

1. Origins of tax problems. 2. Reform

I am a columnist on a legal journal, Justinian. I have been studying the West's two legal systems since 1991.

We cannot really understand a problem until we know where it came from.

The cartel. The complexity of tax law that Dr Henry speaks of derives largely from the existence of a cartel of lawyers and judges. The cartel came into being late in the 12th century in a culture of total public sector corruption: every public office, from Chancellor down, was for sale; the buyer in turn extorted bribes from those who dealt with the office.

The cartel effectively decided in 1219 that truth does not matter. Clyde Cameron, a friend of Sir Garfield Barwick, Chief Justice 1964-81, said after his death in 1997: "I'd never known anyone who is able to so easily explain in a way that is so uncontroversial that a piece of white paper is jet black and a piece of black paper is snow white."

The Barton Hypothesis. Associate Professor Benjamin H. Barton, of the University of Tennessee College of Law, put the question, Do Judges Systematically Favor the Interests of the Legal Profession? in The Alabama Law Review of December 2007.

Professor Barton wrote: "Here is my lawyer-judge hypothesis in a nutshell: many legal outcomes can be explained, and future cases predicted, by asking a very simple question: is there a plausible legal result in this case that will significantly affect the interests of the legal profession (positively or negatively)? If so, the case will be decided in the way that offers the best result for the legal profession."

David Mar observed in Barwick (George Allen & Unwin, 1980): "... the best minds of the Bar are engaged, as Barwick was engaged, in tax avoidance, and from the best minds at the Bar High Court judges are chosen. The High Court has an inbuilt tendency to be a tax avoider's forum." London tax lawyers can make £2 million a year.

H.L. Mencken (1880-1956) observed: "If all the lawyers were hanged tomorrow, and their bones sold to a mah-jongg factory, we'd be freer and safer, and our taxes would be reduced by almost half."

Organised crime. Organised crime is systematic criminal activity for money or power. The British legal system allows lawyers and judges to do things that would be criminal in anyone else.

The cartel in action. Lord Atkin declared in *Inland Revenue Commissioners v Duke of Westminster* (1936): "... the deeds were ... a device by which [the Duke] might avoid some of the burden of sur-tax. I do not use the word device in any sinister sense; for it has to be recognized that the subject, whether poor and humble, or wealthy and noble, has the legal right to so dispose of his capital and income as to attract upon himself the least amount of tax."

Justice is fairness. Lord Atkin did not say how the poor and humble might evade tax: their tax is removed from their weekly wage.

Australia is a vaguely fair-go-all-round sort of country. Section 260 of the Income Tax Assessment Act 1936 said every "arrangement" which has the effect, directly or indirectly, of "defeating, evading, or avoiding any duty or liability imposed on any person by this Act [shall] be absolutely void".

However, High Court judges Sir Owen Dixon, Sir Dudley Williams, Sir Eddie McTiernan, Sir Frank Kitto, and Sir Alan Taylor allowed themselves to be persuaded by Barwick in *Keighery v Federal Commissioner of Taxation* (1957) that "absolutely" does not mean absolutely; there could be an exception. The tax evasion floodgates opened.

As Chief Justice, Barwick, along with Sir Victor Windeyer, Sir Harry Gibbs, and Sir William Owen, finished off the 1936 Tax Act in *Casuarina P/L v the Federal Commissioner of Taxation* (1970). David Marr said *Casuarina* concerned "a wholly artificial scheme ... to avoid tax ... The *Casuarina* case became the cornerstone of the tax avoidance industry".

Barwick, Gibbs, and Sir Douglas Menzies ruled in *Curran v Federal Commissioner of Taxation* (1974) that a profit of \$2782 was a loss, for tax purposes, of \$186,046. The self-employed rushed into tax ramps based on *Curran*. Some tax promoters who entered into the spirit of the Barwick court went to prison, but Barwick, Gibbs and Menzies were not charged.

John Ahern, a Brisbane accountant who went to prison, explained how *Curran* worked in *A Taxing Time* (A & B Management, 1990). A company has shares worth \$100. It issues 100,000 bonus shares at \$1 a share. The shares are now deemed to be worth \$100,100 but are actually worth about \$100. The shares are sold for, say, \$200, a profit of \$100, but Barwick, Menzies and Gibbs would say it is a loss of \$99,900.

The amount of tax money "liberated" from the Treasury in the eight years after *Casuarina* was AU\$800 million, some AU\$10 billion at 2008 rates. In 1978, Treasurer (as he then was) John Howard resorted to retrospective legislation to get back some of the \$800 million lost through *Curran* and similar schemes, and in 1981 he introduced Part IVA to the 1936 Act. The section again purported to bar 'blatant, artificial or contrived arrangements'.

However, lawyers and judges can always defeat the English language. Professor Russell Mathews, an economist, said in 1980 that Australian wage/salary earners paid 81.2% of all income tax, and in 1985 that "Australian taxation policies have more in common with the protection rackets operated by the Mafia, where relatively poor and defenceless citizens are taxed for the benefit of the rich".

A tax office survey in the early 1990s found that "a significant segment of the BRW magazine's Rich List claimed to have a taxable income below the minimum wage".

Tax Commissioner Michael Carmody said in 1999 that tax schemes had caused "\$3.5 billion in claims and rising".

Brian Toohey reported in The Australian Financial Review of July 2-3, 2005: "When the Howard government was elected in 1996, the Income Tax Act was about 3000 pages. It is now estimated to be more than 10,000 pages, not counting the innumerable interpretative guidelines and rulings issued by the ATO ..."

The Financial Times reported in April 2004: "An international task force to combat tax avoidance is to be set up by the US, Australia, the UK and Canada. The task force, which is expected to be based in New York, will focus on tax avoidance schemes employed by business and take joint action against such schemes."

Reform. The remedy is simpler: legislation saying that minimisation, avoidance, evasion, or larceny by trick is forbidden on the ground that it is unfair to pay-as-you-earn taxpayers, and that judges who find an exception to the rule will be instantly dismissed.

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