate duty, and payroll and land tax, among others.[13]

A further category of cases encompassed by adopting the wider approach involved those cases which dealt with challenges to the constitutional validity of taxes, as the decisions in these cases have been of major significance in the shaping of Australian taxation law, particularly in relation to federal taxation. It is considered that the inclusion of such cases provides a more complete picture of the development of taxation law in Australia, particularly in relation to the subsequent role and influence, if any, of dissenting judgments in this class of cases.

Applying these criteria to the High Court decisions in CLR volumes 1 to 245 resulted in extraction of some 975 cases which were characterised as being cases that would qualify as taxation cases. Taxation decisions featured early on in the history of the High Court, with the first tax decision in *Murray v Collector of Customs*[14] being decided by the Full Bench of Griffith CJ and Barton and 2 ¶ & R QQ R JJ in 1903, the first year of the operation of the High Court.

While taxation cases being heard by the High Court continued apace, particularly throughout the halcyon era for tax avoidance during the 1960s and 1970s, the proportion of taxation cases reaching the High Court was showing signs of slowing by the 1980s. This trend was hastened during the 1980s by two significant legislative changes. In 1984 the requirement for a grant of special leave to appeal to the High Court was introduced,[15] thus providing the court with a case selection discretion, with the consequence of reducing the number of appeals, while simultaneously increasing the complexity of the cases being heard by the High Court. Following this, in 1987 the enactment of the *Australia Acts*[16] established the High Court as the final court of appeal for Australia, giving the court added responsibility for making final determinations.

Given that the legal system is able to accommodate differences in judicial opinion on a particular matter, the question arises as to the extent of difference that is required before a decision would be characterised as a dissenting voice. This issue becomes more problematic given the range of the nature and forms which judicial disagreement may take. However, it is suggested that, in broad general terms, a judgment may be classt6alas [(cl192.74ETBT1 0 03(a)9(l)-4(cl] TJETBT1 0 0 1 461.744e77(j)-1n)] TJETd)-195(by)113

The table in Appendix A shows, for each of the Justices who have decided taxation cases, the incidence of dissent for that particular Justice for the taxation cases heard by that Justice.

Initially, and perhaps not surprisingly, there was little dissent among early members of the court, with a strong consensus among the judiciary for a number of years. Barton DQG 2 ¶ r& JJ dissented in around two per cent of the tax cases on which they sat in judgment, with Griffith CJ dissenting in around five per cent of the tax cases heard, demonstrating the early accord in the court in tax decisions. Indeed, many judgments were handed down by Griffith CJ on behalf of the whole court. After an harmonious honeymoon period of around four years, during which the court was in accord, dissent in tax decisions first appeared in High Court tax cases in 1907.[24]

Despite the accord in the early High Courts, an increased incidence of dissent in taxation matters started to emerge in later Courts, although the incidence of dissent was still not high. Among the early Justices, Isaacs and Higgins JJ were the first Justices to find themselves in dissent in over 10 per cent of taxation cases, while Evatt J, Latham CJ, and Webb J were the first Justices to dissent in more than 15 per cent of taxation cases on which they sat.

It has only been the latter half of the twentieth century which has witnessed a greater incidence of dissent by some of the Justices, with Stephen J being the first Justice to dissent in 20 per cent of taxation matters heard.

At the other extreme to the accord of the early High Courts, the highest incidence of dissent in taxation cases fell to Kirby J, who dissented in around 35 per cent of the taxation cases which his Honour heard.

may vary, but the figures provide an early reflection of the relativities of a possible proclivity to dissent.

What is of interest is that the incidence of dissent in taxation cases for some of the more recent Justices has fallen to the same low incidence as was evident in early High Courts. While some of the Justices continue sitting on the High Court, for the cases extracted for the research, Gummow, Hayne, and Heydon JJ, along with Gleeson and French CJ, have exhibited an incidence of dissent in taxation cases not witnessed since the Court of Griffith CJ.

This may appear unexpected, as it may have been thought that with the significantly reduced number of taxation cases reaching the High Court there would be a corresponding increase in the complexity of the taxation cases being heard by the Court, which may have suggested the potential for greater disagreement among Justices. Such would not appear to have been the case, with the Justices almost appearing to be in furious agreement on the outcome of taxation matters.

As noted earlier, there has been a significant diminution in the number of taxation cases being heard by the High Court since the introduction of the requirement for leave to appeal, and this is reflected in the number of cases on which particular Justices have passed judgment. At one extreme, Rich J sat on some 331 taxation cases, with a dissenting opinion in around eight per cent of those cases, and Dixon, as a Justice and Chief Justice, heard some 305 tax cases, delivering a dissenting judgment in around seven per cent of those cases. At the other extreme, in the cases reported up to CLR 245, Bell J had heard some twelve tax cases,

number of the Justices, although individual Justices may not have had a high incidence of dissent.

The Justice who witnessed most dissent in taxation cases has been Jacobs J, who dissented in some 14 per cent of the taxation cases heard, but witnessed dissent in more than another 50 per cent of the taxation cases on which his Honour sat. In a similar vein, while Stephen J dissented in around 20 per cent of the taxations cases which his Honour heard, there was dissent by at least one other Justice in around 38 per cent of the cases on which his Honour sat, so almost 60 per cent of cases heard by Stephen J involved a dissenting judgment. Conversely, while Kirby J dissented in around 35 per cent of the tax cases in which his Honour was involved, there was dissent in 46 per cent of tax cases in which he was involved, so there was dissent by another Justice in only another 11 per cent

Court and the judicial process; and characteristics of particular Justices. While these factors would also contribute to dissent in other areas of law, it is considered that they have the potential to contribute to dissent in taxation matters to a greater extent than in other areas of law. The suggestion is: that the taxation statutory regime has become more complex than statutes in other areas of law; that the nature of taxation laws, as mentioned above, is such that differences between Justices in terms of statutory interpretation approaches and other factors individual to the Justices are more likely to result in a dissenting view; and the increased use of resources such as unreported cases, and in particular overseas cases, is more likely to result in dissent in tax matters as a Justice may look to questions of fairness or equity in application of the law, and may be more inclined to seek more widely for overseas authority on such matters.

As all of these factors are inter-related and interwoven it is not possible to isolate one factor from the others, with this discussion aimed at highlighting aspects of each of these factors which potentially contribute to the incidence of judicial dissent.

While it may appear trite to suggest that complexity of legislation can contribute to alternative judicial interpretations, and thus dissenting judicial voices, the high degree of complexity that permeates the Australian taxation system and taxation legislation has attracted widespread criticism for a considerable period.[26] However, the complexity that may generate judicial disagreement and a dissenting opinion is not limited to the complexity of the legislation, but extends further in taxation matters to the complexity of the factual matrix of commercial transactions and the consequent complexity in matters at issue in taxation cases.

At its very core, Australian taxation legislation is contained in two separate Assessment Acts which have widely divergent drafting methodologies, so it is small

of the legislative provisions, themselves being prepared to voice concerns over the complexity of the legislation which they are interpreting.

A feature of the drafting which has attracted considerable criticism[41] has been the legislative response of enacting detailed and precise provisions, the suggestion being a desire on the part of the legislature to expunge from the law elements of discretion. The theory behind this approach suggests that vague and general provisions increase uncertainty, and allow arbitrary exercises of power by unelected judges. In an attempt to preclude this uncertainty, and forestall judicial decisions which do not suit the legislature, the path taken has been to increasingly extirpate as much vagueness as possible with greater prescription and regulation in the statutes, adding new complexity to the ineffective

While this suggestion does have intuitive appeal, as noted earlier, the incidence of dissent by Justices in taxation cases in more recent High Courts appears to have been declining to levels not witnessed since the early High Courts. With the High Court being in a position to select those cases to be heard by the Court, it would be expected that the cases being granted leave to appeal would be the more complex and demanding cases, which would have the potential to generate greater divergence of opinion, and potentially a higher incidence of dissent. However, such would not appear to be the situation, with the Justices of more recent High Courts, with the notable exception of Kirby J, exhibiting a lesser tendency to dissent in taxation matters.

Another matter inextricably linked with the interpretation of complex provisions relates to the approach to statutory interpretation adopted by a particular Justice, with

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While there have been suggestions that there has been evidence of a judicial trend away from strict literalism to encompass a more purposive approach,[55] an alternative view suggests that an examination of Australian decisions provides no evidence of such a significant change in approach.[56]

It may be thought that with the statutory imprimatur for a purposive approach to statutory interpretation,[57] it needs to be borne in mind that ultimately it is for the courts to determine the legislative purpose, and the starting point for this must of necessity be the literal words of the statute.

The example provided by *Westraders*, which is representative of others, demonstrates that differences in approaches to statutory interpretation can lead to different paths of reasoning, which in turn may well produce different conclusions as to the meaning of a statute, with the result that dissenting opinions can be generated. While this in itself may not appear surprising, when considered in conjunction with the complexity inherent in the taxation legislation, it emerges as one contributory factor in the myriad of factors which together would go towards explaining the higher incidence of dissenting voices in taxation

Appendix A [2] Incidence of dissent by individual Justices