

DISSENT IN HIGH COURT REVENUE DECISIONS: CHANGING JURISPRUDENCE AND THE INCIDENCE OF DISSENT

Rodney Fisher*

This paper draws on findings from a research project examining dissent in High Court revenue law cases. The paper initially outlines the findings in relation to the differences in the incidence of dissent that can be identified between different High Courts led by different Chief Justices.

Drawing upon research relating to the changing jurisprudence of the High Court, particularly during the latter part of the 20th Century, the paper then further explores whether this changing jurisprudence can be said to be reflected in a changed incidence of dissent in revenue cases before the High Court, concluding that there is arguably some evidence that when the Court adopts excessively narrow jurisprudence, or alternatively an activist jurisprudence, this may be reflected in an increased incidence of dissent in revenue cases.

1. INTRODUCTION

This paper draws on research from a research project examining dissent in High Court revenue law cases, with this paper examining in particular the incidence of dissent by different High Courts under the stewardship of different Chief Justices since the establishment of the High Court.

Additionally, the paper also draws on existing research examining the evolving jurisprudence of the High Court in Australia, in particular in relation to the jurisprudence of post

* Associate Professor, Faculty of Law, University of Technology Sydney and Barrister.

World War II courts. The paper examines whether the evolution in the nature of the jurisprudence of the High Court is reflected in a changed incidence of dissent in the High Court in revenue matters.

As explained in the paper, revenue decisions were selected for this research given the nature of revenue laws as imposing a non-voluntary pecuniary burden on taxpayers in the community. This creates the potential for courts to consider matters of fairness or justice in the operation of such laws, which may in turn engender greater potential for dissenting views to be manifest. It may be that the changing jurisprudence on the part of the High Court may be reflected in a changed incidence of dissent in revenue matters in circumstances where Justices find themselves at odds with the evolving jurisprudential orthodoxy of a particular High Court.

The paper briefly outlines matters relating to the conduct of the research project and then examines the findings as to the incidence of dissent in revenue matters. There will be a focus on the incidence of dissent by different Justices on the High Court under the stewardship of different Chief Justices. The paper then explores whether the changing jurisprudence of the Court as it evolved through what may be seen as its more conservative and more activist phases, is reflected in a changed incidence of dissent being evidenced in revenue decisions.

2. REVENUE CASES

Cases identified as relevant to this project were revenue law cases determined by the High Court. The relevant revenue cases were drawn from the Commonwealth Law Reports (CLR) service, with CLR volumes from volume 1 to volume 245 being included in the research. While volume 245 did not coincide with a change in Chief Justice of the Court, with French CJ continuing as the Chief Justice past volume 245, it was considered that the inclusion of revenue cases determined under

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the stewardship of French CJ may allow for the early identification of any trends in the incidence of dissent in the Court in relation to revenue law cases.

In determining which cases would qualify as revenue cases for the purposes of this research, a number of alternative approaches could be followed. A narrow approach would limit revenue cases selected to those cases which determined the application or incidence of a particular revenue provision in a particular circumstance, an example being the determination of whether a particular receipt would be characterised as assessable income, or particular expense would be characterised as an allowable deduction. By contrast a wide approach would include those cases which were not determining the application of a particular revenue provision, but which included broadly all cases determining the imposition of taxation, including cases on the validity of revenue laws. Between the broad and narrow approaches would be varying alternative characterisations.

The approach taken in this project has been a wide approach, thereby encompassing as revenue cases all cases dealing with the imposition, incidence, and application of revenue laws. Such an approach is preferable given the broader aims of the research, which are directed towards seeking to establish the nature of dissent in revenue matters, and the effect that dissenting judgments in revenue law may have on the development and shaping of the revenue law landscape in Australia. Using this criterion, in excess of 900 cases were identified as being revenue law cases for the purposes of this research project.

3. CHARACTERISING DISSENT

From within the identified class of revenue cases, a subset of cases needed to be characterised as including a dissenting judgment or dissenting judgments. It is considered that such a

characterisation is informed by brief reference to the history and nature of dissent.

3.1 The Character of Dissent

The tradition of a court delivering both a majority and dissenting judgments evolved from the 14th Century English common law, whereby judges on appeal would deliver seriatim judgments with the majority opinion ruling.¹ Fostering the tradition of dissent has been the procedure of the English tradition comprising oral hearings and extempore seriatim judgments, with no preliminary reading, no written arguments submitted, and no preliminary consultation between judges.²

By contrast, the European civil law tradition had been for delivery of a single judgment of the court with no role for a dissenting voice, an example being the European Court of Justice that required all judges to sign the opinion of the court.³ Part of the explanation for the difference in tradition may arise from the civil law career judiciary whereby the voice of the court is the voice of the State, with the law demanding a result which is inexorably the right answer expressed in a unanimous judgment.⁴ On this basis, civil judgments are an act of State which would not permit the expression of disagreement.⁵ Additionally, civil law judgments do not have a formal status as

¹ The Honourable Claire L'Heureux-Dube, 'The Dissenting Opinion: Voice of the Future?' (2000) 38 *Osgoode Hall Law Journal* 495, 499.

² J Dyson Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review* 205, 208.

³ See, for example John Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20 *Oxford Journal of Legal Studies* 221, 233.

⁴ Ruth Bader Ginsberg, 'Remarks on Writing Separately' (1990) 65 *Washington Law Review* 133, 134.

⁵ Heydon, above n 2, 206.

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precedent, hence the rule of stare decisis does not officially apply.⁶

Another explanation offered for the difference in legal tradition that has developed between the common law and civil law jurisdictions concerns the audience to whom the judgment is directed.⁷ The suggestion has been that European judgments, in particular German judgments, were addressed to academic scholars, whereas English judgments were directed to the losing party, their function being to render conclusive answers to the arguments of counsel.⁸ In such circumstances dissenting opinions may emerge, with the process characterised as

a discussion between educated, informed and reasonable people who are all equal, about arguments which are closely tied to the facts and which are advanced by advocates as equals to those reasonable people, [which] can result in disagreements without any shame or ground for criticism arising.⁹

Despite the English common law tradition of dissenting opinions, with this tradition having been strongly followed by Australian courts, it should not be thought that the right to voice a dissenting opinion has been universally endorsed.

One of the main arguments posited against the delivery of a dissenting judgment is that the dissent would increase uncertainty and weaken the standing of the court and the doctrine of stare decisis.¹⁰ This argument would suggest that unanimity, or at least the appearance of unanimity by the court, would buttress the authority of the court, and also engender

⁶ Ruth Bader Ginsberg, above n 4, 137-138.

⁷ J Gillis Wetter, *The Styles of Appellate Judicial Opinions: a Case Study in Comparative Law* (A. W. Sythoff, 1960) 26.

⁸ *Ibid.*, 72.

⁹ Heydon, above n 2, 206.

¹⁰ Alder, above n 3, 242.

community confidence in the court and the law more widely.¹¹ As White J of the Supreme Court of the United States stated, this view would hold that the ‘... only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusions of courts of last resort.’¹²

It may be that this is particularly relevant to revenue law cases, where certainty of the law would be sought as a basis to allow for informed and legitimate tax planning by taxpayers.

Further arguments advanced against delivering dissenting judgments centred on the view that dissent for its own sake has no value, and while ‘...some judges are more prone to indulge their individuality...’,¹³ the court is not the place for solo performances.

The contrary view would suggest, in the words of Lord Bingham, that ‘... judicial independence [involves] independence from one’s colleagues’,¹⁴ and that far from generating uncertainty, a robust dissenting view can engender greater confidence in the judiciary and greater certainty. This argument suggests that dissent would not act to jeopardise the coherence of the law in a system where it is understood that there would be circumstances where it may be that the law may allow for the existence of several possible solutions to a single question.¹⁵

Indeed, it may be that dissent serves a useful purpose in that it may draw attention to perceived flaws in the reasoning of the majority view, ensuring accountability of the majority for the

¹¹ Ibid.

¹² *Pollock v Farmers’ Loan & Trust Company* 157 U.S. 429, 608 (1895).

¹³ Ginsberg, above n 4, 142.

¹⁴ Quoted in Heydon, above n 2, 205.

¹⁵ L’Heureux-Dube, above n 1, 503.

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rationale and consequences of their decision.¹⁶ Given the difficulties and complexities that abound in some areas of law, and the complexities that can exist within the factual matrix to which the law must be applied, it is hardly surprising that ‘(d)isagreement on the law or its proper application nowadays is almost universally admitted to be inevitable some of the time.’¹⁷ A greater threat to judicial independence is seen to arise, not from dissenting views, but from judicial majorities who may attempt to muzzle minorities where a dissenting voice may be seen to mar the conduct of the court.¹⁸

Additionally, a dissenting voice may offer assurance to the community that all judges are performing their duty of accountability to the parties and the public, by independently giving their personal attention to the issues to be determined, and revealing what the judge actually thinks.¹⁹ What may be seen as more unsettling for the law than a high incidence of dissent would be a proliferation of separate opinions with no single opinion commanding a clear majority.²⁰

Whatever the merits or otherwise of dissenting judgments, a detailed examination of which is outside the scope of this paper, the High Court of Australia has developed a strong tradition of delivering dissenting opinions. Given that at the core of dissent lies the concept of disagreement, the question arising is the extent of that disagreement which would warrant classifying a decision as being a dissenting opinion.

¹⁶ William J. Brennan Jr., ‘In Defense of Dissents’ (1986) 37 *Hastings Law Journal* 427, 430.

¹⁷ Ruth Bader Ginsberg, above n 4, 136.

¹⁸ Heydon, above n 2, 208-209.

¹⁹ *Ibid*, 215.

²⁰ Ginsberg, above n 4, 148.

3.2 Dissent in Revenue Cases

A key issue in the current research involved the determination of what is required for a separate judgment by a Justice to be classified as being in dissent. As recognised by previous research on dissenting opinions, the seriatim tradition followed by Australian courts creates difficulties with specific application of the terms of ‘majority’, ‘minority’, ‘dissent’ and ‘concurrence’,²¹ with a wide range in the nature and range of disagreements that can occur between members of the Bench.

While arguably an oversimplification, for the purposes of this research the approach taken has been that when a member of the court was not included in a joint majority judgment of the court making orders on a particular issue, their view may be classified as either a separate concurring opinion, a dissenting view, a contra view, or not expressing a view on a particular issue on the basis that the matter did not need to be decided.²² This difficulty in classification may be compounded further when a particular Justice concurs with the orders made while expressing doubt as to the finding.²³

Further difficulty can arise in characterising a judgment as dissenting in those cases where the final orders of the court in a matter are not reflecting any clear majority view of the court, with the final orders representing consensus between different

²¹ Andrew Lynch ‘Dissent: Towards a Methodology for Measuring Judicial Disagreement in The High Court of Australia’ (2002) 24 *Sydney Law Review* 470, 471.

²² See, eg, *FCT v Thorogood* (1927) 40 CLR 454, where Higgins J declined to give an opinion.

²³ See, eg, *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.

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combinations of Justices on different elements,²⁴ such decisions being referred to as plurality decisions.²⁵

It is suggested that in revenue law matters there may be a further layer of complexity that may not necessarily be apparent in all other areas of law, in that while there may be agreement as to the final orders to resolve the matter at issue, the paths of reasoning that led to that same conclusion may be vastly at odds. A ready example would be in determining whether a particular receipt should be included in assessable income. While there may be judicial agreement that the receipt should be assessable, this may be on the grounds of being ordinary income, or income from a profit making undertaking, or income from a business operation, or a capital gain, or income from trading stock. To argue that alternative reasoning which produced the same result should be classed as a dissent would at best, it is suggested, be a problematic approach.²⁶

The approach adopted in characterising dissent in this research follows that applied in other research on dissent,²⁷ in that disagreement between Justices will only be classified as dissent when there is disagreement as to the outcome or final orders of the court, and not disagreement as to the path of reasoning to decide the matter. On this basis a judgment is characterised as dissenting in circumstances where a Justice

²⁴ See, eg, *Hooper & Harrison Ltd (in liq) v FCT* (1923) 33 CLR 458, where Isaacs & 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.

²⁵ See, for example, the discussion in Lynch, above n 21, 482.

²⁶ See, for example, *Shelley v FCT* (1929) 43 CLR 208, where the full court excluded certain sums from taxable income; by Knox CJ 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.

²⁷ See, for example, Lynch, above n 21.

would determine a different resolution to the issue, which would include making a contra finding to the orders of the court. A judgment would not be dissenting if the Justice concurred with the final orders, or determined that a matter did not require determination. Such an approach is seen as the most effective way of addressing the difficulties outlined above.

Given that this initial research is directed to addressing the relativities in the incidence of dissent, it is considered that if such an approach is applied consistently to all revenue cases extracted for use in the research, then it would provide an appropriate reflection of the relative incidence of dissent between Justices individually, and the relative incidence of dissent between courts under the stewardship of different Chief Justices.

Applying this criterion of dissent to the revenue cases demonstrated dissenting judgments have been delivered in more than 300 cases, representing around 33% of the decided cases. While initially this may appear to be a relatively higher rate of dissent than may be expected in an area of law where certainty and clarity would be sought as a basis for taxpayers to operate within the revenue law system, it is of note that only four of the Justices since Federation have dissented in 20% or more of the revenue cases on which they sat in judgment.²⁸ This appears to suggest that the rate of dissent in revenue cases is comprised of lower incidences of dissent by a large number of different Justices, but with different Justices dissenting in different cases, that is, the dissent is effectively ‘spread around’ among the Justices.

²⁸ Justice Kirby at 35%, Murphy J at 28%, Aickin J at 26% and Stephen J at 20%.

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4. DISSENT IN DIFFERENT HIGH COURTS

While it is recognised that statistics cannot tell the whole story,²⁹ it is still considered useful to initially explore the average incidence of dissent by different High Courts, and the incidence of dissent by Justices serving on each of these Courts. The paper then draws on research into the changing jurisprudence of different High Courts, and examines whether this changing jurisprudence may seem to be reflected in this incidence of dissent for different High Courts. Further than considering the changing jurisprudence of the Courts, it is outside the scope of this paper to examine other contributing factors that may result in an incidence of dissent by a particular Justice or particular Court. This is not to suggest that there are no other factors, with such issues being the subject of ongoing research.

Appendix A provides an illustration of the incidence of dissent in Courts under the stewardship of each of the Chief Justices since Federation. While it is recognised that reference to a court by reference to the Chief Justice leading the court ‘... is not a term which accurately describes the dynamics of the Court constituted by Justices of robust independence of mind, willing and able to give cogent expression to their own views’,³⁰ it may be this very independence of mind which may be reflected in a greater propensity for dissent, particularly if a Justice is not comfortable with the prevailing jurisprudential ideology of the Court.

It may not be surprising that the first High Court led by Griffith CJ exhibited a great degree of accord in revenue

²⁹ The Hon Justice Michael Kirby, ‘Judicial Dissent’ (2005) 12 *James Cook University Law Review* 7.

³⁰ Sir Gerard Brennan, ‘A Tribute to Sir Anthony Mason’ in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 10.

decisions, with many of the decisions of the court being delivered by Griffith CJ. This harmonious honeymoon period lasted for around four years, during which the court was in accord, the first dissenting voices in revenue cases appearing in 1907.³¹

It is noteworthy that throughout the first half of the twentieth century there was a general trend for increasing dissent in revenue matters, with dissent reaching its peak in the courts of Barwick CJ and Gibbs CJ, with both of these Courts having an incidence of dissent approaching 50%. These have been the only Courts with an average incidence of dissent above 40%, and stand as a high-water mark for dissenting judgments in revenue law matters. In subsequent Courts the incidence of dissent has fallen from these high levels, but even in revenue judgments emanating from the Court of French CJ, the average incidence of dissent has not fallen to the levels witnessed in the first High Court.

However, while the average incidence of dissent for a particular Court does provide an illustration of the variations of dissent among different Courts, it is suggested that further elucidation is provided by examining the relative incidences of dissent by the Justices serving on the Courts of each of the Chief Justices, particularly in relation to the proclivity of an individual Justice to dissent when serving under different Chief Justices. Appendix B depicts the incidence of dissent by each of the Justices sitting on revenue cases under each Chief Justice. The data on which these graphs are based may be used to allow a ready comparison of dissent by a particular Justice serving

³¹ 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 in the majority. If the new appointments had not been made and there was still a three member bench, Griffith CJ and Barton J would have been in the majority.

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under different Chief Justices. This data is available (at the time of printing) from the *Journal of Australian Taxation* website (www.jausttax.com).

While the Court under Griffith CJ had a lower incidence of dissent than any subsequent court has since that time, the Justices most frequently in dissent were Isaacs and Powers JJ, who had relatively low incidences of dissent, but still dissented more often than other Justices. While Isaacs and Powers JJ maintained similar incidences of dissent during the period that Knox CJ led the Court, Higgins and Gavan Duffy JJ were much more prone to dissent from the majority decisions of the Court of Knox CJ than they had been on the Court of Griffith CJ. Rich J, who served under five Chief Justices, had low incidences of dissent on the Courts of Griffith CJ and Knox CJ, but found himself in dissent on revenue matters more than any other Justice on the Court of Isaacs CJ, and continued dissenting, although to a substantially reduced incidence, on the Courts of Gavan Duffy CJ and Latham CJ.

In a similar vein, Starke J had a low incidence of dissent on the Court of Knox CJ, did not dissent on revenue matters at all on the Courts of Isaacs CJ and Gavan Duffy CJ, but had the second highest incidence of dissent on the Court of Latham CJ, being second only to Latham CJ himself. While the trend generally appears for any of the Chief Justices to have a low incidence of dissent on their own Court, which may not be surprising, Latham CJ would appear to have had more discord with own his Court on revenue matters than any other Chief Justice.

When Dixon J joined the Court of Isaacs CJ, His Honour exhibited an incidence of dissent in approaching 15% of revenue law cases, and a slightly diminished incidence of dissent was maintained on the Court of Gavan Duffy CJ. However, the level of dissent diminished significantly when his Honour served on

the Court of Latham CJ, and remained low when his Honour led the Court as Chief Justice.

By contrast, McTiernan J had low incidences of dissent in revenue cases while serving on the Courts of Gavan Duffy CJ and Latham CJ, but a much greater incidence of dissent while on the Courts of Dixon CJ and Barwick CJ. On the Court led by Dixon CJ, McTiernan and Webb JJ dissented in 25% or more of the revenue law cases, while Dixon CJ and Williams, Fullager, Windeyer and Owen JJ each found themselves in dissent from the majority in fewer than 10% of revenue cases.

On the Court led by Barwick CJ, McTiernan J had the second highest rate of dissent on the court in revenue cases, being second only to Murphy J who dissented in around 38% of revenue cases. Along with Murphy J, McTiernan, Kitto and Aickin JJ were the other Justices with an incidence of dissent of 20% or greater.

It would appear that the Court led by Barwick CJ has been the most volatile High Court since Federation in relation to revenue matters, having the second highest average rate of dissent in revenue cases, and also having the highest turnover of Justices. While Murphy, McTiernan Kitto and Aickin JJ had the higher incidences of dissent, most Justices were in dissent from the majority in revenue decisions between 10% and 20% of the time, with only Taylor, Mason and Wilson JJ dissenting in fewer than 10% of the revenue cases. Barwick CJ himself dissented from the majority decision in around 13% of revenue cases, being among the higher incidences of dissent for a Chief Justice on their own Court.³²

While the High Court under the leadership of Gibbs CJ exhibited a marginally higher average incidence of dissent than

³² Chief Justice Latham dissented in 17% of revenue cases while Chief Justice, Gibbs CJ and Gavan Duffy CJ in 14% of revenue cases, and Isaacs CJ in 13% of revenue cases.

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the Barwick CJ Court, it is notable that Murphy J appeared much more comfortable with the majority views of the Court, dissenting in around only 10% of revenue cases, a similar incidence of dissent to that exhibited by Mason J. At the other extreme, Aickin J dissented in over 35% of cases, and Stephen J dissented in nearly 30% of revenue cases, higher than his Honour's 19% incidence of dissent while serving on the Barwick CJ Court.

Since the time of the Gibbs CJ Court there has been a decline in the incidence of dissent in revenue law cases decided by the High Court. The Courts of Mason CJ, Brennan CJ and Gleeson CJ all exhibited an average incidence of dissent approaching 40%, a 10% decline from the high incidences of dissent on the Courts of Barwick CJ and Gibbs CJ. However, what may be of greater interest is the incidence of dissent by individual Justices on these Courts.

The Court of Mason CJ witnessed only McHugh J exhibiting an incidence of dissent in more than 20% of the revenue cases, while Wilson J did not dissent in revenue cases on any occasion. By contrast, on the Court of Brennan CJ, McHugh J was joined by Deane, Callinan and Hayne JJ in not dissenting at all in revenue cases, with Dawson, Toohey and Gaudron JJ dissenting in more than 15% of revenue law decisions.

While serving on the Court of Brennan CJ, Kirby J had a relatively low incidence of dissent at around 13%. However, his Honour appears to have been much more in discord with the Courts of Gleeson CJ and French CJ, delivering dissenting judgments in over 35% of revenue cases on the Gleeson CJ Court, and in 50% of revenue law cases heard by the French CJ

Court.³³ Apart from Kirby J, there was a great degree of agreement and uniformity from other Justices on these Courts, and while the average incidence of dissent may not appear low, without the dissents of Kirby J, the Courts of Gleeson CJ and French CJ would have exhibited the lowest incidences of dissent in High Court revenue cases, even falling below the incidence of dissent of the Griffith CJ High Court.

As evidenced by the Appendices, the Gleeson CJ Court saw no dissent in revenue decisions from Hayne, Heydon, Crennan and Kiefel JJ, while the French CJ Court had witnessed no dissent in the cases extracted for the research from French CJ and Gummow J. Apart from Kirby J, all other Justices who had dissented had very low incidences of dissent.

This decline in the incidence of dissent from more recent Courts may appear counter-intuitive.

It was during this period that the number of revenue cases reaching the High Court was in decline. This decline in the cases was hastened by the requirement, introduced in 1984, for a grant of special leave to appeal to the High Court,³⁴ thus providing the court with a discretion for case selection. Following this, the 1987 enactment of the *Australia Acts*³⁵ established the High Court as the final court of appeal for Australia, giving the court added responsibility for making final determinations. It may have been expected that the combination of these factors would not only reduce the number of revenue cases, but simultaneously increase the complexity of the cases which needed to be finally

³³ It should be noted that only four revenue cases were heard by Kirby J on the French High Court, with his Honour dissenting in two of these four cases.

³⁴ Introduced by the sec 3(1) *Judicial Amendment Act (No 2)* 1984 (Cth).

³⁵ *Australia Act* 1986 (Cth), *Australia (Request and Consent) Act* 1986 (Cth), *Australia Acts Request Act* 1985 (each state), *Australia Act* 1986 (UK).

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determined, and that this increased complexity may have led to a greater incidence of dissent, as the legal and factual complexity of cases reaching the Court could result in more divergent opinions of Justices, which would manifest as a dissenting view.

One potential explanation for this greater degree of accord may be that many of the more recent Justices serving on the High Court have a background in areas of law other than revenue law, and there may be a greater willingness on the part of Justices to be persuaded as to a conclusion by stronger personalities on the Court.³⁶ While this suggestion is purely speculative in relation to revenue law matters, it may appear unusual that with the greatly increasing complexity of revenue law, and the greatly increased factual complexity of revenue issues reaching the High Court for determination, there has generally been a higher level of accord among most of the Justices as to the outcome than had been the case for most of the twentieth century.

However, whatever the cause, apart from some notable exceptions more recent Courts have witnessed a significant decline in dissenting views in revenue cases. With the Court of Gleeson CJ, and from the cases extracted from the French CJ Courts, most Justices, with the notable exception of Kirby J, appear to be in furious agreement on an area of law that causes so much difficulty and so much angst for so many practitioners.

5. HIGH COURT JURISPRUDENCE AND JUDICIAL DISSENT

The remainder of this paper has regard to research that has examined the changing nature of the broad jurisprudential ideology adopted by the High Court under the leadership of different Chief Justices, with the purpose of then exploring

³⁶ See, for example, Heydon, above n 2.

whether the change in ideology between different Courts may be seen as being reflected in the incidence of dissent in revenue cases.

If it is the case, as is now generally accepted, that Justices can play a pivotal role in making and developing the law, rather than just ‘finding’ the law that exists and applying that law, then the composition of Justices sitting on a Court can evidently impact on the pace of the development of law. The approach to statutory interpretation adopted by a Justice would be expected to be shaped by a number of considerations, not least of which would be expected to be the jurisprudential philosophy embraced by that Justice, although it should be recognised that classification of a Justice to a particular school of thought may be fraught with doubt, as the Justice’s philosophical outlook may be expected to evolve over time.

This shaping of interpretive approaches by jurisprudential philosophical leanings may particularly impact decisions in revenue cases, dealing as they do with the broad issue of non-voluntary individual pecuniary contributions to the state, which becomes interwoven with views as to the proper role for, and level of involvement by, the state, and the concepts of fairness and justice in relation to the power balance between the state and individuals.

In recognising that judicial techniques are influenced by many factors other than doctrine, such factors encompassing both individual and institutional factors, there is a suggestion that from the mid-1950s Australian judges were exposed to a range of pressures to which they had not previously been subjected.³⁷ Also during this same period there had been a change not only in society in general, but in the backgrounds of judges, with judges in the early post mid-1950s period having

³⁷ J Dyson Heydon, ‘Varieties of Judicial Method in the Late 20th Century’ (2012) 34 *Sydney Law Review* 219, 222.

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shared the national agony and unpleasant experiences, having lived through the Great Depression and World Wars, with many having served in war. The suggestion is that these broadening experiences helped put legislation in perspective. From the period of the 1980s very few judges would have had such experiences.³⁸

Given the suggestion that it is the period since the mid-1950s that has witnessed a change in the experiences shaping the views of judges, that most interest has been directed to the jurisprudence of the High Court since the mid-1950s, and that it has been during this period that there has been the suggestion of a change in jurisprudential ideology of the High Court, it is appropriate that this part of the paper focus its attention on the High Courts since that period. A further reason for limiting most of the discussion to this period is that this period has witnessed a consistently high average incidence of dissent in revenue cases since the Court of Barwick CJ.

5.1 Interpreting Revenue Law

The approach to interpretation of revenue statutes was set early in the High Court's history, with Griffith CJ endorsing a literal approach, being to determine the intent of the revenue legislation from the words of the statute, absent any ambiguity or imprecision in the words of the legislation. In *Tasmania v Commonwealth and South Australia*,³⁹ his Honour drew on a passage from Lord Chief Justice Tindal to explain 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

³⁸ Ibid.

³⁹ *Tasmania v Commonwealth and South Australia* (1904) 1 CLR 329.

ordinary sense. The words themselves alone do in such a case best declare the intention of the law-giver.⁴⁰

The traditional interpretation to be applied to statutes imposing a penalty on the community, as with penal or 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*:⁴¹

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.⁴²

5.2 Legalism and Literalism

In terms of the interpretation of revenue statutes, arguably the Justice who has had the most significant lasting impact has been Sir Owen Dixon, during his time as both a Justice and Chief Justice on the High Court. Chief Justice Dixon has been the High Court jurist most identified with what has been labelled the legalistic approach, probably due to his own comments on being sworn in as Chief Justice when he described himself as ‘excessively legalistic’ and expressing faith in a ‘strict and complete legalism’ as the only safe guide to judicial decisions in the face of conflict.⁴³

⁴⁰ *Sussex Peerage Case* (1844) 11 Cl & F 85, 143, quoted in *Tasmania v Commonwealth and South Australia* (1904) 1 CLR 329, 339.

⁴¹ (1907) 5 CLR 132.

⁴² *Ibid* 154-5.

⁴³ Quoted in Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2003) January-February *Quadrant* 11.

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However, while Dixon CJ may have adhered to a legalist approach, there is evidence that his legalism was not narrowly confined in that he did not seek to impose narrow limits on relevant considerations in determining cases, and did not seek to deny the political character of relevant considerations nor the practical significance of High Court decisions.⁴⁴ Rather, Dixon CJ's legalism allowed that the common law was not frozen and immobile, but contemplated change in the law as legitimate and that the judiciary had a role to play in this change. Such change, however, needed to be effected by an incremental growth in existing rules or a rational extension of existing rules to new instances, rather than by innovation.⁴⁵ As noted by his Honour:

It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience.⁴⁶

The great virtue seen in this incremental legalist approach of Dixon CJ was that it '... subordinated individual judicial whim to the collective experience of generations of earlier judges out of which could be extracted principles hammered out in numerous struggles.'⁴⁷

⁴⁴ Rachael Gray, *The Constitutional Jurisprudence and Judicial Method of the High Court of Australia* (Presidian Legal Publications, 2008) 25.

⁴⁵ Heydon, above n 43, 12.

⁴⁶ Sir Owen Dixon, 'Concerning Judicial Method' in Sir Own Dixon, *Jesting Pilate* (Law Book Co, 1965) 158.

⁴⁷ Heydon, above n 43, 12.

This broader approach to legalism has been contrasted with the stricter and more narrowly confined approaches of the Chief Justices who both preceded and followed Dixon CJ, being Latham CJ, who was seen as having greater regard to the letter of the law,⁴⁸ and Barwick CJ, whose tenure is examined later in the paper.

In looking to the changes in the incidence of dissent in revenue cases between the court of Latham CJ and the court of Dixon CJ, it is noteworthy that the Justices with the highest incidences of dissent on the court of Dixon CJ were McTiernan and Webb JJ, who both dissented in 25% or more of cases. For both of these Justices this represented a significant increase above their incidence of dissent on the Latham CJ court. There was also a marked increase in the occurrence of dissent by Kitto J, who had always been with the majority on the court of Latham CJ, but had an incidence of dissent approaching 15% under Dixon CJ. However, while the average incidence of dissent was marginally higher in revenue law cases for the court of Dixon CJ, there was exhibited an incidence of dissent of less than 10% by Dixon CJ himself, along with Williams, Fullager, Windeyer and Owen JJ.

The figures reflecting the incidence and incidence of dissent would appear to suggest that McTiernan and Webb JJ were arguably more comfortable with the narrower legalist approach of Latham CJ than the arguably broader legalism of Dixon CJ.

5.3 A Narrower Strict Literalism

While legalism and literalism may be distinguished, there is much overlap, with legalism relying on the text as being of primary significance, while recognising that meaning can be deduced from an understanding of the words within a wider context of authoritative material.⁴⁹ It is suggested that this

⁴⁸ Gray, above n 44, 24.

⁴⁹ Gray, above n 44, 21.

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approach of wide legalism was broadly the approach of courts in revenue cases until the court of Barwick CJ, with the court of Barwick CJ generally seen as exhibiting a strict and narrow form of literalism.⁵⁰

This was particularly the case in revenue matters involving anti-avoidance legislation. In a series of revenue decisions which favoured taxpayers at the expense of the revenue generally, Barwick CJ himself applied strict literalism to read down legislative anti-avoidance provisions to the stage where they became largely ineffective, and in doing so appeared to display what almost amounted to an admiration for the taxpayer's position, as evidenced in *FCT v Westradere*,⁵¹ where His Honour characterised the taxpayer's claim as '... an ingenious use of the provisions ... of the *Income Tax Assessment Act*.'⁵² Arguably the Barwick CJ Court applied strict literalism within a broadly legalistic context to subvert the intent of the revenue law.

Rather than seeking the legislative purpose or intent from the words in the legislation, the approach of the Court led by the Chief Justice appears to have been to look only at the words themselves, and unless the words themselves envisaged the particular matter at issue, then the statute was seen to not have any application. This approach has been described as the court taking 'a parsing approach rather than a purposive approach',⁵³ and by so doing the Court was able to dilute the legislative provisions to the point of being ineffective.

In justifying this narrow literalist approach, Barwick later argued that 'The obligation to pay [taxes] is a legal one. Some

⁵⁰ Ibid.

⁵¹ *FCT v Westradere* (1980) 144 CLR 55.

⁵² *FCT v Westradere* (1980) 144 CLR 55, 59.

⁵³ Jason Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006) 201.

politicians try to treat it as a moral obligation. But it is not.⁵⁴ A fellow Justice on the Barwick court commented that there was on the Barwick court ‘... a strong feeling of animosity directed towards revenue generally. This was led by Barwick. That was fairly dominant in the Court ...’⁵⁵

Such an expression of opinion by Barwick lends support to the earlier proposition that the nature of revenue cases, invoking notions of fairness and justice, may engender divergent jurisprudential views between Justices, with the potential to create dissenting views.

From Appendix A, the Court of Barwick CJ exhibited a high average incidence of dissent, being only marginally below the highest average incidence of dissent by a High Court. On its face, this lends support to the view that the move to a more narrow jurisprudential approach has been reflected in a greater average incidence of dissent by the Court. However, it is suggested that it is instructive to look behind the average incidence of dissent by the Court, to the dissent by individual Justices on the Court.

It is suggested that not all Justices on the Barwick CJ Court appeared totally comfortable with this narrow approach in revenue law matters, as evidenced by the increase in the incidence of dissent witnessed from the Barwick Court when compared with the Dixon Court. The Barwick Court evidenced a widespread incidence of dissent among a number of the Justices.

The Justice with the greatest incidence of dissent in revenue cases on the Barwick CJ Court was Murphy J, who, it has been suggested, derided the traditional approach of the Court, and espoused the view that as judges make the law, they should bring it up to date, changing it openly and not by an incremental

⁵⁴ Ibid 200.

⁵⁵ Ibid.

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approach.⁵⁶ Justice Murphy was seen as not constrained by the legalistic approach of seeking to identify an existing body of law from which answers were to be found, but had regard to the wider social and political values influencing and being impacted by the decisions of the Court.⁵⁷ It is for this reason that it has been suggested that his appointment in 1975 heralded the commencement of the demise of legalism,⁵⁸ and while there is the suggestion that he influenced the views of other Justices such as Mason J, any such influence became apparent after his death.

However, Murphy J was not alone, with a number of the Justices exhibiting incidences of dissent of around 15% or more in the revenue cases heard, with McTiernan, Kitto and Aickin JJ also dissenting in 20% or more of the cases on which they sat, while Gibbs and Stephen JJ dissented in more than 15% of their cases. Such an incidence of dissent had been unusual in previous courts, and also in more recent subsequent courts. This incidence of dissent is seen as even more notable, given the level of influence and control by Barwick CJ over the Court, and Barwick CJ's animosity to revenue imposition generally.

As noted, another Justice with a higher incidence of dissent on the Barwick CJ Court was McTiernan J, and it is of interest that while his Honour had dissented more on the Dixon CJ Court than that of Latham CJ, presumably preferring the stricter legalistic approach of Latham CJ, his incidence of dissent continued on the Barwick CJ Court, dissenting in some 25% of revenue cases, suggesting a degree of discomfort with the strict literalism of Barwick CJ.

The Justices who would have appeared to be more at ease with the approach of the Barwick CJ Court were Taylor, Mason

⁵⁶ Heydon, above n 43, 16.

⁵⁷ Gray, above n 44, 51.

⁵⁸ Ibid.

and Wilson JJ, all of whom had an incidence of dissent of less than 10%. Of particular interest is that while serving on the courts of Barwick CJ and Gibbs CJ, Mason J had a low incidence of dissent in revenue cases, suggesting that his Honour was comfortable with the narrow legalism and literalism of these courts, and yet after assuming the role of Chief Justice, his Honour was seen to shun such an approach and instead lead a court that has been characterised as an activist court.

What is also of interest is the incidence of dissent by Barwick CJ himself. While not a high incidence of dissent, at some 13%, it is among the higher incidences of dissent by a Chief Justice, with Latham CJ being most in discord with his own Court, dissenting in some 17% of revenue cases. This suggests that neither Latham CJ nor Barwick CJ were able to dispose other Justices to their views to the same extent seen from more recent Chief Justices.

While recognising that a range of factors would influence the propensity of individual Justices to issue dissenting judgments, it is suggested, on the basis of the discussion above, that it is at least arguable that the move from a broader legalism to a narrow literalism in the approach of the Court can go some way to partly explaining the increased incidence of dissent in revenue cases. As noted, dissent was not limited to one Justice, with a number of the Justices serving on the Court dissenting in revenue decisions.

The Court under Gibbs CJ has been seen as a stepping stone to the Court under Mason CJ,⁵⁹ with the view being expressed that Gibbs CJ was a more orthodox judge than Barwick CJ, although not exercising the same incidence of control.⁶⁰ The Gibbs Court has been characterised as less conservative than the Barwick Court, and while the incidence of dissent in revenue

⁵⁹ Pierce, above n 53, 201.

⁶⁰ Ibid.

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cases under Gibbs CJ was marginally higher than under Barwick CJ, the Court itself did not appear as fractured, with only Stephen and Aickin JJ dissenting in more than 25% of cases they heard, with Aickin J dissenting in more than 35% of these revenue cases. While these suggest some incidence of discord within the Court, it is of interest that Murphy J dissented in just over 10% of cases, the same incidence of dissent as seen from Mason J, and considerably less than witnessed from Murphy J on the Barwick CJ Court, suggesting more accord with the Court of Gibbs CJ on revenue matters.

One explanation for this greater incidence of dissent on the Gibbs CJ High Court may be that Justices felt less restrained under Gibbs CJ, as he did not exercise the same level of control as had Barwick CJ, and Justices may have felt less constrained about delivering a dissenting opinion.

5.4 Judicial Activism

While legal formalism had dominated the approach of the High Court for much of the twentieth century, placing a premium on logic, deduction, and a robust commitment to stare decisis, the Court of Mason CJ witnessed legal realism securing a foothold in the judicial culture.⁶¹

While legalism recognised an evolution in the law, it envisaged an incremental evolution, precluding consideration of matters such as political value judgments and policy considerations. If the appointment of Murphy J was seen as the start of the demise of legalism as the prevailing orthodoxy, then the change from legalism to what has been termed judicial activism reached its high point during the tenure of Mason CJ as Chief Justice. Rather than return to the broader approach of legalism, following the narrow literalism of the Barwick era, the Mason CJ High Court saw the pendulum swing further in the

⁶¹ Ibid 147.

other direction, with the Court being seen as taking an activist approach.

If the Court of Gibbs CJ was seen as a stepping stone to the Mason CJ Court, it was the Mason CJ Court which shifted the focus away from simply resolving legal disputes to addressing policy issues.⁶² As noted in relation to the Mason High Court:

The Court shifted its institutional focus away from simply resolving legal disputes to making policy that addressed some of the country's most controversial issues. Fairness, not certainty, became the Court's watchword, and as a result it employed new, controversial modes of legal reasoning.⁶³

The term of judicial activism has been applied in circumstances where judicial decisions are viewed in a wider political context, with the court recognising the roles for community values and judicial policy considerations.⁶⁴ Such an approach witnessed a change away from black letter law and strict literalism, recognising that there may be more than one plausible interpretation of a statute, leaving some discretion on the part of the Court.⁶⁵ This approach of looking to fairness, and having regard to community values and economic or social consequences of decisions has particular relevance to revenue law decisions, as the decisions of the Court will have both a pecuniary impact on the taxpayer and a fiscal impact on the revenue.

As may be expected, a change from legalism to a more activist or realist approach by the High Court was not met with universal endorsement, with the suggestion that judicial activism meant:

⁶² Pierce, above n 53, 4.

⁶³ Ibid, 4.

⁶⁴ Gray, above n 44, 64.

⁶⁵ Pierce, above n 53, 147-8.

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using judicial power for a purpose other than that for which it was granted, namely doing justice according to law in the particular case. It means serving some function other than what is necessary for the decision of a particular dispute ... often the illegitimate function is the furthering of some political, moral or social program,; the law is seen not as the touchstone by which the case in hand is to be decided, but as a possible starting point⁶⁶

The average incidence of dissent by the Mason High Court was lower than that witnessed under the Barwick Court, but remained at an incidence of almost 40%, being higher than all Courts other than the Courts of Barwick CJ and Gibbs CJ. This again appears to suggest that, on the basis of the figures, the move to a more activist jurisprudential approach may be reflected in the higher average incidence of dissent by the Court. Again, it is instructive to look to the dissent by individual Justices on the Mason Court.

While the incidence of dissent in revenue cases fell from the higher levels witnessed on the courts of Barwick CJ and Gibbs CJ, there would not appear to have been universal accord in the revenue decisions of the Court. Mason CJ and Wilson J had the lowest incidences of dissent, with low levels of dissent not seen since the early High Courts. McHugh J appeared most at odds with an activist approach in revenue cases, dissenting in more than 20% of cases, still considerably lower than the high incidence of dissent evident on the courts of Latham CJ, Barwick CJ, Gibbs CJ and even Dixon CJ.

The suggestion has been that it was Mason CJ, Deane, Toohey and Gaudron JJ who formed a majority group prepared to make changes.⁶⁷ In revenue cases this is not entirely borne out by the incidence of dissent, with Deane, Toohey and Gaudron JJ all dissenting in 10% or more of cases, although again this is a

⁶⁶ Heydon, above n 43, 10.

⁶⁷ Pierce, above n 53, 204.

low incidence of dissent when compared with some other Courts. Justice Dawson has been seen as one of the more conservative Justices on the Mason High Court, and this is reflected in an incidence of dissent above 15%. Brennan J also dissented in more than 15% of revenue cases, which although historically is still a low incidence of dissent, suggests some level of unease with an activist approach in revenue cases, although more broadly Brennan J has been seen as one of the advocates of reform.⁶⁸

Based on these figures, it is suggested that, just as the evidence appeared to suggest an increased incidence of dissent in revenue matters when the Barwick High Court moved from a broad legalism to adopt a narrow strict literalism, so too the evidence appears to suggest a higher than average incidence of dissent on the Mason Court in revenue matters, when the pendulum had swung in the other direction to a more activist approach. Of the Justices who served on the High Court under Mason CJ, half of the Justices had an incidence of dissent in nearly 15% or more of the cases on which they sat. This would appear to suggest a degree of discomfort by some Justices with the activist approach of the Court.

The suggestion that arises from the figures as to the incidence of dissent is that when a Court has departed from what may be seen as the traditional jurisprudential approach of broad legal formalism, which appears to have dominated the approach of the High Court for much of its life, the change in jurisprudential approach may, to a degree, be reflected in an increased incidence of dissent. It is not suggested that the changed jurisprudence explains all of the change in the incidence of dissent, but that the change in jurisprudence is itself reflected in the increased incidence of dissent.

⁶⁸ Ibid.

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5.5 Retreat of Activism

It has been noted that ‘If the Gibbs Court experienced judicial rumblings about the orthodoxy, justices on the Brennan Court aired their misgivings and uncertainties about many of the revolutionary changes wrought under Mason.’⁶⁹ This heralded a return to an approach closer to the legalism that the Court had more traditionally followed, with the year 1995 having been identified as the beginning of a gradual rollback in the popularity among Justices for a more activist judicial role,⁷⁰ and although the number of revenue cases before the Brennan Court was not large, the variability in the incidence of dissent is interesting.

On the Mason Court, Deane, Toohey and Gaudron JJ were seen as a majority prepared to make change, while Dawson J had taken a more conservative approach. However, on the Breannan Court, Deane, Toohey and Gaudron JJ exhibited vast differences in the propensity to dissent in revenue cases, with Deane J not dissenting at all, while Toohey and Gaudron JJ dissented in over 15% and 25% of cases respectively, with Dawson J also dissenting in more than 20% of cases. Additionally, when Kirby J joined the Court, his Honour dissented in less than 15% of cases, although overall he has the highest incidence of dissent in revenue cases.⁷¹

Also of interest on the Brennan CJ, Gleeson CJ and French CJ⁷² Courts has been the number of Justices who have not felt the need to deliver a dissenting judgment at all in revenue cases.

⁶⁹ Ibid 247.

⁷⁰ Ibid.

⁷¹ Justice Kirby dissented in around 35% of revenue cases on which his Honour sat.

⁷² The Court of French CJ continues past the cases considered in this research, but is still included for the trend exhibited by the Court, both

The rollback of the popularity of a more politicised role has been seen as being quickened with the appointment of Gleeson CJ,⁷³ with the Gleeson Court having been generally seen as more conservative. While the Gleeson High Court has been characterised as placing stronger reliance on past decisions, and avoiding in engaging in policy type matters, there had not been a complete return to the pre-Mason CJ strict legalism and literalism of earlier Courts, with the Court seen as willing to look more to the purpose of legislative provisions, as did the Mason Court.⁷⁴

Although returning to the more traditional jurisprudential norm in the approach of the Court, the Gleeson Court witnessed an average incidence of dissent similar to that displayed by the Mason Court. Again, however, the incidence of dissent by individual Justices is of more interest, with Kirby J, having an incidence of dissent above 35%, being the only Justice to dissent in more than 10% of cases.

The average incidence of dissent for the French Court fell to a level similar to the earlier Court of Isaacs CJ, but again there has been great variability if the incidence of dissent by individual Justices. The figures for the French Court are not complete, with his Honour continuing as Chief Justice after the cases considered in this research project.

As noted, despite the overall incidence of dissent being above 20%, it has only been the higher incidence of dissent by Kirby J on the Gleeson and early French courts which has resulted in this overall level of dissent. Apart from Kirby J, the Justices on the Courts have shown an even greater degree of accord than was evident on the early High Court of Griffith CJ,

in terms of the incidence of accord between Justices generally, and the move away from activism.

⁷³ Pierce, above n 53, 247.

⁷⁴ Gray, above n 44, 71.

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with a number of Justices not dissenting on revenue cases at all. Without the incidence of dissent from Kirby J, the courts would have the lowest rates of dissent of all High Courts since Federation.

As noted earlier, this low incidence of dissent in revenue cases may be seen as a little surprising given the requirement to seek leave to appeal to the High Court, whereby it would be expected that revenue cases reaching the High Court would be the more complex and contentious of the cases. Apart from the return to a more traditional jurisprudential approach there may be a number of other causes for this more recent lower incidence of dissent.⁷⁵

While speculative, it may be that the retreat from an activist approach has generated a desire by Justices to present a ‘united front’, particularly in revenue cases where much turns on the judgment in terms of tax planning. There may be a view that avoiding dissent in revenue cases may engender greater certainty in relation to the interpretation of revenue statutes and tax planning. This suggestion would be intricately linked to the method of operation of any particular court, and whether Justices engage in pre-hearing discussions, and whether there is an attempt to reach some element of consensus, all of which would be a reflection of the style of the serving Chief Justice. It is outside the scope of this paper to explore these areas further.

Whatever the underlying explanation, it would appear that the more recent High Courts have seen a greater degree of accord, with less dissent by individual Justices, than at any time since the first High Court in 1903.

It is suggested that this return to a lower incidence of dissent when the Court follows a more traditional form of jurisprudence provides some further evidence for the suggestion that the

⁷⁵ This ongoing research project is looking to this as well as other areas related to the incidence of dissent.

jurisprudence of a particular High Court is arguably reflected in the incidence of dissent in revenue law cases, with a reduced incidence of dissent when the Court has returned to a more traditional legalism as the underlying jurisprudential approach.

6. CONCLUSION

This paper has been concerned to examine the incidence of dissent in High Court revenue decisions, looking to differences in dissent between different High Courts, and any potential relationship between this incidence of dissent and the prevailing jurisprudential approach of the Court.

By way of background, the approach to the identification of revenue decisions has been outlined, in addition to the features characterising a judgment as being in dissent in a particular case. This characterisation of a judgment as being in dissent is drawn from the history of the nature of the dissenting opinion, and the arguments posited both in favour, and against, the tradition of the expression of a dissenting view.

While generally the overall incidence of dissent appears to have been higher in revenue cases than may have been expected from an area of law which craves certainty, there has been variability between the propensity towards judicial dissent on different High Courts under the stewardship of different Chief Justices. While early High Courts witnessed relatively low incidences of dissent, there would appear to have been a greater incidence of dissent in Courts towards the latter part of the twentieth century, starting with the Court led by Barwick CJ, and continuing to the Courts led by Mason CJ and Brennan CJ. Since that time the incidence of dissent has fallen again, apart from the regular dissent of Kirby J.

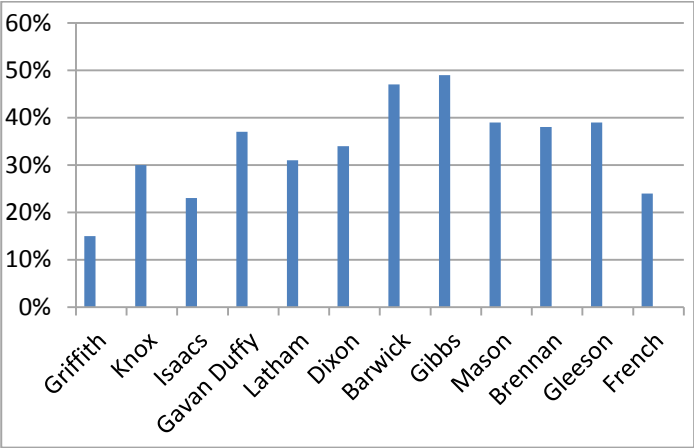
In looking to whether the changing jurisprudence of the High Court is reflected in the incidence of dissent in revenue cases, it is suggested that it would be too simplistic an approach

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to suggest that the jurisprudential approach of the court would fully explain changes in the incidence of dissent between different High Courts. There would be a number of factors contributing to the propensity of Justices to dissent in revenue cases, ranging from characteristics particular to an individual Justice to institutional factors, both within and external to the court itself.

However, it is suggested that, on the basis of the foregoing discussion, there is some evidence from the figures to suggest that, particularly when the jurisprudential philosophy of the court has varied from what may be seen as the established orthodoxy for much of the life of the High Court, more Justices are more likely to experience a degree of discomfort with the newly prevailing orthodoxy, as evidenced by an increased incidence of dissenting judgments. This appears to be the case whether the jurisprudential pendulum swings towards a narrower conservatism, as with the Barwick Court, or to a more liberal and activist approach as with the Mason Court. Both the narrow literalism of the Barwick Court and the activism of the Mason Court have witnessed a greater incidence of dissent in revenue cases, with the incidence of dissent falling when the jurisprudence of the Court returned to the more traditional approach of broad legalism.

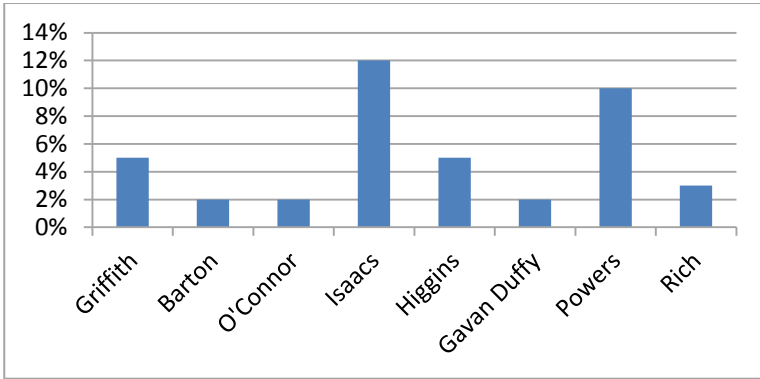
Appendix A – Incidence of High Court Dissent under each Chief Justice



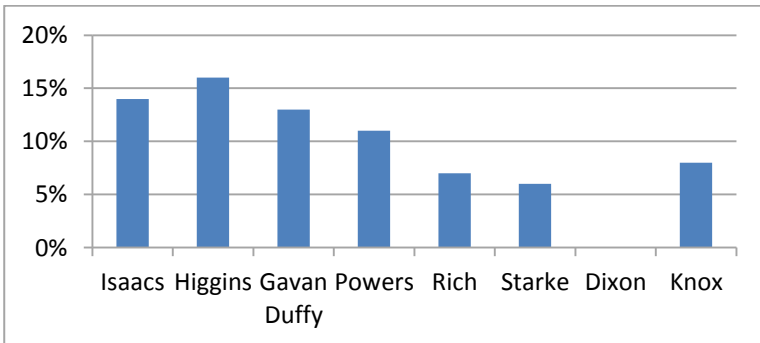
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Appendix B – Dissent by Justices serving under each Chief Justice

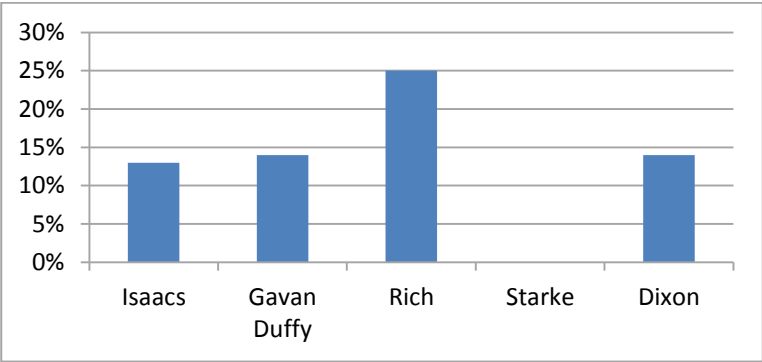
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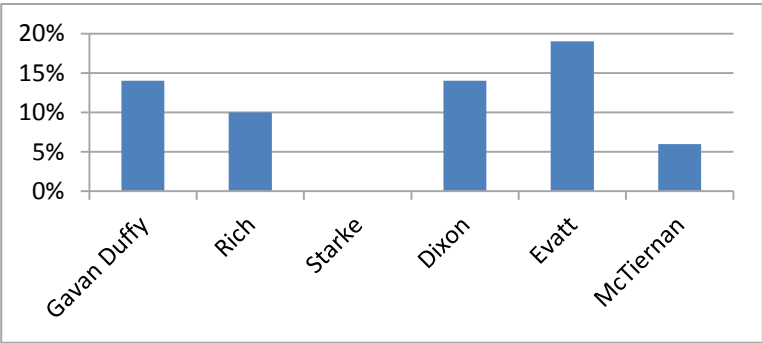
Court of Knox CJ



Court of Isaacs CJ

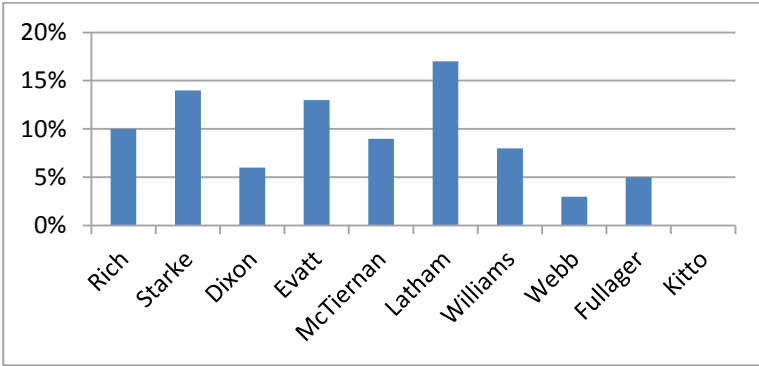


Court of Gavan Duffy CJ

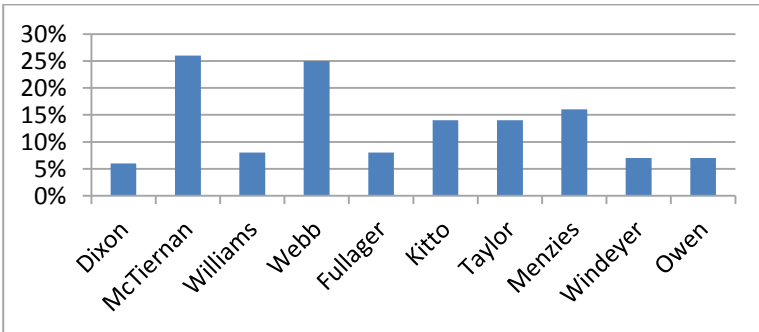


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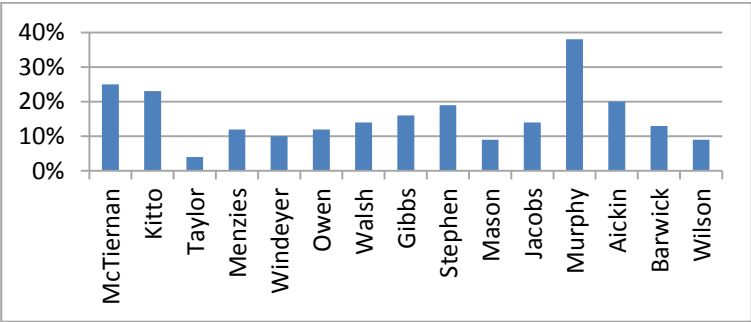
Court of Latham CJ



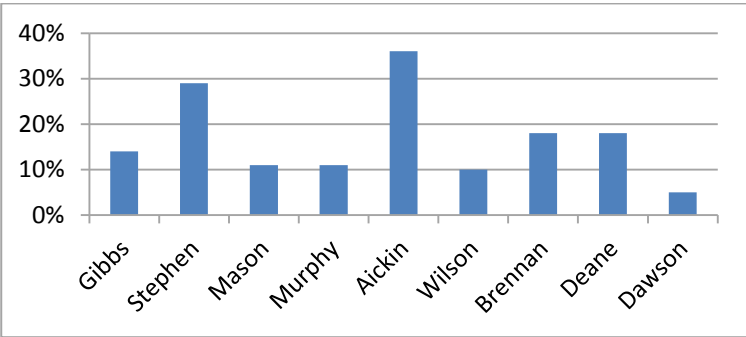
Court of Dixon CJ



Court of Barwick CJ

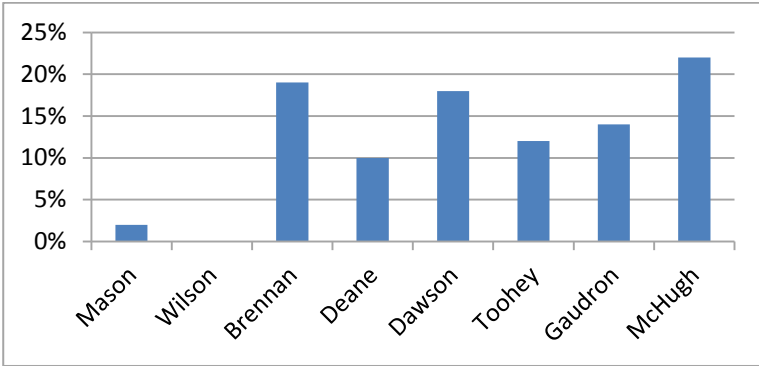


Court of Gibbs CJ

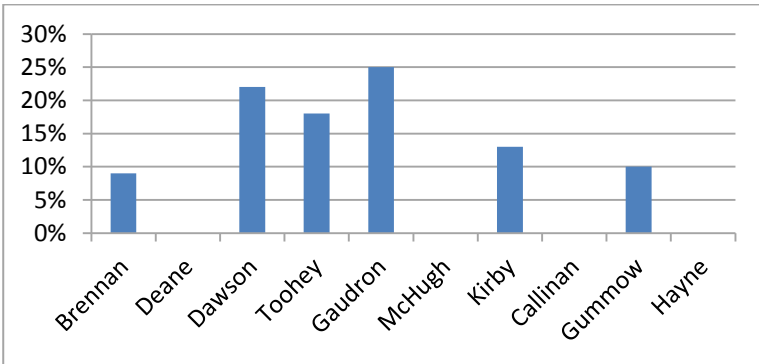


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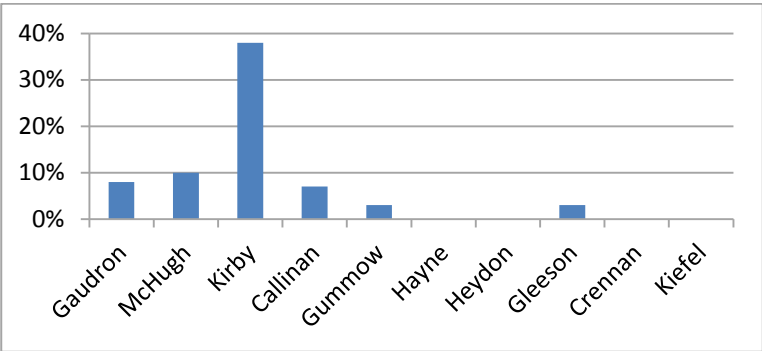
Court of Mason CJ



Court of Brennan CJ



Court of Gleeson CJ



Court of French CJ

