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Judicial dissent in taxation cases: The incidence of dissent and factors contributing to dissent

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Abstract

This paper outlines findings from a research project examining dissent in taxation decisions determined by the High Court of Australia. This paper focuses on the incidence of dissent by individual Justices on the High Court, with the suggestion being that the overall incidence of dissent in tax decisions appears to be higher than may have been expected.

Given this incidence of dissent, the paper examines some factors contributing to the level of dissent in taxation cases more so than in other areas of law, such factors including greater complexity in taxation law, judicial approaches to statutory interpretation, institutional factors of the High Court, and characteristics individual to judges themselves.

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1. INTRODUCTION AND SCOPE

The Australian approach to the delivery of judgments by the courts follows the common law tradition, encompassing the delivery of seriatim decisions by individual justices, this tradition carrying with it the right for an individual judge to deliver a dissenting opinion if not in agreement with the majority view of the court. This paper reports on findings from a research project examining the incidence of judicial dissent by individual Justices in taxation decisions heard by the Australian High Court. As outlined later, the project considered taxation decisions as these, by their nature, involve the imposition of a non-voluntary pecuniary burden on members of society. Given the nature of such laws, it was considered that they may have the potential to generate greater tension and disagreement among members of the judiciary, involving, as they do, notions of fairness and equity in relation to the relative contributions to society by different taxpayers. Differing judicial approaches to statutory interpretation or underlying jurisprudential approaches by Justices in relation to such matters may be manifest in a dissenting opinion.

The paper outlines the methodology adopted in determining the incidence of dissent in tax judgments of the High Court for each of the Justices who have served on the High Court since Federation. Classification issues arise in identifying those decisions which may be classed as tax decisions, as a particular case may involve legal issues which are not limited to the incidence of taxation alone, but span a number of different areas of law. Categorisation issues also arise in ascertaining which decisions may be classified as being dissenting opinions, as opposed to decisions where a different reasoning path has resulted in a similar outcome. Approaches used in the research to distinguish those cases treated as tax cases, and those cases identified as expressing a dissenting view are explained, along with the rationale for the approaches adopted.

Given the incidence of judicial dissent identified in tax judgments, which the paper suggests appears to be higher than may have been expected in an area where certainty and stability would assist taxation planning, the paper examines some factors contributing to this higher incidence of dissent. Rationales canvassed in the paper include the greater complexity in the tax system, in particular the complexity surrounding tax legislation and commercial transactions, the related issue of judicial approaches adopted in the process of statutory interpretation, institutional issues in relation to the operation of the High Court and the delivery of judgments, and individual characteristics of judges themselves. While these matters would contribute to dissent in all areas of law, it is suggested that they may have greater significance in the taxation law realm, as explained later.

By way of background, the paper firstly outlines the development and operation of the practice of Justices delivering dissenting judgments, examining in particular the role dissenting judicial opinion may play in the development and evolution of the wider legal system.

2. DISSENTING OPINIONS

Unlike a number of European civil law jurisdictions, where the tradition provides for a single judgment of the court, Australia has inherited from England the common law tradition, a feature of which has been that members of the judiciary retain the right to

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 not discouraging, dissenting opinion.

The strong argument in favour of a unanimous judgment from a court, or at least a single composite speech, rests on the perceived certainty that this provides in relation to the application and operation of the law. This appears particularly relevant to taxation law, with tax planners and taxpayers seeking certainty in the interpretation and application of the law. However, as pointed out by Eyre CJ in the 18th Century, such certainty may be more illusory than real, suggesting that '… it is impossible that bodies of men should always be brought to think alike …'.[3] Justice Kirby, speaking extra judicially, has gone further, suggesting that given the frequently ambiguous language in legislation, and the changes in society and societal values, disagreements over the law are inescapable and quite common, and that the '… demand by observers for unanimity among judges is often infantile'.[4]

In a similar vein, Judge Brennan of the US Supreme Court saw judicial dissent as an essential democratic safeguard, and uncertainty in the law as a sign of a healthy society.[5] He suggested that dissenting opinion may serve a number of functions, including demonstrating perceived flaws in the majority legal analysis, and offering a corrective for later cases; safeguarding the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of the decision; and emphasising the limits of the majority decision, and ways to distinguish subsequent cases.[6]

The acceptance of dissenting opinion in the judicial decision-making framework has been seen to depend, not so much on legal tradition and culture as such, but on the acceptance of a number of hypotheses. These hypotheses would propose that dissenting opinions do not jeopardise the coherence of the law, provided that the law is understood to allow for the existence of several possible solutions to a single question, at least in the absence of clear and precise statutory provisions; that institutional legitimacy of the courts is compatible with the individual independence and impartiality of judges; and that majority opinion will be viewed as sufficient to lend authority to judicial decisions.[7]

These views would suggest that where the legal and judicial system is sufficiently robust, the system is able to accommodate differing judicial opinion without placing the system under stress, jeopardising the legitimacy of the system, or threatening the acceptance of the authority of the system.

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[2] Ruth Bader Ginsburg, 'Remarks on Writing Separately' (1990) 65 *Washington Law Review*, 133, 134.

[3] (1798) 1 Bos and Pul 229 at 238, quoted in John Alder, 'Dissents in Courts of Last Resort: Tragic Choices' (2000) 20 *Oxford Journal of Legal Studies*, 221.

[4] The Hon Justice Michael Kirby, 'Judicial Dissent' (2005) 12 *James Cook University Law Review*, 4–5.

[5] William J Brennan Jr, 'In Defense of Dissents' (1986) 37 *Hastings Law Journal*, 427.

[6] Ibid, 430.

[7] The Honourable Claire L'Heureux-Dube, 'The Dissenting Opinion: Voice of the Future?' (2000) 38 *Osgood-Hall Law Journal*, 503.

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 '… dissents that soar with passion and ring with rhetoric', being '… dissents that, at their best, straddle the world of literature and law'.[8] Such dissents he saw as the most enduring dissents, where the dissent can be both prophetic as well as expressing the judge's opinion, while at the same time operating as a careful and methodical refutation of the majority's legal analysis.[9] It is these dissents which may ultimately be transformed into fundamental legal principles that may have never seen the light of day but for the dissenting voice.

This contribution to the law would not be true of all dissenting judgments, however, as there are many dissents which '… become obsolete the instant they are published'.[10] The more likely outcome for dissenting opinions may be that they produce no significant or lasting impact, either because the dissenting view may only be different in outcome and not in analysis, or because the dissenting view holds no attraction for new directions in law.

Given that dissent is an intrinsic part of the Australian legal tradition, matters that arise for consideration in relation to dissenting opinions include the incidence of dissent, and the possible rationales which may contribute to this incidence of dissent. This paper considers these two elements in relation to taxation decisions of the High Court of Australia.

The reason for looking at dissent in taxation decisions lies in the nature of taxation statutes, which, along with penal statutes, seek to impose a penalty on members of the community, thus invoking notions of fairness and justice, which may create tension between Justices with alternative views. In the case of taxation statutes this penalty is by way of a non-voluntary pecuniary impost requiring an individual contribution from a broad range of the community, and the appropriate balance between individuals and the state, setting taxation law apart from many other areas of law. Historically, the traditional interpretation to be applied to statutes imposing a penalty on the community, as with penal provisions, and from the 1820s with revenue provisions, suggested that the statute should be interpreted strictly but not so as to defeat the purpose of the legislature, as explained by Isaacs J in *Scott v Cawsey*:[11]

> When it is said that penal Acts or fiscal Acts should receive a strict construction, I apprehend that it amounts to nothing more than this. Where Parliament has in the public interest thought fit … to extract from individuals certain contributions to the general revenue, a Court should be specially careful … to ascertain and enforce the actual commands of the legislature, not weakening them in favour of private person to the detriment of the public welfare, nor enlarging them as against the individuals towards whom they are directed.[12]

While it may be that statutory interpretation of penal and taxing statutes no longer stands apart from the interpretation of other provisions, the nature of taxation statutes,

[8] Brennan, above note 5, 431.

[9] Ibid.

[10] L'Heureux-Dube, above note 7, 517.

[11] (1907) 5 CLR 132.

[12] Ibid, 154–155.

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 be the case for other areas of law.

3. IDENTIFYING TAX CASES

The research project from which these findings are reported involves an examination of taxation decisions of the Australian High Court to determine the incidence of dissent in taxation cases decided by the Court, to consider those factors which may have contributed to the dissent, and at a broader level, to examine whether dissenting opinions have played a part in the shaping of the taxation landscape in Australia. The cases in the research project were drawn from the Commonwealth Law Reports (CLR) service, with CLR volumes 1 to 245 being the volumes which had been reported at the time of the research, and were thus included in the research project.

The two significant issues which required initial resolution were firstly distinguishing those criteria to be used in classifying a court decision as being a taxation decision, and within that subset of taxation cases, then identifying whether or not a particular judgment could be categorised as being a dissenting judgment. Each of these issues is of significance, as it is those cases identified as taxation cases, and those cases characterised as involving a dissenting opinion, which would influence the outcome as to the incidence of dissent that can be ascribed to individual Justices.

However, while the identification of taxation cases or dissenting judgments is certainly a significant matter, the aim of this component of the research is more to gain an overall impression as to the relativities of the incidence of dissent between different Justices rather than to definitively identify a particular quantum of dissent. On this basis it was considered that if the criteria applied were transparent, justifiable, and consistently applied in identifying a case as being a taxation case, or identifying a particular judgment as being in dissent, then the resultant outcomes would provide a sufficient reflection of the relativities of dissent between Justices, being the outcome sought by this initial stage of the research.

The first difficulty which arose in categorising relevant cases for the project involved the determination of the scope of the class of cases which would qualify as taxation cases, and therefore be included in the project. The choices available included either taking a narrow view, selecting only those cases which dealt with the imposition of a tax in particular circumstances, or taking a more expansive view, which would involve the inclusion of all cases which had an impact on the development of the taxation landscape in Australia.

This research has adopted the broader more expansive classification in identifying taxation cases, as one purpose of the project is to look to whether dissenting judgments have had a role to play in the transformation and shaping of the overall taxation environment in Australia. On this basis, it was considered that the wider rather than narrower classification of what constituted a taxation decision would provide a better reflection of any influence that judicial dissent may have had on the development of the broader taxation regime.

Accordingly, relevant cases identified included those cases dealing both with the application of individual taxes in particular circumstances, and also included those

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 O'Connor 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.

4. IDENTIFYING DISSENTING JUDGMENTS

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 classed as being a dissenting view in one of two ways, being either on the basis of the outcome of the decision or the resolution of the matter, or alternatively on the basis of the difference in reasoning underlying that resolution.

[13] This included some interesting, but long repealed taxes, such as an entertainment tax, and a light dues tax.

[14] *Murray v Collector of Customs* (1903) 1 CLR 25.

[15] Introduced by section 3(1) *Judicial Amendment Act (No 2) 1984* (Cth).

[16] *Australia Act 1986* (Cth), *Australia (Request and Consent) Act 1986* (Cth), *Australia Acts Request Act 1985* (each state), *Australia Act 1986* (UK).

While it may be argued that such an approach oversimplifies the nature and forms of judicial disagreement that may arise, from a practical view there needs to be some method chosen to identify 'dissent'. It is suggested that if the method chosen to characterise 'dissent' is again transparent, sufficiently justifiable, and applied consistently across the range of cases, then whatever particular approach is applied is a valid measure for that research.

Previous research into High Court dissent has sought to clearly delineate judicial dissent from the concepts of majority and minority opinion, proposing a set of rules for identifying a judgment as dissenting.[17] In essence, the rules characterised a judgment as being in dissent when the Justice voted to dispose of the case in a manner that differed from the final orders of the court, with opinions that concurred with the orders of the court, even if not part of the majority, not being characterised as dissenting opinions.[18]

Such an approach effectively overcomes the difficulty associated with plurality decisions, where there is no clear majority but a profusion of differing judgments, with the final orders of the court reflecting varying points of consensus among the judgments. With the High Court approach of seriatim judgments such plurality of decisions can occur, with the final orders of the court not necessarily favoured by any one judge.

Essentially the identification of dissent in this research followed the approach outlined, with dissent characterised on the basis of the outcome or order made, rather than on the basis of the reasoning underlying the decision. Accordingly, a judgment is categorised as dissenting when the Justice would resolve the outcome in a different way to the final orders of the court, including making a contra finding to the orders of the court. A judgment would not be classified as being a dissent when the judgment concurred with the final orders of the court, even if the reasoning underlying the decision was at odds with the reasoning of the majority making those orders.

Similarly, a judgment would not be dissenting if the Justice concurred with the orders made, even if expressing doubt as to the finding.[19] Further, a judgment would not be categorised as dissenting if the Justice made no order on a particular issue, for example, having found that issue did not need to be decided.[20]

This approach to classifying dissent by outcome rather than by reasoning is seen as useful in overcoming difficulties which may arise in all cases, but which can prove particularly problematic in taxation cases. In taxation cases, while there may be a single issue for decision, there may be a number of alternative paths of reasoning to follow in reaching the same conclusion. As an example, in determining the single issue of whether an amount should be included in assessable income, the amount may be found to be income under ordinary concepts, or income from carrying on a business, or income from carrying on a profit making scheme, or statutory income under

[17] Andrew Lynch, 'Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia' (2002) 24 *Sydney Law Review*, 484.

[18] Ibid.

[19] See, for example, *Automatic Totalisators Ltd v FCT* (1920) 27 CLR 523, where Isaacs and Rich JJ essentially concurred with the orders of the majority of Knox CJ, Gavan Duffy and Starke JJ, but doubted the reasoning.

[20] See, for example, *FCT v Thorogood* (1927) 40 CLR 454, where Higgins J declined to give an opinion.

provisions of the legislation, such as income from trading stock, or a capital gain included in assessable income. It is suggested that it would be an unusual outcome if all Justices agreed on the outcome of an amount being assessable income, but the opinions were labelled as dissenting because of the different reasoning employed to reach the decision.[21]

It is recognised that with plurality decisions, this approach to characterising an opinion as being in dissent based on outcome may itself result in circumstances where many of the Justices are identified as being in dissent in a particular case. As noted above, it may be that when a number of issues are to be determined, there is no clear majority but a profusion of differing judgments, with the consensus shaping the final orders of the court.[22] However, while not ideal, it is considered that the method chosen for characterising dissent provides a useful measure, and is better suited to the purpose of identifying whether and how judicial dissent may have contributed to the shaping of the broader Australian taxation landscape.

5. DISSENT FOR INDIVIDUAL JUDGES

By applying this characterisation of dissent to some 975 cases which had been extracted as taxation cases, there were in excess of 320 cases initially identified as involving a dissenting judgment by one or more of the Justices. This indicates a dissent rate of around 33 per cent in taxation cases decided by the High Court, which may be seen as a little surprising for a number of reasons.

Such an incidence of dissent may appear to be a higher incidence of dissent than may have been expected in taxation cases, as it may have been thought that Justices would seek to achieve a degree of unity in taxation matters to generate greater certainty in the interpretation of taxation laws as a means to assist taxation planning by taxpayers.[23] Additionally, given the significance of decisions in taxation cases generally in imposing a non-voluntary pecuniary burden on individuals in the community, it may have been thought that a court may have sought to reach agreement and minimise dissent in taxation decisions as a path to providing a degree of certainty in the broader taxation landscape. It would be thought that to lose a taxation case would be disappointment enough for a taxpayer, and it must only add to that angst to know that, in a split decision, a narrow minority of the Justices shared the taxpayer's view as to the operation of the law.

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[21] As an example see *Shelley v FCT* (1929) 43 CLR 208, where the Full Court excluded certain sums from taxable income; by Knox CL and Dixon J on the basis that the entity was not a co-operative company, and by Isaacs J on the basis that the amounts were a diminution of expenditure and not income.

[22] See, for example, *Hooper & Harrison Ltd (in liq) v FCT* (1923) 33 CLR 458, where Isaacs and Rich JJ dissented on one issue, and Knox CJ and Gavan Duffy J dissented on another issue, leaving Higgins J as the only Justice in full agreement with the order of the court.

[23] While there is no broad comparable data to allow comparison with the incidence of dissent across a range of other areas of law, one example of research which has identified a lower rate of dissent in other areas of law over limited timeframes is provided in A Lynch and G Williams, 'The High Court on Constitutional Law: The 2004 Statistics' (2004) 27 *University of NSW Law Journal*, 88, which suggested an average rate of dissent in cases examined in that research in the low 20% range; Kirby J had a rate of dissent of around 33%, making him 'the great dissenter'.

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 and O'Connor 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. Other Justices with higher rates of dissenting opinions included Murphy J with a dissent rate of some 28 per cent, Aickin J with a dissent rate of 26 per cent, and Stephen J, who dissented in some 20 per cent of taxation cases, these being the only other justices who dissented in 20 per cent or more of the taxation cases which they heard. Of the 48 Justices to have served on the High Court in the period covered by the CLR reports considered, Kirby J was the only justice with a rate of dissent above the average rate of 33 per cent.

During the period covered by the research, the most common incidence of dissent appears to fall in the range of between around 10 per cent to 15 per cent, with a total of nineteen of the Justices having an incidence of dissent in this range. Apart from the four Justices above with incidences of dissent of 20 per cent or more, the only other Justices to exhibit an incidence of dissent above 15 per cent were Evatt, Latham, Webb, Brennan and Bell JJ, and with Bell J the small numbers of taxation cases heard may distort the percentage. Only eight of the Justices exhibited an incidence of dissent at or below the five per cent range, and apart from Griffith CJ and Barton O'Connor JJ on the first High Court, others included French CJ, Gleeson CJ, and Gummow, Hayne and Heydon JJ, all of whom have served on more recent High Courts. With the research covering the cases reported to CLR 245 there are some Justices who remain on the High Court so their incidence of dissent in taxation cases

[24] See, for example, *Chandler & Co v Collector of Customs* (1907) 4 CLR 1719. The case highlighted the significance of the composition of the court, as Griffith CJ and Barton J were in dissent, with O'Connor, Isaacs and Higgins JJ comprising the majority. If the new appointments had not yet been made and there had still been a three member bench, Griffith CJ and Barton J would have been in the majority and the decision would have been different.

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, dissenting in only two of those, and French CJ had sat on some seventeen tax cases, dissenting in none of those.

6. DISSENT IN TAXATION CASES

These initial findings from the research suggest that while the overall average incidence of dissent in taxation cases is around one-third of cases heard, very few of the Justices who have sat on taxation cases have consistently demonstrated a high incidence of dissent during their period on the bench. Rather, it appears that the generally higher incidence of overall average dissent is generated by different Justices dissenting in different cases, leaving individual Justices with lower dissent rates, while the overall proportion of cases with a dissenting opinion appears generally higher. Effectively, the dissent appears to have been dispersed among the Justices, with the figures suggesting that only four of the Justices who have served on the High Court dissented in 20 per cent or more of the taxation cases on which they sat in judgment.[25]

Appendix B illustrates, for each of the Justices, the incidence of dissent in taxation cases during the period for which the Justice was a member of the court, whether or not the particular Justice was in dissent. As an example, for tax cases heard by Aickin J, there was a dissenting judgment delivered in 48 per cent of the cases on which his Honour sat, while Aickin J himself dissented in only 26 per cent of these cases, meaning there was a dissenting view from another member/members of the court in the remaining 22 per cent of cases in which he was involved. This chart appears to lend some support for the view that dissent in taxation cases has been spread among a

[25] Kirby J at 35%, Murphy J at 28%, Aickin J at 26% and Stephen J at 20%.

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 of the taxation cases heard while his Honour was in the majority.

What is of interest from this chart is the degree to which this aggregation of any dissent for cases raises the overall incidence of dissent in taxation judgments, with the majority of Justices sitting on taxation decisions which witnessed dissent in above 30 per cent of the cases, and sixteen of the Justices seeing dissent in more than 40 per cent of the taxation cases heard. Even for Justices who themselves had a low incidence of dissent, dissent by another Justice/Justices in the cases raises the overall incidence of dissent. As examples, while Gummow and Hayne JJ each dissented in less than five per cent of their taxation cases, there was dissent in the taxation cases on which their Honours sat in more than 30 per cent of the cases. Similarly, while Mason as Justice and Chief Justice dissented in around seven per cent of taxation cases, there was a dissenting voice in more than 40 per cent of the taxation cases heard while he was part of the High Court bench.

Also of interest is that the incidence of dissent in taxation cases has been declining in more recent times from the higher levels apparent in earlier Courts, although the figures for the court of French CJ are subject to change as the Court continued to sit at the time the taxation cases were extracted. While the numbers of cases are low, there had been dissent in only 18 per cent of tax cases heard by the court of French CJ, with his Honour not being in dissent on any occasion for the cases reported at the time of the research. These lower incidences of dissent occurring while the particular Justice is serving appear to broadly correspond with the lower incidences of dissent for each Justice, with the incidence of dissent by any Justice in a taxation case falling in the more recent High Courts.

7. EXPLAINING DISSENT

The following discussion outlines some contributing factors which may assist in explaining why taxation decisions should cause Justices to dissent from a majority view in taxation cases. It would be expected that no single matter would provide an explanation of the incidence of judicial dissent, with a range of considerations interacting to exert differing influences over a period of time.

Contributing factors outlined in this paper relate to: the complexity of taxation law in Australia, particularly in relation to taxation legislation; changing judicial approaches to statutory interpretation; institution factors relating to the operation of the High

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.

8. COMPLEXITY IN TAXATION LAW

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 wonder that the taxation system edifice with such an ungainly and awkward base has been described as failing abysmally against almost any test of simplicity,[27] being possibly the largest in the world in terms of volume,[28] and while volume alone does not necessarily generate complexity, the legislation is also seen as among the most difficult to read and comprehend.[29]

Much of the criticism of the complexity now inherent in the taxation legislation has come from academics and commentators, with the suggestion being that '(a)lmost certainly, more irrational distinctions based on inappropriate criteria exist in the Australian law than in any other nation's tax legislation …'.[30] However, commentators have not been alone in their assessment of the tax legislation, with members of the judiciary, charged with determining the interpretation and application

[26] As examples, see Hon Justice Nye Perram, 'The Perils of Complexity: Why More Law is Bad Law' (2010) 39 *Australian Tax Review*, 179; David Wallis, The Tax Complexity Crisis' (2006) 35 *Australian Tax Review*, 274; Richard Krever, 'Taming Complexity on Australian Income Tax' (2003) 25 *Sydney Law Review*, 467.

[27] Krever, above n 26.

[28] Ibid, 468.

[29] Ibid.

[30] Ibid.

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

In an oft quoted passage from the judgment in *FCT v Cooling*[31] in the Federal Court, concerning the capital gains tax provisions as originally enacted, Hill J referred to one of the sections at issue as having been 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'.[32] The case of *Hepples v FCT [No 2]*[33] also involved consideration of the capital gains tax legislation as firstly enacted, with Deane J being led to lament that "successive administrations have allowed the Act to become a legislative jungle …'.[34] In the same case, and in a similar vein, Toohey J was driven to characterise the capital gains tax provisions as '… unduly labyrinthine …'.[35]

While there has been an attempt to reduce complexity by rewriting legislation in plain English language, Sir Harry Gibbs, writing extra-judicially after his term as Chief Justice of the High Court had expired, commented that the legislative

> … complexities cannot be removed simply by rewriting the existing provisions in plainer language … Real reform would require not a rewriting of the present law, but a completely new Act; that is, a new approach is necessary …[36].

Part of the reason for the complexity of the legislative provisions lies in the drafting method adopted, with taxation legislation exhibiting different drafting styles as amendments have been made to the legislation. As a consequence, the probable and understandable response to the complexity which is now imbued in the Australian tax provisions is to point an accusatory finger at the drafters of the legislative provisions, as illustrated by the comments in the judgment of Hill J in *Consolidated Press Holdings v FCT*,[37] where his Honour expressed his frustration with the provisions, commenting that ' ... it should not be expected that the courts will construe legislation to make up for drafting deficiencies which revel in obscurity'.[38]

However, it has been suggested that drafters should not alone stand accused of increasing legislative complexity, arguing that others, including judges themselves, should bear some of the responsibility for increased legislative complexity,[39] although arguably most of the responsibility should be sheeted home to the legislature.[40] In particular, the suggestion is that inappropriate or piecemeal responses to judicial decisions that did not suit the government, and the government use of taxation laws to achieve other social or political objectives, contribute significantly to legislative complexity.

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[31] *FCT v Cooling* (1990) 22 FCR 42.

[32] Ibid, Hill J at 61.

[33] *Hepples v FCT [No 2]* (1991) 65 ALJR 650.

[34] Ibid, Deane J at 657.

[35] Ibid, Toohey at 662.

[36] Sir Harry Gibbs, 'The need for taxation reform' (1993) 10(1) *Australian Tax Forum*, 9.

[37] *Consolidated Press Holdings v FCT* (1998) 98 ATC 5009.

[38] Ibid, Hill J at 5018.

[39] Krever, above n 26, 470.

[40] Ibid, 486.

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 existing complexity.[42]

However, the danger from this approach of increasing the level of prescription is that it invariably increases the number of legal terms in play, and the suggestion has been that rather than reduce uncertainty, it simply exchanges one form of uncertainty for another, with a consequence of making every step in the judicial reasoning process more problematic.[43] The result of the complexity is a judicial branch burdened by increasingly unreadable provisions, leading to greater uncertainty in interpretation outcomes. The problem is exacerbated further when a judicial decision is unfavourable to the legislature, which then responds with additional prescriptive provisions.

In addition to the complexity of legislation, the complexity of matters at issue and transactions giving rise to these issues has also increased over time. Part of the reason for judicial disagreement, which finds voice in a dissenting judicial opinion, is that the problems to be addressed involve difficult and complex issues.[44] One of the reasons underlying this increase in the complexity of cases before the High Court has been the removal of an automatic right to appeal to the High Court and the need to seek special leave to take a case before the Court. As a consequence, those taxation cases for which special leave is granted would be expected to be the more complex cases raising more difficult questions of law than would be the case with those cases where special leave had not been granted. A further source of complexity in issues before the court has been the increase in complexity of the commercial transactions raising questions of law, particularly in situations where financial engineering has generated detailed and complex transactions which may not be readily understood other than by specialists in the area.

Regardless of the source of the complexity, and where the responsibility for complexity should lie, it is intuitively appealing to suggest that the incidence of complexity in taxation legislation and taxation issues has been a contributory factor to the increasingly difficult task of interpretation of the statutes, as the judicial reasoning process becomes more problematic as complexity generates uncertainty. On this basis, it may be that the uncertainty in interpretation arising from the complexity of the legislative provisions and issues involved may provide, in part, an explanation for a greater incidence of judicial dissent in taxation decisions than is demonstrated in other areas of the law.

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[41] See, for example, Hon Justice Nye Perram 'The Perils of Complexity: Why More Law is Bad Law' (2010) 39 *Australian Tax Review* 179.

[42] Ibid,184.

[43] Ibid, 185.

[44] See, for example, the discussion in J D Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review*, 205–222.

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.

9. STATUTORY INTERPRETATION

Another matter inextricably linked with the interpretation of complex provisions relates to the approach to statutory interpretation adopted by a particular Justice, with the method of statutory interpretation thus perhaps being one of the contributing factors in explaining the higher incidence of dissenting opinions in taxation cases. Part of the reasoning that suggests that the judiciary itself should bear some responsibility for the complexity of taxation legislation arises from what may be seen as an abdication of responsibility by the judiciary by way of excessive reliance on principles of strict literalism.[45]

10. INTERPRETING REVENUE STATUTES

In looking to the approach to the interpretation of revenue statues, the early High Court adopted the English approach of a literal interpretation of the statute as a means to determine the intent of the legislature. The literal approach for determining the intent of taxation legislation received early endorsement in Australia, with Griffith CJ in *Tasmania v Commonwealth and South Australia*[46] drawing on authority from the House of Lords in a passage from Lord Chief Justice Tindal, that:

> … the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of a statute are in themselves precise and unambiguous, then no more can be necessary than to expound these words in their natural and ordinary sense. The words themselves alone do in such a case best declare the intention of the law-giver.[47]

The proviso added to this approach suggested that when Parliament legislated for an imposition on the public, this must be done in clear and unambiguous terms, and if a construction of the statute is available which avoids the impost, such a construction is to be preferred. As summarised by Lord Russell of Killowen:

> I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if, in accordance with a Court's view of what it

[45] Krever, above n 26, 470.

[46] *Tasmania v Commonwealth and South Australia* (1904) 1 CLR 329.

[47] *Sussex Peerage Case* (1844) 11 Cl. & F., 85 at p 143, quoted in *Tasmania v Commonwealth and South Australia* at [339].

> considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case.[48]

In effect, this principle of construction suggested that application of the literal rule would only see tax imposed if the circumstance fell within the ambit of the clear words of the section, with the taxpayer being given the benefit of any doubt in the wording of the enactment. Such an interpretation may be viewed as a shift away from the original objective of the literal approach, which had been stated to be the interpretation of the words as a means to discern the legislative intent, towards a narrower strict literal interpretation having regard only to the words as an end in themselves, rather than as a means to an end of determining legislative intent.

While it may be suggested that the approach to interpretation of fiscal statutes in Australia has been as much a function of the constituency of the judiciary as a function of the statute itself, the approach of Isaacs J seems to be echoed in the words of Gibbs J many years later when suggesting that '… if the terms of the Act plainly impose the tax they should be given effect, equally if they do not reveal a clear intention to do so the liability should not be inferred from ambiguous words'.[49]

The diversity of approaches to statutory interpretation and the question as to the correct application in relation to taxation statutes are all evidenced in Australian taxation judgments. What becomes apparent on examination of some of the noteworthy taxation decisions is that within one court a significant diversity of approaches by the judges can result in strongly divergent judgments. Of particular relevance for the discussion in this paper are the strong dissenting concerns which have been voiced, the dissenting views being in large part a function of different approaches to statutory interpretation.

11. THE EFFECT OF STATUTORY INTERPRETATION

While the literal interpretation of taxation provisions reigned for much of the twentieth century, it was the High Court under the stewardship of Barwick CJ which witnessed arguably the high water mark of a much narrower literal approach to statutory interpretation. This narrower literalism looked to the words of the statute, not to discern a legislative intent, but to judge whether the words envisaged the particular arrangement at issue. If it was found that the words did not specifically address the particular arrangement, then the statute was found to be not applicable.

In this way the Court arguably used the cloak of literalism to condone a range of tax minimisation schemes, which could hardly be seen as being the intent of the legislature when enacting the then existing general anti-avoidance provisions in the legislation. The Chief Justice himself led this line of reasoning, while also seeming to display a thinly veiled regard as taxpayers manipulated the law to avoid tax. An example of this is provided in the case of *FCT v Westraders*,[50] with His Honour

[48] *IR Commrs v Westminster (Duke)* [1936] AC 1 at 24.

[49] *Western Australian Trustee Executor and Agency Co Ltd v Commr of State Taxation of WA* (1980) 147 CLR 119, 126.

[50] *FCT v Westraders* (1980) 144 CLR 55.

characterising the taxpayer's claim as '… an ingenious use of the provisions … of the *Income Tax Assessment Act*'.[51]

A ready example of the approach taken by Barwick CJ is demonstrated in the case of *FCT v Westraders Pty Ltd* in which His Honour explained:

> The function of the court is to interpret and apply the language in which the Parliament has specified those circumstances. The court is to do so by determining the meaning of the words employed by the Parliament according to the intention of the Parliament which is discoverable from the language used by the Parliament. It is not for the court to mould or to attempt to mould the language of the statute so as to produce some result which it might be thought the Parliament may have intended to achieve, though not expressed in the actual language employed.[52]

While paying lip-service to determining the intent of the Parliament, Barwick CJ arguably used the guise of a strict literal interpretation to produce an outcome which can hardly have been intended by the legislature, reading down the language of the anti-avoidance provision to the point where it was effectively inoperable.

However, not all members of the High Court followed this path, the notable exception being Murphy J who saw greater merit in a more purposive interpretation to better reflect the intention of the legislation. His Honour explained:

> It is an error to think that the only acceptable method of interpretation is strict literalism. On the contrary, legal history suggests that strict literal interpretation is an extreme, which has generally been rejected as unworkable and a less than ideal performance of the judicial function.
>
> It is universally accepted that in the general language it is wrong to take a sentence or statement out of context and treat it literally so that it has a meaning not intended by the author. It is just as wrong to take a section of a tax Act out of context, treat it literally and apply it in a way which Parliament could not have intended. The nature of language is such that it is impossible to express without bewildering complexity provisions which preclude the abuse of a strict literalistic approach.[53]

Such an alternative approach to statutory interpretation contributed in no small way to the higher incidence of dissent by Murphy J, among others, on the Barwick CJ High Court.

However, there have been indications in later cases of a return to the broader literal approach of using the literal words to determine the legislative intent. The early approach of Isaacs J would appear to echo in the words of Mason and Wilson JJ when stating that '(t)he courts are as much concerned in the interpretation of revenue statutes as in the case of other statutes to ascertain the legislative intention from the terms of the instrument viewed as a whole'.[54]

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[51] Ibid, 59.

[52] Ibid, 59-60.

[53] Ibid, 79-80.

[54] *Cooper Brookes (Wollongong) v FCT* (1981) 147 CLR 297 at 323.

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 related cases than in other areas of law.

12. INSTITUTIONAL FACTORS

It has been suggested that there are a number of institutional factors which have influenced judicial method over time,[58] and these factors may also play a role in explaining a judicial tendency to be more prepared to voice a dissenting opinion, particularly in complex taxation matters.

One of these institutional factors would relate to the composition of the Court at any particular time, and the attitude of the Court as to whether dissent was seen to be accepted as the norm, or to be shunned. A significant aspect which would bear on shaping the attitude of a Court would be the leadership style of the Chief Justice and how this was reflected in the leadership of the Court at that time. It may be that a Court which encouraged formal judicial conferences may witness less dissent, as judges may be subject to persuasion on points of law, and in the end agree with the majority. The danger with such an approach, however, may be that excessively dominant judicial personalities may act to dissuade others from a dissenting view, which may threaten judicial independence.[59] Also related to the composition of the Court would be whether particular judges were perceived as being activist judges, and how this may affect relations with colleagues in the operation of the Court.

A further factor suggested has related to the change in the manner in which cases are heard, and the judicial method. The English tradition for the judicial process involved an oral hearing followed by the delivery of *extempore* seriatim judgments. This

[55] See, for example, A Mason 'Taxation Policy and the Courts' (1990) 2 *CCH Journal of Australian Taxation*, (4) 40, 42.

[56] See, for example, R Allerdice 'The Swinging Pendulum: Judicial Trends in the Interpretation of Revenue Statutes' (1996) 19(1) *University of New South Wales Law Journal* 162, 163.

[57] *Acts Interpretation Act* (Cth) s 15AA.

[58] See, for example, J D Heydon 'Varieties of Judicial Method in the Late 20th Century' (2012) 34 *Sydney Law Review* 219.

[59] Heydon, above n 43, 208.

process would involve no preliminary hearing or written submissions, with no preliminary consultations or private research by judges, leaving less opportunity for points to occur to judges after the hearing, as can be the situation with a reserved judgment.[60]

This traditional approach has been replaced by a case management approach, involving a requirement to file written submissions, preliminary conferences between judges, and the reserving of decisions. In conjunction with the increased factual complexity of cases, as outlined earlier, this has been seen to generate increased complexity in legal analysis, with voluminous reference to case law, including unreported cases which are now more readily available, and a greater tendency for judgments to provide detailed reasoning.[61]

In addition to matters surrounding the hearing of cases, factors in non-curial life may also create an increased tendency to dissent. Generally judges now have more personal staff than had traditionally been the case, with these staff often having been the brightest of law students with superior skills, and who are keen to impress. Wider research by the staff with technology now available would generate a great many more authorities than would previously have been the case, with the potential to again raise legal issues which had not been raised in the case itself. When combined with the use of technology, facilitating both a greater research capability, and the use of word processing for preparing judgments rather than handwriting judgments, it may be that judges are more prepared to express an opinion in disagreement with the majority more often than may have previously been the case.

While these reasons may go towards explaining a greater rate of dissent generally, when viewed in conjunction with the greater incidence of complexity of taxation matters appearing before the High Court, it may contribute to providing part of the explanation of the higher average incidence of dissent in taxation cases than has been observed in other areas of law. It must again be noted, however, that these matters are still present and yet the suggestion is that recent Justices have exhibited a declining incidence of dissent in taxation cases.

13. JUDGES THEMSELVES

A final matter for consideration in looking to the factors that may contribute to judicial dissent in taxation law is to consider those factors relating to individual judges themselves. The discussion above suggests no single factor stands alone, with all of the factors interacting. As an example, it would be expected that the approach to statutory interpretation taken by a particular judge would be a product of, and inextricably linked with, individual factors surrounding that particular judge.

Individual factors that may mould the attitudinal approach of a particular judge would include such matters as political beliefs or associations, demographic factors such as age and gender, and their social background. Judges themselves represent a constituency of competing societal values, and disagreements giving rise to dissent may lie with the incommensurable issues of justice or policy, representing ethical or

[60] Ibid.

[61] Ibid, 228.

political values of the particular Justice. Arguably, taxation matters and taxation avoidance matters, dealing as they ultimately do with issues of fairness and justice in relation to individual contributions that should be made to society, have the potential to engender policy and justice issues in the decision-making process to a greater extent than may be the case with other areas of law. It is arguably the case that these ethical and political issues of individual Justices underlie the preference that a Justice may have for their approach to statutory interpretation, adopting the approach which provides an outcome that is more aligned to their particular values.

However, while it may appear intuitively appealing to suggest that personal characteristics may bear some relation to the likelihood of a particular judge dissenting, Australian research has suggested that court institutions have been a better predictor of rates of dissent than the social and political complexity of the external environment,[62] so it may be that this view is bestowing too great a role on the values and beliefs of the individual Justices in determining their predisposition to form a dissenting opinion.

14. CONCLUSION

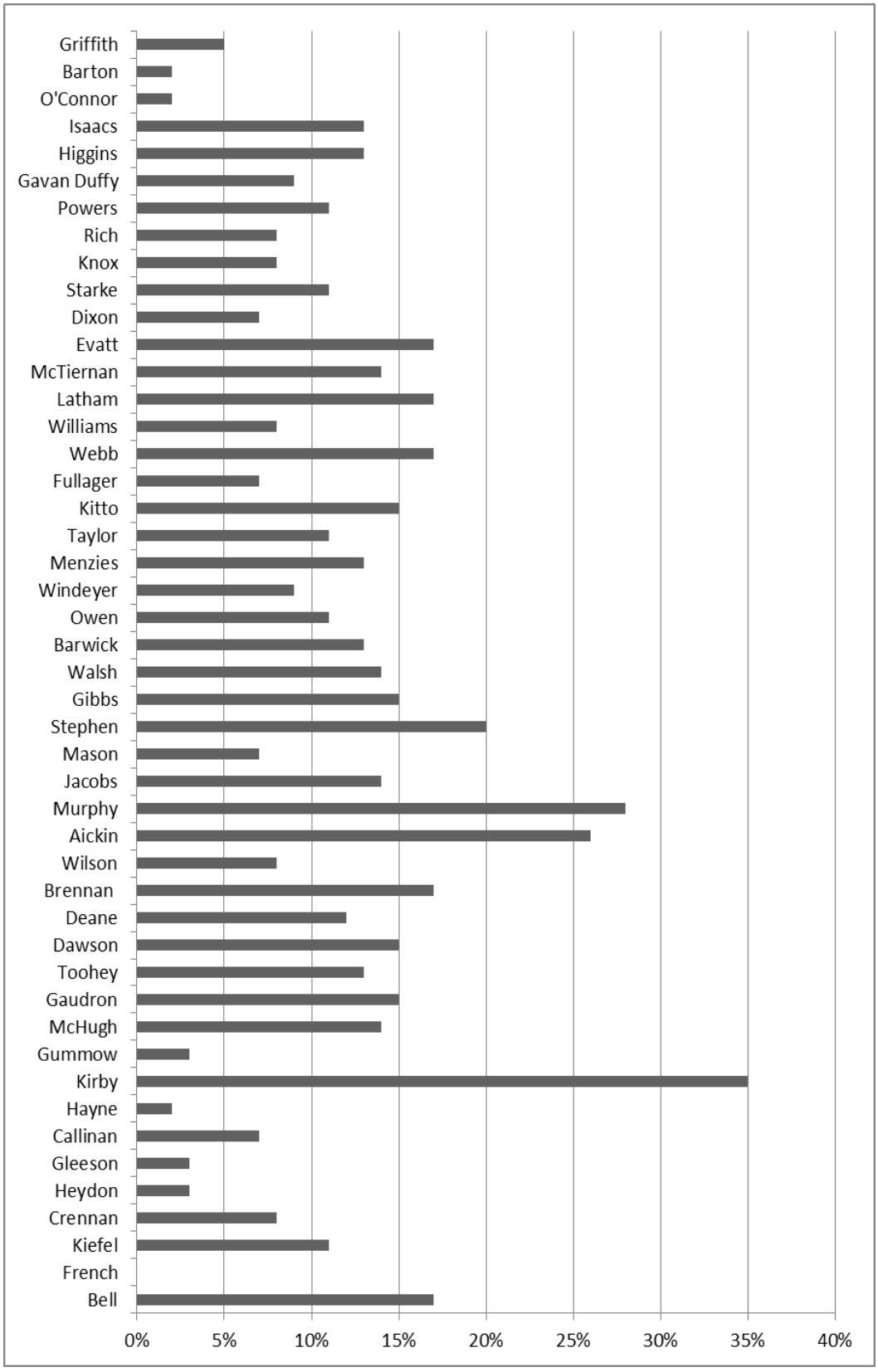
The Australian judicial approach has followed the English tradition of accepting that Justices may voice an opinion in dissent from the majority decision of the court. The legal system accepts that dissent does not act to weaken the law, as under the doctrine of stare decisis it is the majority decision that establishes precedent. While not all dissents are of equal worth, with possibly most being forgotten, a dissenting voice may, however, have value in exposing weaknesses in other legal reasoning, or in foreshadowing change in an evolving area of law.

An examination of dissent in Australian High Court taxation decisions demonstrates an incidence of dissent in around one-third of all taxation matters heard, which may be a little surprising in an area of law that would be expected to provide certainty and stability to assist tax planning. While dissent is evidenced on average in around one-third of taxation decisions, only four of the High Court Justices have themselves dissented in more than 20 per cent of cases on which they sat. This appears to suggest that dissent in taxation cases is widespread among Justices, but with different Justices dissenting in different cases.

In looking to factors contributing to the incidence of dissent, there are a number of interlinked matters which suggest themselves as candidates in generating dissent. The complexities now inextricably interwoven into taxation legislation, in conjunction with increasingly complex commercial transactions, suggest they may contribute to alternative interpretations and dissenting judgments. When combined with varying approaches to statutory interpretation by different Justices, a range of institutional factors that may make dissent a less onerous option, and personal characteristics shaping individual Justices, it becomes apparent that the reasons contributing to a greater incidence of dissent in taxation decisions are wide and interlinked.

[62] See Russell Smyth, 'What Explains Variations in Dissent Rates?: Time Series Evidence from the High Court' (2004) 26 *Sydney Law Review* 221.

Appendix A—Incidence of dissent by individual Justices



Appendix B—For each Justice, incidence of dissent by any Justice in cases heard