

## JUSTICE GRAHAM HILL & AUSTRALIAN TAX LAW<sup>\*</sup>

The Hon Justice Michael Kirby AC CMG<sup>\*\*</sup>  
Acting Chief Justice of Australia

### REMEMBERING JUSTICE GRAHAM HILL

Justice Graham Hill was an outstanding lawyer and judge. His contribution to the law of taxation is fittingly described in Professor Richard Vann's reference to him as a 'tax titan'<sup>1</sup> and by Mr Robert Richards's remark that<sup>2</sup>:

"Over the last 30 years, [Justice Hill] and the late Professor Ross Parsons were effectively the final arbitrators of tax thought in this country."

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<sup>\*</sup> Inaugural Justice Graham Hill Memorial Lecture given at the annual conference of the Taxation Institute of Australia, Hobart, 15 March 2007.

<sup>\*\*</sup> The author acknowledges the assistance of Mr Adam Sharpe, legal research officer in the Library of the High Court of Australia who, in collecting some of these materials, came to know of the qualities and legacy of Justice Graham Hill as, it is hoped, other young Australians will do from reading such tributes.

<sup>1</sup> See F Buffini, "Tax Titan was no heir but had all the graces", *The Australian Financial Review* (Sydney), 26 August 2005, 29, available at <<http://www.grahamhillaward.com.au/web/taxtitan.pdf>>, accessed 9 February 2007 (hereafter "Buffini").

<sup>2</sup> R Richards, "Justice Graham Hill: The end of an era" (2005) 43(9) *Law Society Journal* 45.

His contribution to the law extended far beyond tax law, as Chief Justice Black of the Federal Court of Australia observed during his eulogy<sup>3</sup>:

“I keep coming back to tax [law]. That, of course, was his primary field, but as I hope will become apparent, his work extended throughout the whole field of law and legal and judicial education.”

In delivering this tribute for his professional friends and admirers, I wish to pay my respects to Graham Hill's contribution to the law of taxation and to the law generally, to lawyers and to Australian society.

## SCHOLAR

*Legal texts:* There was early evidence of Graham Hill's boundless energy. In 1970, he published *Stamp, Death, Estate and Gift Duties (New South Wales, Commonwealth and Australian Capital Territory)*. From 1973-1976, a supplement to this work was published in loose-leaf form.

In 1979, the second edition of the work was published, titled *Stamp and Death Duties (New South Wales and Australian Capital Territory)*. The removal of the analysis of estate and gift duties from the work reflected the Commonwealth's repeal of those duties. Graham Hill

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<sup>3</sup> M Black, “Vale Justice Graham Hill 1938-2005” (2005) September *ATTA News* 4 at 6, available at <[http://www.atax.unsw.edu.au/atta/newsletters/2005/2005-09\\_ATTA\\_News.pdf](http://www.atax.unsw.edu.au/atta/newsletters/2005/2005-09_ATTA_News.pdf)>, accessed 9 February 2007 (hereafter "Black").

explained that the second edition “took on the form of a loose-leaf service, for the fashions in legal publishing had changed”<sup>4</sup>. Following the abolition of death duty by New South Wales, the work renamed *Stamp Duties (New South Wales and Australian Capital Territory)*.

In 1998, it was transformed into a new publication titled *Duties Legislation* in response to the repeal of the *Stamp Duties Act 1920* (NSW) and the enactment of its successor, the *Duties Act 1997* (NSW). Throughout the life of this work, and through its several iterations, it has been, and remains, the seminal publication in its field.

Graham Hill, together with Steven Economides, also edited *Australian Sales Tax Law & Practice* (1991). This work contains insightful contributions from many leading taxation experts. As Graham Hill suggested, it filled “the vital role of providing an accessible introduction to sales tax”<sup>5</sup>.

*Articles and papers:* Aside from these two major works for legal practitioners, accountants, officials and other users, Graham Hill wrote, or presented, countless articles, papers and talks to conferences. Indeed, when the University of Sydney conferred the Honorary Degree of Doctor of Laws upon him in 2002, the Chancellor, Justice Kim

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<sup>4</sup> D G Hill, *Duties Legislation*, vol 1 (at Update 5) at [53].

<sup>5</sup> D G Hill & S Economides (eds), *Australian Sales Tax Law & Practice* (1991) at vi.

Santow, said justly that Graham Hill had “a research and publication record of which a full-time academic could be proud”<sup>6</sup>.

Mr Colin Fong is compiling a list of Graham Hill’s publications for an article that will appear in the Australian Tax Forum. I thank Mr Fong for providing me with a copy of the current list. I will not reveal the number of articles contained it in advance of his publication. Let me simply affirm Justice Santow’s comments. It is an astonishing record of industry mixed with patience, deep thought and fine analysis. I applaud Colin Fong’s initiative in producing the definitive list. It will be another tribute to Justice Hill and an encouragement to those who came after.

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<sup>6</sup> Quoted in *Alumnus Recognised: Award in Honour of Justice Graham Hill* (2007) The University of Sydney <<http://www.usyd.edu.au/news/alumni/156.html?newscategoryId=20&newsstoryid=1533>>, viewed 14 February 2007.

## COUNSEL

*Talented barrister:* In 1976, after 12 years as a solicitor, Graham Hill was admitted to the New South Wales Bar. He was an excellent advocate. In 1984, after only eight years at the junior Bar in Sydney, he was appointed Queen's Counsel. In 1988, he appeared before me in the New South Wales Court of Appeal in *John Fairfax & Sons Ltd v Deputy Commissioner of Taxation (NSW)*<sup>7</sup>. The deft way in which he wove his arguments earned my admiration at the time<sup>8</sup>.

Graham Hill upheld the best qualities of the Bar. Justice Richard Edmonds of the Federal Court, who was his junior on a number of occasions in the mid eighties, has written that<sup>9</sup>:

“To his great credit, Graham treated all retainers, whether they be for taxpayers or the Commissioner, on the same basis, applying all his intellectual and forensic skills in his scholarly fashion without discrimination.”

*Before the High Court:* According to the reported cases, Graham Hill appeared as counsel before the High Court of Australia on 16

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<sup>7</sup> (1988) 15 NSWLR 620.

<sup>8</sup> I have discussed his arguments in M D Kirby, “The Late Justice Graham Hill” (2005) 8 *Journal of Australian Taxation* 206 at 634.

<sup>9</sup> R Edmonds, “Tribute to the late Justice Graham Hill” (Paper presented at the Law Council Tax Workshop, Sydney, 22 October 2005) at 2 (hereafter “Edmonds, Tribute”).

occasions<sup>10</sup>. All were cases involving taxation law – the subject in which he was recognised as one of Australia’s pre-eminent lawyers.

In three of those matters, Graham Hill appeared as senior counsel<sup>11</sup>. Even before his appointment as Queen’s Counsel, however, he had appeared in the High Court on four occasions without a leader – and in three of those cases, his opponent was Queen’s Counsel<sup>12</sup>. This demonstrates the confidence in his high talents of practising solicitors, accountants and fellow barristers<sup>13</sup>. More, it demonstrates his own

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<sup>10</sup> The cases in which Graham Hill appeared as junior counsel were *Brayson Motors Pty Ltd (In Liq) v Federal Commissioner of Taxation* (1985) 156 CLR 651; *Clyne v Deputy Commissioner of Taxation* (1984) 154 CLR 589; *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622; *Avco Financial Services Limited v Federal Commission of Taxation* (1982) 150 CLR 510; *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431; *F J Bloemen Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 360; *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336; *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440; *Slutzkin v Federal Commissioner of Taxation* (1977) 140 CLR 314. The remaining cases in which Graham Hill appeared in the High Court are discussed in the next paragraph.

<sup>11</sup> *Commissioner of Stamp Duties v Pental Nominees Pty Ltd* (1989) 167 CLR 1; *Smith v Federal Commissioner of Taxation* (1987) 164 CLR 513; *Federal Commissioner of Taxation v Galland* (1986) 162 CLR 408.

<sup>12</sup> The three cases were *Brayson Motors Pty Ltd v Federal Commissioner of Taxation* (1983) 57 ALJR 288; 46 ALR 279; *Tourapark Pty Ltd v Federal Commissioner of Taxation* (1982) 149 CLR 176; *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227. In the other case, *Clyne v Deputy Commissioner of Taxation (NSW)* (1983) 57 ALJR 673; 48 ALR 545, Graham Hill appeared against an appellant who appeared in person.

<sup>13</sup> For a list of some of the cases in which Graham Hill appeared as counsel in courts other than the High Court, see R Edmonds, “The Contribution of Justice Hill to the Development of Tax Law in

growing assurance that was to mark his time as leading counsel and as a judge.

## JUDGE

*Justice Hill's decisions:* In 1989, Graham Hill was appointed a Judge of the Federal Court. During his tenure of this office, he wrote dispositions in over 1000 proceedings. A list of his published judicial reasons has been collated and can be found on the Atax website<sup>14</sup>. Over 200 of them dealt with the law of taxation. I made my respect for his accuracy and precision as a judge evident during his lifetime<sup>15</sup>. I emphasise it again. He was a sound lawyer with catholic skills in a wide range of law, especially that connected with federal causes.

In relation to Justice Hill's judicial reasons Associate Professor Cynthia Coleman has said that<sup>16</sup>:

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Australia" (Paper presented at the Australasian Tax Teachers' Association's 18th Annual Conference, Melbourne, 30 January 2006) at 7 (hereafter "Edmonds, Constitution").

<sup>14</sup> See "List of Judgments of Hill J", available at <[http://www.atax.unsw.edu.au/atta/newsletters/2005/JUDGMENTS\\_OF\\_HILL\\_J.pdf](http://www.atax.unsw.edu.au/atta/newsletters/2005/JUDGMENTS_OF_HILL_J.pdf)>, viewed 14 February 2006.

<sup>15</sup> See my defence of Justice Hill's reasoning in *Federal Commissioner of Taxation v Stone* (2005) 222 CLR 289 at 319-320 [104]-[105]. See also *Federal Commissioner of Taxation v Murray* (1998) 193 CLR 605 at 635-636 [85] where I endorsed and applied his reasoning in *FCT v Krakos Investments Pty Ltd* (1995) 61 FCR 489 at 498.

<sup>16</sup> C Coleman, "Recollections of Justice Hill, Patron of ATTA" (Paper presented at the 18th Australasian Tax Teachers Association

“His interest in teaching was reflected in his judgments. Whenever he could make a contribution in a difficult area he did. *Davis’s* case was his first judgment and he stated obiter that when calculating trust income the proportionate view was preferable to the quantum one.”

I agree with this interpretation of Justice Hill’s judicial reasons. He always sought to set out the law in a clear and intelligible manner, including in tax cases where the law is often complicated and sometimes nearly incomprehensible. The intractability of certain aspects of taxation legislation was, of course, reflected in his famous criticism in *Commissioner of Taxation v Cooling* that section 160M(6) of the *Income Tax Assessment Act 1936* (Cth)<sup>17</sup>:

“is drafted with such obscurity that even those used to interpreting the utterances of the Delphic oracle might falter in seeking to elicit a sensible meaning from its terms.”

Let me briefly mention some of the assessments made by commentators of Justice Hill’s jurisprudence dealing with the fundamental concepts of taxation law.

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Conference 2006, *Old Taxes in a New World*, Melbourne, 30 January 2006 – 1 February 2006) at 2 (hereafter "C Coleman, Reflections").

<sup>17</sup> (1990) 22 FCR 42 at 61. This statement was quoted with approval by McHugh J in *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 546.



*Income:* Justice Hill's contribution to the understanding of the concept of income for the purpose of Australian taxation law was highlighted by Justice Edmonds in his moving tribute to him<sup>18</sup>:

"In terms of basic concepts, one only has to look at the cases he decided in the area of the basic concept of income. One might call it: 'From *Cooling* to *Montgomery*'; while he was not involved at any stage in *Montgomery*'s case, there can be no doubt that the ultimate slim majority in *Montgomery*, whether one agrees with it or not, had its source in Graham's decision in *Cooling*. In the same area is Graham's contribution to a proper understanding of what he called the two strands of reasoning in *Myer Emporium* in their application to various sets of facts which subsequently came before the Court. One only has to look at cases such as *Westfield*, *Henry Jones (IXL)*, *Hyteco Hiring*, *Reuter*, *SP Investments* and other cases which raised the implications of the High Court's decision in *Myer Emporium* to the facts of those cases. Graham contributed greatly to the evolution of the reasoning process that came out of *Myer Emporium*."

*Capital gains:* Justice Hill's impact upon the development of capital gains tax law was explained by Professor Chris Evans, Geoffrey Hart and Matthew Wallace in their creatively titled tribute "Wrestling with the 'Terrible Twins' and other heroic endeavours. The contribution of Mr Justice Hill to jurisprudence in the area of Australia's capital gains tax provisions"<sup>19</sup>.

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<sup>18</sup> Edmonds, Tribute, above n 9, at 2.

<sup>19</sup> Paper presented at the Australasian Tax Teachers' Association's 18th Annual Conference, Old Taxes in a New World, Melbourne, 30 January – 1 February 2006, available at <<http://pandora.nla.gov.au/pan/23524/20060224/>

In that paper, the authors reviewed the three judicial opinions in which Justice Hill examined sections 160M(6) and 160M(7), or the ‘terrible twins’ as they became widely known among taxation specialists. Those three cases were *Federal Commissioner of Taxation v Cooling*<sup>20</sup>, *Hepples v Federal Commissioner of Taxation*<sup>21</sup> and *Ashgrove Pty Ltd, Gooch, Davey, Wadley & Swain v Deputy Federal Commissioner of Taxation*<sup>22</sup>. In that paper the authors suggest that Justice Hill’s criticism in *Cooling* and *Hepples*<sup>23</sup>, among other things, provided:

“at least part of the impetus for the abandonment of the asset, acquisition, disposal paradigm embodied in Part IIIA in favour of the CGT event paradigm adopted in the rewrite of the CGT provisions in Parts 3-1 and 3-3 of the *Income Tax Assessment Act 1997* [(Cth)].”

*Trust income:* In an article titled “Taxation of trust income under Div 6: A reflection on Justice Hill’s contribution”, Mr Michael Blissenden examined the very issue to which Professor Coleman was adverting, in her commentary to which I have referred, namely on the taxation of trust

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WallaceHartEvans\_Wrestling%20with%20terrible%20twins\_Justice%20Hill.pdf>, viewed 22 February 2007 (hereafter "Evans, Hart and Wallace").

<sup>20</sup> (1990) 22 FCR 42.

<sup>21</sup> (1990) 22 FCR 1.

<sup>22</sup> (1994) 53 FCR 452.

<sup>23</sup> See, for example, the quotation from *Cooling* referenced in footnote 17 above.

income. Mr Blissenden explains the competition between the ‘quantum’ and ‘proportionate’ approaches when calculating trust income in Division 6 of Part III of the *Income Tax Assessment Act 1936* (Cth).

Mr Blissenden asserts that “there is little doubt that the weight of authority rests with the proportionate approach”<sup>24</sup>. He credits the acceptance of this conclusion to Justice Hill’s approach in *Davis v Federal Commissioner of Taxation*<sup>25</sup>. He suggests that this case “provide[s] a leading example of [Justice Hill’s] ability to identify, to explore and to provide guidance to the tax community at large”<sup>26</sup>.

It would be inappropriate for me to endorse the proportionate approach or quantum approach or to express any other partisan view. I will, however, endorse the sentiment expressed by Mr Blissenden that Justice Hill was a wonderful leader of the Australian taxation profession. For those, like me, who sometimes feel beyond the pale in this discipline, Justice Hill was a bright light, often showing the way.

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<sup>24</sup> M Blissenden, “Taxation of trust income under Div 6: A reflection on Justice Hill’s contribution” (2006) 35 *Australian Tax Review* 262 at 269.

<sup>25</sup> (1989) 86 ALR 195. Mr Blissenden quotes a passage which appears at page 230-231 ((1989) 20 ATR 548 at 576) which illustrates Justice Hill’s support for a proportionate approach. See M Blissenden, (2006) 35 *Australian Tax Review* 262 at 266.

<sup>26</sup> Blissenden, (2006) 35 *Australian Tax Review* 262 at 267.

*Appeals to the High Court:* Justice Gzell of the New South Wales Supreme Court has described the 14 judicial opinions of Justice Hill which have been considered by the High Court<sup>27</sup>. When his list was published, the High Court had affirmed Justice Hill's judgments on 6 occasions<sup>28</sup> and reversed him on 7 occasions<sup>29</sup>. The decision of the High Court in the fourteenth case, *Federal Commissioner of Taxation v Citylink Melbourne Ltd*, was then reserved. That case has now been decided<sup>30</sup>. Over my dissent, I am afraid, the joint opinion of Justices Hill, Stone and Allsop was upheld. Therefore, Justice Hill's 'record' in the High Court was 7-7.

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<sup>27</sup> I V Gzell, "The Legacy of Justice Graham Hill" (Paper presented at the 2006 Annual Convention of the Taxation Institute of Australia, South Australian Division, Barossa Valley, 4 May 2006), available at <[http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_gzell010506](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_gzell010506)>, viewed 14 February 2007 (hereafter "Gzell").

<sup>28</sup> See *Hepples v Federal Commissioner of Taxation (No 2)* (1992) 173 CLR 492; *Commonwealth v Genex Corporation Pty Ltd* (1992) 176 CLR 277; *Federal Commissioner of Taxation v Peabody* (1994) 181 CLR 359; *Federal Commissioner of Taxation v Energy Resources of Australia Ltd* (1996) 185 CLR 66; *Commissioner of Taxation v Payne* (2001) 202 CLR 93; *Commissioner of Taxation v Stone* (2005) 222 CLR 289.

<sup>29</sup> *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Federal Commissioner of Taxation v Australia & New Zealand Savings Bank Ltd* (1994) 181 CLR 466; *Federal Commissioner of Taxation v Prestige Motors Pty Ltd* (1994) 181 CLR 1; *Commissioner of Taxation v Consolidated Press Holdings Ltd* (2001) 207 CLR 235; *Commissioner of Taxation of the Commonwealth of Australia v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520; *Commissioner of Taxation v Hart* (2004) 217 CLR 216; *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* (2005) 220 CLR 592.

<sup>30</sup> (2006) 80 ALJR 1282

This is by no means a record to be ashamed of. From time to time, before my elevation, I too was overturned by the High Court. As is well known, I regularly disagree with my fellow judges. It is in the very nature of High Court adjudication, and particularly in appeals which must now, universally, secure the agreement of two or three Justices as being reasonably arguable, that such cases stand at the cusp. Highly trained and experienced lawyers will often disagree about their disposition. In tax appeals that feature is the rule and not the exception.

#### INTERPRETATION OF TAXATION STATUTES

*HP Mercantile*: One of Justice Hill's greatest legacies to the law of taxation in Australia may be in his approach to the interpretation of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) which he explained and applied in *HP Mercantile Pty Ltd v Commissioner of Taxation*<sup>31</sup>.

Justice Gzell reviewed that decision, which was the last tax decision that Justice Hill wrote, in a paper titled "The Legacy of Justice Graham Hill". After setting out paragraphs 13, 16 and 17 of Justice Hill's reasons in *HP Mercantile* in full, Justice Gzell wrote<sup>32</sup>:

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<sup>31</sup> (2005) 143 FCR 553.

<sup>32</sup> Gzell, above n 27, at 2.

“Hill J's explanation of the structure of our GST system in *HP Mercantile* is a powerful piece of jurisprudence, not only for its erudition, but also for its insightfulness and simplicity of expression. It was powerful enough to convince Allsop J (who with Stone J constituted the other members of the Full Court) to change his mind.”

Justice Gzell noted that an application for special leave to appeal the High Court in *HP Mercantile* had been filed but not listed at the time that his paper was delivered. Justice Gzell predicted, however, that<sup>33</sup>:

“Whatever the outcome of that application, I venture to suggest that Hill J's analysis will be regarded as the seminal analysis of our GST system.”

Justice Edmonds has a similar impression of the importance of Justice Hill's reasons in *HP Mercantile*, stating<sup>34</sup>:

“I think it likely that [Graham Hill's] approach in [*HP Mercantile*], with its emphasis on policy and contextual considerations rather than delving into a syntactical analysis of textual matter will be a template for the future, not only in the area of GST, but in other revenue law areas as well. I know that special leave has been sought in that case but irrespective of the outcome, I predict that Graham's approach will make that case a ‘watershed’ in the development of tax jurisprudence in Australia in the first half of this century.”

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<sup>33</sup> Gzell, above n 27, at 1.

<sup>34</sup> Edmonds, Tribute, above n 9, at 5.

It would be inappropriate for me to comment specifically on Justice Hill's approach in this regard. The thought of being disqualified from participating in a single appeal on tax law is not one that would lead me to expressing an indiscreet prejudgment. I would observe, however, that it was Justice Gummow (as Acting Chief Justice) and I who sat on the special leave application in *HP Mercantile*. In giving our joint reasons for dismissing the application for special leave, Justice Gummow stated<sup>35</sup>:

“Despite the strong arguments put by counsel for the applicant we have reached a conclusion similar to that of Justice Allsop in the Full Court of the Federal Court. A purely textual analysis of section 11.15(5) of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) may give some support to the argument for the applicant. However, as Justice Hill showed in what was the leading judgment delivered in the Full Court, the statutory scheme and legislative context and purpose carry the day for the respondent Commissioner.”

This outcome will probably give some comfort to Justices Gzell and Edmonds in relation to their predictions.

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<sup>35</sup> *HP Mercantile Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia* [2006] HCATrans 320 at 9 (lines 325-332).

*Purposive Interpretation:* In his analysis of *HP Mercantile*, Justice Gzell stated<sup>36</sup>:

“The decision in *HP Mercantile* demonstrates the significance of context and purpose in the statutory construction process.”

I agree. The tenor of the approach adopted by Justice Hill is conveyed by the following two paragraphs in his reasons in that decision<sup>37</sup>:

“A more profitable approach to the question of construction is to consider both the policy which is enshrined in Div 11 and the legislative context, so far as that casts light upon the proper interpretation of s 11-15(2)(a).

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It is clear, both having regard to the modern principles of interpretation as enunciated by the High Court in cases such as *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 and s 15AA of the *Acts Interpretation Act 1901* (Cth) that the Court will prefer an interpretation of a statute which would give effect to the legislative purpose, as opposed to one that would not. This requires the Court to identify that purpose, both by reference to the language of the statute itself and also any extrinsic material which the Court is authorised to take into account.”

This is a useful and accurate statement of the applicable interpretive principle. A glance at some of his earlier decisions suggests that, during

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<sup>36</sup> Gzell, above n 27, at 2.

<sup>37</sup> (2005) 143 FCR 553 at 564 [43]-[44].



his judicial service, Justice Hill progressed in his thinking about the proper approach to interpreting taxation legislation<sup>38</sup>. This thought leads me to a key question concerning the general interpretation of taxation statutes.

*Tax law interpretation principles?:* In considering the question of how to interpret legislation that imposes taxation, one question that often arises is whether any special common law rules of interpretation apply when construing taxation statutes as a *genre* of the written law. It is my view that they do not<sup>39</sup>. I have said this in many decisions over the years. At first, my view was regarded as heresy by many tax lawyers brought up in the thinking that tax law was a special category of legislation, subject to a special approach of strict interpretation in deriving its meaning. In *Federal Commissioner of Taxation v Citylink*

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<sup>38</sup> See eg Hill J's reasons for the Full Court of the Federal Court in *Prestige Motors Pty Ltd v Federal Commissioner of Taxation* (1993) 47 FLR 138 concerning the validity of a notice to pay tax in accordance with s 174(1) of the 1936 Act. The Full Court reversed the decision of Gummow J: (1993) 114 ALR 507; 25 ATR 338; 93 ATC 4359. The approach of Gummow J (which was, with respect, somewhat more practical and realistic) was restored by the unanimous decision of the High Court: *Federal Commissioner of Taxation v Prestige Motors Pty Ltd* (1994) 181 CLR 1.

<sup>39</sup> See my reasons in *Central Bayside General Practice Association Ltd (formerly known as Central Bayside Division of General Practice Ltd) v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1529-1530 [92]; 229 ALR 1 at 25; *Federal Commissioner of Taxation v Citylink Melbourne Ltd* (2006) 80 ALJR 1282 at 1287 [12]; 228 ALR 301 at 305; *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 146 [84]; *Steele v Deputy Commission of Taxation* (1999) 197 CLR 459 at 477 [52].

*Melbourne* (“*Citylink Melbourne*”), although on that occasion in dissent, I restated what by now was becoming a familiar *Leitmotif*<sup>40</sup>:

“Income tax law is not a mystery unto itself, to be preserved separate from other parliamentary law as a legal canon reserved to a specialised priestly caste.”

I hold that view in relation not only to income tax law, which was being considered in *Citylink Melbourne*, but to all tax law.

The general approach now taken to interpreting statutes generally in Australia must also, in my opinion, be applied to tax statutes. That approach requires that a purposive approach, rather than a strictly or narrowly literal one, be employed when construing such statutes<sup>41</sup>. At the peril of offending some of my hosts, I recall that in *Federal Commissioner of Taxation v Ryan*, I earlier remarked<sup>42</sup>:

“It is hubris on the part of specialised lawyers to consider that “their Act” is special and distinct from general movements in statutory construction which have been such a marked feature of our legal system in recent decades. The [*Income Tax Assessment Act 1936* (Cth)] is not different in this respect. It should be construed, like any other federal statute, to give effect to the ascertained purpose of the Parliament.”

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<sup>40</sup> *Federal Commissioner of Taxation v Citylink Melbourne Ltd* (2006) 80 ALJR 1282 at 1287 [12].

<sup>41</sup> See my reasoning at *Austin v Commonwealth of Australia* (2003) 215 CLR 195 at 290-291 [251].

<sup>42</sup> *Ryan* (2000) 201 CLR 109 at 146 [84].

The key premise that sustains my approach to the interpretation of taxation statutes is that laws imposing taxation are, in the end, no more than statutes of a Federal or State Parliament concerned<sup>43</sup>. Once this feature of their essential character is remembered, it follows that the principles of interpretation set out in the relevant Interpretation Act must be applied. Such interpretation laws do not exclude taxation statutes from their general operation. Neither should judges do so in approaching the declaration of the meaning of such laws.

At the federal level, section 15AA(1) of the *Acts Interpretation Act* 1901 (Cth) contains a legislative injunction requiring federal statutes to be construed in a manner that promotes “the purpose or object underlying the Act”. In addition, section 15AB of that Act allows the use of extrinsic materials to assist with the interpretation of statutes. There are equivalent provisions now in the laws of all of the Australian States and Territories. Moreover, the common law itself has developed “to adopt a more purposive approach to the task of statutory construction”<sup>44</sup>. It is because taxation statutes are statutes, without any special status as a class, that these approaches apply equally to them as to all other statutes.

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<sup>43</sup> See my reasons in *Ryan* (2000) 201 CLR 109 at 145 [81]; *Steele* (1999) 197 CLR 459 at 477 [52] in relation to the interpretation of the *Income Tax Assessment Act* 1936 (Cth).

<sup>44</sup> *Ryan* (2000) 201 CLR 109 at 145 [82] (my reasons).

All Australian judges today are therefore bound to give effect to the purposive approach, by virtue of sections such as section 15AA and also high judicial authority. Of course this states the task. Sometimes the ascertainment of the purpose is by no means easy. However, there are several practical reasons that reinforce acceptance of the purposive approach. In *Federal Commissioner of Taxation v Ryan*, I referred to one of them in describing that approach as<sup>45</sup>:

“...an approach proper ... to the relationship between modern democratically elected legislatures and the independent courts. The price that will be exacted for spurning the legislative instruction to give effect to the purpose of legislation is increasingly complex and detailed statutory provisions, difficult for citizens to understand and for courts to construe.”

*The benefit of ambiguity?:* Obviously, there was once a rule at common law that courts should interpret ambiguities in taxation statutes in favour of the taxpayer. In *Austin v Commonwealth* I poured cold water on this "residual rule"<sup>46</sup>:

“[I]n more recent times, this Court has departed from the narrow and literal interpretation of words appearing in legislation, including that imposing taxation, in favour of an interpretation that seeks to achieve the apparent purposes or

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<sup>45</sup> *Ryan* (2000) 201 CLR 109 at 145 [81] (my reasons).

<sup>46</sup> *Austin* (2003) 215 CLR 195 at 291 [251].

objects of the enactment as expressed in its terms.” [footnote omitted]

Justice Hill disagreed with this approach to the law. In the article “A Judicial Perspective on Tax Law Reform”<sup>47</sup>, he criticized two decisions that I had delivered while President of the Court of Appeal of the Supreme Court of New South Wales expressing this view<sup>48</sup>. Justice Hill’s set out his own approach as follows<sup>49</sup>:

“It is, in my view, important in a democracy, that the government be required to legislate with precision if it is to impose a liability upon its subjects, and conversely it would be a sad day if the courts were to abandon the rule, even if it is but a rule of last resort. A rule which says that in tax cases there should be an attempt on the part of the courts to make the legislation work (in favour of the revenue) is an encouragement to sloppy drafting.”

As will be evident from my reasons in *Austin*, I am not persuaded by Justice Hill’s criticism. In my view, the so-called “rule” no longer applies. This development is consistent with the move to a purposive interpretation of statutes being applied to taxation legislation, as it is applied to all other legislation. If taxation legislation is to be interpreted *against* the revenue as a matter of legal principle, it is more likely to

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<sup>47</sup> (1998) 72 *The Australian Law Journal* 685.

<sup>48</sup> (1998) 72 *The Australian Law Journal* 685 at 689, criticising my reasons in *Chief Commissioner of Stamp Duties v Buckle* (1995) 38 NSWLR 574 at 577 and *Commissioner of Stamp Duties v Commonwealth Funds Management* (1995) 38 NSWLR 173.

<sup>49</sup> See (1998) 72 *The Australian Law Journal* 685 at 689.

frustrate the achievement of the purpose of the legislation. Such an approach creates an unwelcome incentive for the legislature to enact ever more specific, particular, detailed and complex taxation law which is undesirable for the reasons that I have expressed already<sup>50</sup>. Justice Hill's insistence on the continuing existence of the earlier "rule", even as a last resort, reflects his early training as a tax practitioner to a rule that had not then been entirely swept away by the new purposive approach.

There is at least one further social and historical reason for the shift to the approach I favour in deriving the meaning of taxation statutes. It explains why it rests not only on legal authority but also on social and political realities. At the time when the strict approach to the interpretation of taxing statutes was first expounded, the legislature in Britain was, to a large extent, an unrepresentative collection of vested interests, rotten boroughs and landed gentry. Property qualifications excluded ordinary citizens from the franchise. Women were generally outside the franchise until the electoral reforms of the twentieth century. With such reforms came the wider franchise, ultimately, universal. This accompanied and stimulated the larger role of the modern regulatory state and the growth of social welfare and other governmental initiatives to be funded from the revenue.

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<sup>50</sup> This point is affirmed by the expanding size of the federal income taxation legislation. In 1927 it amounted to 60 pages. In 2007 it consumes 5303 pages and still growing.

It was this new legislative environment that both explained and necessitated a much less hostile attitude to the interpretation of taxation statutes on the part of the judiciary. No longer were such laws impositions on taxpayers imposed by unrepresentative Parliaments. Now they could be taken to be the expressed and necessary will of the representatives of the population as a whole. An approach to interpretation that would defeat that will would be inappropriate and ultimately ineffective. I appreciate that this analysis too involves a few fictions. Today Parliaments are often captured by the Executive or even the leader of the party in power. However, in the theory of representative democracy, implicit in the Constitution, enacted legislation has the approval of the governed - now all of them.

The modern states that have succeeded in the twentieth century are those that enacted, enforced and respected their taxation laws. The contrasting social and economic conditions of Argentina and Australia, that started the 20th century at roughly equal economic strength, has been attributed, at least in part, to the effectiveness of their respective taxation laws and practices.

## GENERAL ANTI-AVOIDANCE PROVISIONS

Justice Hill made a significant contribution to general anti-avoidance provisions in Australia. Through his papers and articles, he enhanced an understanding of general anti-avoidance provisions<sup>51</sup>.

In 1980, together with Murray Gleeson QC (now the Chief Justice), Graham Hill was invited by the then Australian Treasurer, the Hon John Howard MP, to draft a new anti-avoidance provision for inclusion in the *Income Taxation Assessment Act 1936* (Cth). In 1981, the new Part IVA was enacted, based on their joint recommendations. It substantially continues in operation today.

The aim of this undertaking was to 'bolster' the general anti-avoidance provision following a series of controversial decisions of the High Court during Sir Garfield Barwick's chief justiceship<sup>52</sup>. Justice Hill was later to observe that Part IVA of the *Income Tax Assessment Act*

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<sup>51</sup> See, for example, D G Hill, "The incremental expansion of Part IVA" (2005) 40 *Taxation in Australia* 23; D G Hill, "GST anti-avoidance: Division 165" (1999) 2 *Journal of Australian Taxation* 295.

<sup>52</sup> Justice Hill contended that not all of the blame for the High Court's interpretation of section 260 of the *Income Tax Assessment Act 1936* (Cth) rested with Chief Justice Barwick. Indeed, he suggested, that there is "much to be said for the argument ... that the opprobrium for the spate of s 260 decisions adverse to the revenue should as much be laid at the feet of Dixon CJ as his successor": D G Hill, "The Judiciary and its Role in the Tax Reform Process" (1999) 2 *Journal of Australian Taxation* 66 at 74.



appears to have succeeded in reducing tax avoidance, suggesting that<sup>53</sup>:

“It is perhaps correct to say that since the 1980s, with the advent of Pt IVA, paper tax avoidance schemes have largely been eliminated.”

In a recent article published in the *Law Quarterly Review*, Professor Judith Freedman, KPMG Professor of Taxation Law at Oxford University, undertook a comparative law analysis of general anti-avoidance provisions and principles in several jurisdictions. In the result, she endorsed Australia’s approach of establishing a general statutory anti-avoidance rule in Part IVA<sup>54</sup>. Although noting that a consensus might be forming that Part IVA was perhaps slightly over-weighted in favour of the Commissioner<sup>55</sup>, Professor Freedman argued that such a statutory mechanism was preferable to a judicially-created anti-avoidance mechanism, such as that propounded by the House of Lords in decisions such as *W.T. Ramsay v IRC*<sup>56</sup>. She argued that a similar statutory mechanism should be adopted in the United Kingdom, contending that<sup>57</sup>:

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<sup>53</sup> (1999) 2 *Journal of Australian Taxation* 66 at 76.

<sup>54</sup> J Freedman, “Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament” (2007) 123 *Law Quarterly Review* 53.

<sup>55</sup> (2007) 123 *Law Quarterly Review* 53 at 81.

<sup>56</sup> [1982] AC 300.

<sup>57</sup> Freedman, above n 56, (2007) 123 *Law Quarterly Review* 53 at 84-85.

“The Australian experience does suggest ... that those who argue that a GAAR [General Anti-Avoidance Rule] can do nothing more than a normal rule of statutory construction are mistaken.”

We may yet see the legacy of Graham Hill spread to the United Kingdom in the form of a general anti-avoidance provision in the taxation laws of that country. If that were to happen it would be a fitting outcome because, like myself, Graham Hill and Murray Gleeson grew up in the era of Privy Council appeals and of the profound influence of English law and English judicial ways on the legal system of Australia. We were proud of our links with the common law system of England. Although, for constitutional reasons, taxation law is primarily enacted law, our general approaches, principles and judicial techniques remain profoundly English. We have never felt an embarrassment in acknowledging this. It is part of our cultural heritage and legal training. It is fruitless to deny it.

After his appointment as a judge, Justice Hill developed the jurisprudence of anti-avoidance regarding Part IVA. Justice Edmonds has explained that<sup>58</sup>:

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<sup>58</sup> Edmonds, “Contribution” above n 13, at 6. Note that (2004) 217 CLR 216 is the citation of the High Court decision. The citation of the decision of the Full Court of the Federal Court in which Justice Hill participated is *Hart v Commissioner of Taxation* (2002) 121 FCR 206.

“[Justice Hill’s] involvement with our current general anti-avoidance rule from before its birth in 1981 up to and including his participation in the Full Court in *Commissioner of Taxation v Hart* (2004) 217 CLR 216 and as the trial judge in *Macquarie Finance Ltd v Commissioner of Taxation* (2004) 210 ALR 508 has led to his Honour having made an indelible contribution to the development of the law in this area. Some might well say that it is his most important contribution and time might well prove them right.”

## TRIBUTES

After Graham Hill's death, an award, named after him, was established by Mr Robin Speed, a colleague of us both from law school days and a great admirer of Justice Hill’s work in this field. It was created “in recognition of the contribution made by Graham Hill to improving revenue law in Australia.”<sup>59</sup> Fittingly, in 2006, the first award went to the Hon Daryl Davies QC, who has himself made many fine contributions to the law, tax law and administrative law more generally.

A collection of tributes to Justice Hill has been compiled on the website for this award<sup>60</sup>. Examination of the tributes explains the extremely high regard that existed for his intellect and scholarship as a

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<sup>59</sup> *About the Graham Hill Annual Award* (2006) The Graham Hill Annual Award <<http://www.grahamhillaward.com.au/web/default.asp>>.

<sup>60</sup> *Bibliography* (2006) The Graham Hill Annual Award <<http://www.grahamhillaward.com.au/web/bibliography.asp>>. There are further tributes yet to be published. Professor Richard Vann is preparing an article which examines judicial and academic consideration of the interpretation of tax treaties.

lawyer and a judge; the sincere gratitude for his enormous contribution to the law and to lawyers and law students in Australia and internationally; and the deep sense of loss at his passing. I will make final reference to some of these tributes as part of my own reflection upon Justice Hill's personal qualities and his contribution to the law beyond the courtroom<sup>61</sup>.

### A BROADER CONTRIBUTION

*Legal education:* Graham Hill made a huge contribution to the education of law students, lawyers and judges, both in Australia and overseas. After returning to Australia from study abroad in 1965, Graham Hill became a part-time lecturer at Sydney University (while also employed as a full-time solicitor). His initial subject was stamp duties and estate planning law which he taught with Russell Fox QC (later Chief Justice Fox). There were no texts and few precedents. He remedied this deficiency. He also played a large part in establishing the successful postgraduate programme of the University of Sydney in revenue law. The course was to earn the University many plaudits.

In 1967, he was appointed Challis Lecturer in Taxation. He held this post for 38 years – a most remarkable achievement. At the time of his death, he was the longest serving teacher at the Sydney Law School.

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<sup>61</sup> cf Kirby, "The Late Justice Graham Hill" (2005) 8 *Journal of Australian Taxation* 206.

Graham Hill was involved in the creation of the Australian School of Taxation (“Atax”) at the University of New South Wales<sup>62</sup>. He had also been a judicial fellow at Flinders University. He was Chair of the Law Faculty Advisory Committee at the University of Wollongong. As a mark of the affection and gratitude of ordinary law students he was elected Patron of the University of Western Sydney’s Law Students’ Society.

As I am sure members of the Institute are aware, Graham Hill was involved for many years with the Institute, including as its National President in 1984-1985. In 1986, he was awarded honorary life membership. Paul Dowd, Chair of the NSW State Council of the Institute, has written that Graham Hill’s “involvement in the affairs of [this Institute] at both a National and State level is ... legendary”<sup>63</sup>.

Graham Hill was patron of the Australasian Tax Teacher’s Association (“ATTA”). Patrick Gallagher, the Foundation President of that Association, has written that “year after year [Graham Hill] attended its annual conferences to the great benefit of all tax teachers across NZ and Australia”<sup>64</sup>. Apart from everything else it showed an amazing

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<sup>62</sup> P Gallagher, “The Honourable Justice D Graham Hill 1938-2005” (2005) 3 *eJournal of Tax Research* 147 at 147 (hereafter “Gallagher”).

<sup>63</sup> P Dowd, “Chairman’s Message”, (2006) September Branchlines, Taxation Institute of Australia, NSW Division at 1, available at <<http://www.grahamhillaward.com.au/web/chairmans.pdf>>, accessed 9 February 2007.

<sup>64</sup> Gallagher, above n 62, (2005) 3 *eJournal of Tax Research* 147 at 147.

endurance, sense of duty and forbearance for those lawyers (amongst whom I would include myself) who lacked the deep knowledge of, and familiarity with, his chosen field of expertise.

Graham Hill also assisted in the development of the law and lawyers in Australia and internationally through a host of other legal organisations such as Australian Tax Research Foundation<sup>65</sup>, the Law Council of Australia, the Law Society of New South Wales, the New South Wales Bar Association and the International Fiscal Association.

For many years, he was convenor of the Federal Court's education committee. In his eulogy, Chief Justice Black acknowledged that in the area of judicial education, he had made a "massive contribution to the Federal Court and to the judiciary generally, here and overseas."<sup>66</sup> Chief Justice Black observed that<sup>67</sup>:

"[Graham Hill] was involved with the Commonwealth Judicial Education Institute and more recently was appointed to the Board of the newly formed International Organisation for Judicial Training."

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<sup>65</sup> As Councillor from 1985-1987.

<sup>66</sup> Black, above n 3, 4 at 6.

<sup>67</sup> Black, *ibid*, 4 at 6.

He was alternate representative and later primary representative of the Federal and Family Courts on the Council of the National Judicial College of Australia.

Graham Hill's contributions to law extended to Thailand and China. He travelled to Thailand with other Australian lawyers to conduct an intensive course for Thai judges and tax practitioners<sup>68</sup>. In China, Graham Hill.<sup>69</sup>

“as part of a program funded by the Australian Government, ... outlined the significance of the rights of appealing taxation rulings and assessments to independent courts[.]”

*Technology*: Chief Justice Black also paid tribute to Graham Hill's “huge contribution to the Court” in the field of technology<sup>70</sup>. He noted that “Graham Hill was a member of the Federal Court's information technology committee for some 16 years, and for 14 years ... he was its Convenor”<sup>71</sup>. His estimate was that “Graham Hill's leadership in this risky area was indispensable.”<sup>72</sup> Fortunate was the Federal Court of Australia, that in its early years, when it was winning professional,

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<sup>68</sup> *Thais Court Tax Expertise*, (2003) University of New South Wales <[http://www.unsw.edu.au/news/pad/articles/2003/jun/Atax\\_thai\\_training.html](http://www.unsw.edu.au/news/pad/articles/2003/jun/Atax_thai_training.html)>, accessed 9 February 2007.

<sup>69</sup> Black, above n 3, 4 at 6.

<sup>70</sup> Black, *ibid*, 4 at 6.

<sup>71</sup> Black, *ibid*, 4 at 6.

<sup>72</sup> Black, *ibid*, 4 at 7.

community and judicial confidence, it had in so many departments a judge of such energy, foresight and devotion.

### THE PERSON

*Efficiency:* Graham Hill's efficiency was remarkable. Bill Cannon, who assisted Graham Hill in editing his text on duties over many years, wrote that<sup>73</sup>:

"In 1997, Graham entirely rewrote the book when the Duties Act was introduced. He did that over a period of approximately 4 weeks, a task which, in my view, could not have been accomplished in that time frame by any other living person."

Justice Edmonds has also mentioned Justice Hill's swift turn around of the reasons for judgment in the *Consolidated Press Cases*<sup>74</sup>:

"His Honour had an enormous capacity to turn judgments around and he did so, generally speaking, without sacrificing quality in the reasoning process. The best example of this is his Honour's judgments at first instance in what were colloquially known as the 'Packer tax cases', cases involving companies within the private ownership of the late Mr Kerry Packer and his family. They all involved the most complex of

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<sup>73</sup> B Cannon, "Tribute to the late Hon Justice D Graham Hill" (Paper presented at the 18th Atax GST and Indirect Tax Weekend Workshop, Noosa, 6-8 April 2006) available at <[http://www.atax.unsw.edu.au/news/gst18thwkshop06/Justice\\_Graham\\_Hill\\_Tribute.pdf](http://www.atax.unsw.edu.au/news/gst18thwkshop06/Justice_Graham_Hill_Tribute.pdf)>, viewed 13 February 2007.

<sup>74</sup> Edmonds, "Contribution", above n 13 at 8-9.



issues - the application of s 177E for the first time; the application of s 177D to a scheme the parties to which it was alleged had the dominant purpose of evading the quarantining provisions of s 79D; the application of Part X dealing with controlled foreign companies to a defeasance profit of a kind which arose in Unilever Australia Securities Limited and Orica Limited; and the interaction of the provisions of Part X and the thin capitalisation provisions of Division 16F to controlled foreign companies. ...

The cases were heard at first instance by his Honour over a period of some seven to eight days and his Honour turned the judgments around in all four cases within fourteen days. Not everyone agreed with his Honour's findings of fact or conclusions of law, but I do not believe any other judge in this country could have replicated that performance with the quality of the reasoning process.”

Truly, this was a man of remarkable ability and gifts of intellect and energy.

*Generosity:* One of the recurring comments that I have noticed, on reading the tributes, or listening to them at this Conference, relates to Graham Hill’s generosity with his time and knowledge. In paying tribute to Graham Hill at an ATTA meeting, Professor Coleman reflected on the fact that he “was a wonderful patron [of ATTA] who was always generous with his time and intellectual support.”<sup>75</sup> She recalled that<sup>76</sup>:

“He came to every conference, he gave a fabulous technical talk, and he always said ‘put me up in the cheapest

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<sup>75</sup> Coleman, “Recollections”, above n 16, at 1.

<sup>76</sup> Buffini, above n 1, 29.

accommodation so I can meet the most people' he made himself available to everybody.”

Patrick Gallagher remarked that<sup>77</sup>:

“Graham spoke at a huge number of tax conferences over many years – for an array of organisations. He was generous with his time and his knowledge and concerned to ensure clear understandings and mutual gratification in learning and in work. He enjoyed meeting delegates from all areas of all professions and he had no time for grandeur or graces – but all the time in the world for people and their opinions. When at Atax UNSW, I was honoured time and again to have Graham accept invitations to attend events I was organising. His generosity was simply without equal – with all people.”

Bill Cannon also attested to Graham Hill's generosity:

“[T]he remarkable thing about Graham was that I cannot recall there being any occasion when I asked him to do something for me when he said no. In my experience he never thought of himself on such occasions . He never thought, or at least never gave any indication that he thought about himself or whether what you were asking him to do was in his interest. If at all physically possible he would do it.”

Christopher Bevan recalled his dry sense of humour.<sup>78</sup>

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<sup>77</sup> Gallagher, (2005) 3 *eJournal of Tax Research* 147 at 149.

<sup>78</sup> C Bevan, “Justice Graham Hill: Judge of the Federal Court of Australia 1989-2005” (2005) 79 *Australian Law Journal* 654 at 655.

*Commitment to the rule of law:* Unremarkably, Graham Hill felt very strongly about the importance of the rule of law. In a speech following the conferral on him by the University of Sydney of the honorary degree of Doctor of Laws, he made important observations about migration, and specifically refugee, law<sup>79</sup>. He made particular reference to legislation restricting judicial review of decisions to refuse to grant refugee visas to asylum seekers.

These remarks secured attention in the public media. They were the product of Graham Hill's deep-seated belief in the importance of the rule of law. Some were surprised that such a technical guru in one of the most difficult areas of legal practice, would reveal himself as a compassionate man and a lover of the bedrock of our constitutional arrangements. But it was not surprising to me for I had sat with him in classrooms in the public school at Summer Hill Opportunity School in Sydney in 1949 and 1950 (and later at Fort Street Boys' High School in Petersham). Together we imbibed wonderful values – Australian values – from our public education. His mother was a teacher in public schools. Like him I shared a deep love of the ethos of public schools – their universality and their democracy. I was not the slightest surprised when he proclaimed the deep well-springs of his feeling for the plight of asylum seekers and the need for the law to protect such people in Australia, always. He was, I believe, a profoundly democratic person.

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<sup>79</sup> D G Hill, "Graduation Address: Justice Hill" (2003) 77 *Australian Law Journal* 275.

In 1996 Justice Hill gave a speech to the Tasmanian Division of this Institute in which he stated that<sup>80</sup>:

“Many ministerial decisions and many bureaucratic decisions can be the subject of judicial review. ...

Many administrative decisions made by Ministers are set aside on review because there has been some error of law affecting the decision-making process. That often does not endear the courts to the decision-maker shown to be wrong.

...

I need not apologise if courts set aside decisions made by politicians, even if those politicians are our elected representatives. Politicians are not above the law; they must abide by it. Parliament of course may change the law, but until it does the law exists to be obeyed.”

*A few frailties:* Of course, Graham Hill, like all of us, was not without human frailties. Although he felt very strongly about the answerability of power to the rule of law and to the decision of independent judges, he was quite conservative on many substantive subjects. He came from a family of comparatively modest means

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<sup>80</sup> D G Hill, “Do Judges Make Tax Law?” (Paper presented at the Taxation Institute of Australia Tasmanian Division Annual Seminar, Swansea, 18 & 19 October 1996) at 2-3, quoted in C Fong, “Justice Hill and Justice: Beyond the Black Letter of the Law” (Paper presented to the 18th Australasian Tax Teachers Association Conference 2006, *Old Taxes in a New World*, Melbourne, 30 January – 1 February 2006) at 10, available at <[http://pandora.nla.gov.au/pan/23524/20060224/CFong\\_JusticeHillAndJusticeBeyondTheBlackLetterOfTheLaw.pdf](http://pandora.nla.gov.au/pan/23524/20060224/CFong_JusticeHillAndJusticeBeyondTheBlackLetterOfTheLaw.pdf)>, viewed 13 February 2007.

although both of his parents were very intelligent and well-educated. Over the years, he became generally rather cautious in his social and economic views. Possibly this is a professional hazard for taxation lawyers. By definition, they are usually (although not always) dealing with substantial amounts of money, and with people who have more than trivial incomes and capital. Otherwise, it will be rare that their services will be engaged; and rarer still to have their causes pressed into litigation. Such propinquity probably helped to make him a social preserver rather than a changer. Something happened to us in our respective journeys from schooldays that took us in slightly different directions from our common starting points.

His was a complex personality. He could be prickly and occasionally difficult to deal with. He had great pride in his capacity and talent. To adapt Churchill's words concerning Mr Attlee, he could sometimes seem immodest; but with plenty to be immodest about. By reputation, as a judge, he was greatly attached to his draft reasons. For his judicial colleagues who participated with him in the Full Court of the Federal Court, getting him to change even a semicolon in a draft was reportedly something of an ordeal. However, especially in tax cases, he knew more than most. He was not reticent, when he felt the occasion required, to let the ignorance of occasional intruders into his field of law to be disclosed<sup>81</sup>.

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<sup>81</sup> See also Robin Speed's description of debating legal issues with Hill J: R Speed, "Speech for 2006 Graham Hill Award" (Speech delivered at the presentation of the inaugural Graham Hill Annual

I was myself sometimes to receive this treatment. I knew that, like the cold showers that were urged on us in schooldays, to tame the ardour of erroneous passions, his disdain was probably good for my soul. Even when I did not agree with it or give it effect. Yet he was respectful of our judicial institutions. He might not agree with a decision of the High Court. But he was not a judge who would endeavour to undermine or circumvent its authority. For example, in *Macquarie Finance Ltd v Commissioner of Taxation*<sup>82</sup>, Justice Hill appeared to be critical of some aspects of the reasoning of the High Court in *Commissioner of Taxation v Hart*<sup>83</sup> relating to Part IVA. Nevertheless, he indicated that, if he had been required to decide whether Part IVA applied in the *Macquarie Finance* case, he would have held that it did apply, stating<sup>84</sup>:

“I might add that I reach this conclusion with some reluctance. I doubt if the legislature would have regarded the present “scheme” as involving the application of Pt IVA when the Part was enacted in 1981. However, it seems to me that the approach of the High Court in *Hart* requires me to reach the conclusion I have.”

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Award, 30 November 2006) at 1-2, available at <http://www.grahamhillaward.com.au/web/RobinSpeedSpeech.pdf>, viewed 23 February 2007.

<sup>82</sup> (2004) 210 ALR 508.

<sup>83</sup> (2004) 217 CLR 216.

<sup>84</sup> *Macquarie Finance* (2004) 210 ALR 508 at 542 [120].

*Respecting complexities:* He could sometimes display a short fuse as, for example, when he had had enough of judicial complaints concerning his role on the information technology committee of the Federal Court. He resigned from leadership of the committee but not before securing important advances for the Court.

Within the Federal Court, his leadership of the education committee is still remembered with great appreciation. He would welcome the proposals of judges, including some whose world view he did not share, concerning topics that should be discussed. In this sense, he was truly intellectual in his outlook. However, he was sometimes hard to know on a personal level. Even I, who had been very close to him in schooldays and thereafter, drifted apart from his world. We were never able to rekindle the intense friendship of our school years.

Diversity is a precious feature of the legal profession. It is a badge of honour in the judiciary. Any frailties of Graham Hill are, in the big picture, insignificant. His differences with us were no more than the expression of his character, upbringing, interests and life experiences. I have not spoken of his family and personal life because I know little of it. Even in childhood he was reserved. No doubt this reserve was the product of his Scottish ancestors and Australian experiences. I know that he was deeply respected by his personal staff. They came to see me after his death, clutching, through conversations with me, for memories and images of Graham Hill when he was young and carefree. Yet even then, he was his own person. One knew that it was possible to

go so far and no further. There were deep currents at work. He was sensitive and he remembered perceived slights.

We do not enlarge our respected colleagues and beloved friends by ignoring the light and shade in their personalities. Reflections on these elements help us to reconstruct, after their passing, the full portrait - as Cromwell said, warts and all. Graham Hill can certainly withstand such an evaluation. Keeping all of the qualities in proportion and respecting truth as one sees it, are necessary features of human estimation.

## LEGACY

Justice Graham Hill leaves us a rich legacy. Chief Justice Murray Gleeson credits Justice Hill with introducing “a search for principle, rationality and order into an area of the law that had in the past lacked to a large extent those qualities”<sup>85</sup>.

In the preface to *Duties Legislation*, Graham Hill wrote that<sup>86</sup>:

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<sup>85</sup> See “Honourable Justice D G (Graham) Hill” (Citation by the University of Sydney upon the conferral of an Honorary Doctor of Laws, 24 May 2002), available at <<http://www.usyd.edu.au/senate/Citations/Hill.pdf>>, viewed 14 February 2007.

<sup>86</sup> D G Hill, *Duties Legislation*, vol 1 (at Update 5) at [55].



“[The work] has, I believe, also contributed to the growth of a well-informed body of professionals able to advise in the area. It is my hope that it continues to do this[.]”

He certainly achieved these stated goals and much more. He is directly responsible for increasing the number of people able to provide a high standard of advice on taxation matters. He greatly assisted tax professionals in understanding taxation law. He improved the quality of taxation law in Australia and overseas. More than this, he served his fellow citizens in education, law and the Judicature with fidelity and devotion. I hope that in a life of so much service, Graham, my friend from school days, also found that modicum of happiness and love and joy that is vouchsafed to us, mere human beings, whilst accomplishing our journey through life. His energy and industry are now stilled. But his legacy lives on. We must nurture it and, in our different ways, keep it before us as an example of the very best that our institutions and our professions can produce in Australia. I am grateful that this Institute has allowed me the privilege of recording some of his achievements and recollecting to the inward eye his shy, intelligent, energetic, complex personality. In the future this memorial speech will doubtless be different, more substantive, more technical. But it is fitting to begin the series with a personal reflection so that, decades hence, those who never knew Graham Hill as a living person will glimpse his qualities and partly understand why we gathered in Hobart, after his death, to honour him.

**TAXATION INSTITUTE OF AUSTRALIA**  
**JUSTICE GRAHAM HILL MEMORIAL SPEECH**  
**HOBART, 15 MARCH 2007**

**JUSTICE GRAHAM HILL & AUSTRALIAN TAX LAW**

**The Hon Justice Michael Kirby AC CMG**