*Andrew McNicol**

PRINCIPLES OF PROPERTY LAW AND THE INTERPRETATION OF THE *INCOME TAX ASSESSMENT ACT* 1936 (CTH) AND *INCOME TAX ASSESSMENT ACT* 1997 (CTH)

INTRODUCTION

The British colonisation of Australia involved not only the introduction to Australia of the rabbit, fox and prickly pear but also the transportation of the British common law including the law regulating the fragmentation of interests in real property. The law regulating the fragmentation of proprietary interests is a fundamental component of the common law which, in the author's opinion, is one of the foundation stones of the *Income Tax Assessment Act* 1936 (Cth) (the Tax Act). In particular the fragmentation of proprietary interests can be understood in terms of the distinction between income and capital. That distinction is one of the basic concepts of taxation law. It will be argued in this article that an appreciation of the principles of property law is needed by law makers, legal practitioners and others in applying, drafting, interpreting and teaching income tax law and practice.

In his article on easements and capital gains tax, Patrick Cussen notes that the provisions of Part IIIA of the Tax Act are based on concepts of property law.[1] Cussen's observation is based on his review of the comments of Davies and Einfeld JJ in *Gray v Federal Commissioner of Taxation* (*Gray's Case*).[2] Cussen states:

> The comments of Davies and Einfeld JJ appear to indicate that, in the absence of specific provisions in Pt IIIA, the concepts of property law should apply in analysing the application of the CGT provisions to the grant of easements.

---

* B Com, LLB (Melb), LLM (Mon), ACA; Lecturer, Department of Business Regulation and Taxation, Faculty of Business and Economics, Monash University. A shorter version of this paper was presented by the author at the Australasian Law Teachers' Association conference at the University of Technology, Sydney, in September 1997. This article now represents the final revised and expanded form of that paper.

1 Cussen, "The Grant of Easements and Capital Gains Tax - Has the Commissioner Lost His Way?" (1994) 23 *AT Rev* 64.

2 [1989] 2 ATC 4640 at 4643.

> This appears to be a sensible approach as the CGT provisions have at their heart the concepts of property law.[3]

The purpose of this article is to determine whether common law principles of property law are reflected in the provisions of the Tax Act and in particular Part IIIA: the capital gains provisions of the Tax Act. In discussing these principles this article will discuss the Federal Court decision of Hill J in *Ashgrove Pty Ltd v Deputy Federal Commissioner of Taxation*[4] (the *Ashgrove Case*) and the contents of Income Tax Ruling TR 95/35 issued by the Commissioner of Taxation following that case. That decision and the ruling provide useful discussion points regarding the interpretation of Part IIIA with respect to those principles. This article will also examine the application of those principles to the proposed rewrite of the capital gains provisions that will eventually replace Part IIIA.

It will be argued that certain property law principles (relating to the fragmentation of proprietary interests):

1. are impliedly incorporated into taxation law;

2. are only excluded by specific statutory provisions of the Tax Act;

3. need to be recognised in interpreting and utilising the current capital gains provisions of the Tax Act (Part IIIA) and the proposed rewritten capital gains provisions; and

4. should be a compulsory component of a subject for students who undertake studies in taxation law where their course will not otherwise cover those principles. For example, students who undertake business courses where such courses do not cover the principles of property law discussed in this paper.

THE ALIENATION OF INTERESTS IN REAL PROPERTY

Historical Basis

Property law has for centuries recognised that freehold ownership of real property carried with it a right to grant lesser interests in respect of real property. Such rights would include the granting of life interests, tenancies and profits à prendre. For example, the common law has for centuries recognised that the granting of a lease alienates an interest in the land subject to the lease: "For nearly 500 years it has been recognised that a lease is

3 Cussen, "The Grant of Easements and Capital Gains Tax - Has the Commissioner Lost His Way?" (1994) 23 *AT Rev* 64 at 68.

4 [1994] ATC 4549.

not a mere contract but creates rights *in rem*, that is to say, an estate or interest in the land demised."[5]

William Blackstone devoted Chapter 4 in his second book of the *Commentaries on the Laws of England* to describing the historical origins of the feudal system:

> It is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feodal law....[6]
>
> The grand and fundamental maxim of all feodal tenure is this; that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown. The grantor was called the proprietor, or *lord*; being he who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the use and possession, according to the terms of the grant, was stiled the feudatory or vasal, which was only another name for the tenant or holder of the lands.[7]

Although Blackstone's writings on the legal principles relevant to interests in land were published in the seventeenth century, those legal principles form the basis of the modern law of real property in Australia. In particular, it is critical to understand that the origin of those principles is the feudal system. Under the feudal system all interests, including interests in respect of real property, were ranked. The most important interest was that of the sovereign, that is, all other interests were lesser interests with each lesser interest being granted by virtue of a superior interest. This ranking is still reflected in modern property law. For example, an interest in fee simple is greater than a leasehold interest which in turn is greater than a licence to occupy. Each interest is dependent on the existence of a superior interest. In addition, at any point in time only one of each particular type of interest can exist with respect to a particular property. For example, two identical leasehold interests cannot be granted in respect of the same property.

This ranking of interests and the ability to grant lesser interests is reflected in the Latin maxim "nemo dat quod non habet" (no one can give what he does not have). This maxim can be applied to interests in real property as the holder of a leasehold interest in property can create a lesser interest, such as a licence, but cannot create a freehold interest (a superior interest) by virtue of holding the leasehold interest.

---

5 Bradbrook & Croft, *Commercial Tenancy Law in Australia* (Butterworths, Sydney 1990) p1.

6 Blackstone, *Commentaries on the Laws of England: Book II* (University of Chicago Press, Chicago 1979, facsimile of 1st ed 1766) p44.

7 At p53.

It is submitted that when a purchaser acquires a freehold interest in real property the purchaser is acquiring a bundle of rights in respect of that property including the right to alienate some or all of those rights. That ability to alienate or fragment the bundle of rights acquired by the purchaser is a fundamental concept that is embodied in Part IIIA.

General Principles

The subject of interests in land and the alienation of such interests in land is discussed by Sackville and Neave.[8] The authors discuss such alienations in the context of the doctrine of estates, that is, the fragmentation of interests in land and the extension of that principle to other types of property. The authors state:

> The doctrine of tenure has influenced the modern law in one important respect. By classifying interests in land according to the conditions on which they were granted (the tenurial incidents), the doctrine of tenure recognised that the sum total of rights in relation to an object could be divided in many ways, so that a number of persons could have proprietary interests in a single piece of land. ... Land has certain special characteristics. While its use may change, its location is permanent and it may be capable of generating income forever. In these respects it differs from most chattels, although in modern times personal property such as stocks and shares may share the same characteristics of apparent permanence and income producing potential.[9]

The Position in Australia

As discussed above, the English system of real property law evolved the principles of land tenure over many centuries. When Britain began to acquire colonies those principles became part of the laws of the new colonies.

In the decision of the High Court of Australia in *Mabo v Queensland (No 2)*[10] (*Mabo*) the High Court examined the transportation of English common law principles of property law to the Australian colonies. In examining those principles the High Court referred to a line of decisions that recognised the principle that, on the colonisation of New South Wales in 1788, the English law regulating interests in real property became the law in the colony of New South Wales and each of the other Australian colonies as they separated from New South Wales.

---

8 Neave, Rossiter & Stone, *Sackville and Neave: Property Law: Cases and Materials* (Butterworths, Sydney, 5th ed 1994) pp195-196.

9 As above.

10 (1992) 175 CLR 1.

In *Mabo* Brennan J (as he then was) referred to two decisions of the High Court which recognised that the laws of England regulating real property became the laws of New South Wales at the time of colonisation:

> The doctrine of exclusive Crown ownership of all land in the Australian colonies was again affirmed by Stephen J. in *New South Wales v. The Commonwealth* ("the *Seas and Submerged Lands Case*"):
>
>> "That originally the waste lands in the colonies were owned by the British Crown is not in doubt. Such ownership may perhaps be regarded as springing from a prerogative right, proprietary in nature, such as is described by Dr. Evatt in his unpublished work on the subject ... the prerogatives of the Crown were a part of the common law which the settlers brought with them on settlement..."
>
> Dawson J., following this line of authority in *Mabo v Queensland*, said that "colonial lands which remained unalienated were owned by the British Crown".[11]

Brennan J also cited the following passage from *Randwick Corporation v Rutledge*:

> On the first settlement of New South Wales (then comprising the whole of eastern Australia), all the land in the colony became law vested in the Crown. The early Governors had express powers under their commissions to make grants of land. The principles of English real property law, with socage tenure as the basis, were introduced into the colony from the beginning - all lands of the territory lying in the grant of the Crown, and until granted forming a royal demesne.[12]

INCOME TAX LAW AND INTERESTS IN REAL PROPERTY

The distinction between income and capital for the purposes of the Tax Act has, for many years, been a fruitful source of remunerative work for the legal and accounting professions. In its most basic form the distinction between income and capital can be described as the distinction between the land itself - the capital - and the product of the land - income. That distinction has been addressed by courts in many jurisdictions over many years. For example, probably the best known attempt to provide a layperson's definition of the distinction between income and capital are the comments of the Supreme Court of the United States of America in *Eisner v Macomber:*

---

11 At 28. The cases referred to are *New South Wales v. Commonwealth* (1975) 135 CLR 337 at 438-439; *Mabo v Queensland* (1988) 166 CLR 186 at 236.

12 (1959) 102 CLR 54 at 71, cited in *Mabo* (1992) 175 CLR 1 at 27-28.

> The fundamental relation of "capital" to "income" has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former being depicted as a reservoir supplied from springs, the latter as the outlet stream, to be measured by its flow during a period of time.[13]

The historical origin of the income and capital distinction is, in the author's opinion, derived from principles of property law, including those regulating the fragmentation of proprietary interests in real property, that evolved with the development of the English common law over many centuries. Those principles became an integral part of Australian law following the British colonisation of Australia in 1788. A understanding of the fragmentation of interests in real property has significant implications for interpreting the various capital gains provisions of the Tax Act.

Once it is acknowledged that rights with respect to real property can be fragmented, the issue then arises (and this issue is of significance with respect to the application of Part IIIA) as to whether the fragmentation of an interest creates a new asset or splits off an existing right from a bundle of rights that collectively represents the freeholder owner's interest in the real property. This issue is important with respect to the application of the capital gains provisions of the Tax Act irrespective of whether the asset from which the interest was alienated was acquired by the owner before or after 19 September 1985. If the alienation does create a new asset then that asset will be an asset subject to capital gains tax and any matter giving rise to a disposal in respect of that new asset may give rise to a capital gain for the asset's owner. Alternatively if the alienation does not create a new asset and the asset from which the new asset was alienated was acquired before 19 September 1985 then that asset will not be subject to the capital gains provisions of the Tax Act. If the old asset is an asset subject to capital gains then, in the absence of some particular provision providing otherwise, there will be a part disposal of an existing asset and the issue of apportionment arises with respect to the cost base of the original asset.

The Competing Theories: Fragmentation or New Asset?

The opposing views are as follows. The first view (known as the "existing rights" view) is that the rights accrue to the owner of the freehold at the time the freehold is acquired and are not created at the time the owner chooses to exercise or alienate those rights.[14] The exercise of those rights merely confirms the existence of those rights stemming from the ownership of a freehold interest in the land. The second and diametrically opposing view (known as the "new rights" view) is that the alienation of the interest or right in land creates that interest or right - that is, the right or interest is a new asset at least for income tax purposes. As such the alienation/creation of the new right gives rise to an asset subject to capital gains and any consequential capital gain so realised is included in the former

13 252 US 189 at 206 (1919).
14 *Gray's Case* [1989] 2 ATC 4640.

owner's assessable income. It should be noted that the "new rights" view has been adopted by the Commissioner in Income Tax Ruling TR 95/35.

Tax Cases Dealing with Interests in Real Property

The common law principles regarding the nature of interests in land have been recognised by the courts in interpreting the various provisions of the Tax Act. For example, in *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation*[15] the High Court of Australia, in determining if a payment made by a landlord to a tenant to abandon a leased premises was deductible under s88 of the Tax Act, referred to, with approval, various common law authorities dealing with the nature of a lease.

Furthermore, there have been subsequent decisions dealing with profits à prendre[16] (ie a right granted by the owner of real property to another that allows the grantee to remove some valuable commodity from the land such as standing timber or sand), the granting of leases[17] and restrictive covenants. For example, in *Hepples v Federal Commissioner of Taxation*[18] (*Hepples' Case),* a case dealing with a restrictive covenant, Deane J took the view in obiter dicta that a profit à prendre was an asset that was not created by the disposal but was a pre-existing asset and the granting of a profit à prendre or an enforceable easement (an interest in land) attracted the application of s160R (part disposals) and not s160M(6) (creation of new asset) of the Tax Act. His Honour commented:

> the grant of an enforceable easement or *profit à prendre* would come within s. 160R as a disposal of part of the pre-existing right to use or exploit and the calculation of any resulting "capital gain" would make allowance for any resulting diminution in the value of the subject property.[19]

The view of Deane J that there is a disposal of a pre-existing asset is consistent with established principles of property law.

In *Gray's Case*, the Full Federal Court examined the application of s160ZS(1) to the granting of a lease where the lease was granted over property acquired before 20 September 1985 (ie, the date on which the capital gains provisions of the Tax Act became effective). In making their decision, Davies and Einfeld JJ remarked that the granting of a lease was a part disposal of a pre-existing asset. Their Honours stated that the submission

---

15 (1966) 115 CLR 1.

16 *Ashgrove Case* [1994] ATC 4549.

17 *Federal Commissioner of Taxation v Cooling* [1990] 2 ATC 4472.

18 [1991] ATC 4808.

19 At 4821.

of the taxpayers that the grant of a lease constitutes the part disposal of an asset had much to commend it.[20]

However, in the *Ashgrove Case*[21] Hill J of the Federal Court took the view that the granting of a profit à prendre over land acquired before 20 September 1985 was the creation of a new asset and not the disposal of a pre-existing asset.

THE ASHGROVE CASE: A PRACTICAL EXAMPLE OF THE ISSUES

The facts in the *Ashgrove* case required Hill J to consider the distinction between determining the income tax status (capital or income) of payments having a common source: the disposal of standing timber on real property where the real property was acquired before 20 September 1985. That case serves as a good illustration of the importance of analysing the income tax nature of interests acquired and disposed of so as to identify and quantify the resulting income tax consequences.

The *Ashgrove Case* involved appeals to the Federal Court by five taxpayers, four individuals and a company, against assessments issued by the Commissioner of Taxation. Each taxpayer had received payments under standard form contracts in which the taxpayers disposed of standing timber situated on rural properties in Tasmania. The purchasers of the timber were either North Broken Hill Ltd or Forest Resources, a division of HC Sleigh Resources Ltd.

The facts common to all the taxpayers in the *Ashgrove Case* were as follows:

1. Each taxpayer received payments in respect of agreements for the sale of standing timber situated on real property owned by the taxpayers.

2. Each taxpayer had acquired the real property upon which the standing timber subject to the agreement stood prior to 20 September 1985.

3. The agreements were standard documents used by the two purchasers. Each agreement gave the purchaser the right to cut standing timber and granted the relevant purchaser the right to enter the taxpayer's land and the right if necessary to construct access roads. The consideration payable was either a set price and/or an agreed rate per tonne of timber cut and removed.

4. Each agreement was similar to the type of agreement used in *Stanton v Federal Commissioner of Taxation*[22] (*Stanton's Case*).

---

20 [1989] 2 ATC 4640 at 4643.
21 [1994] ATC 4549.
22 (1955) 11 ATD 1.

In *Stanton's Case* the court held the relevant agreement was not for the payment of a royalty (a payment calculated by reference to the quantity of timber cut) but a payment of a capital nature received for the sale of a capital asset: the standing timber and therefore the amount payable under the agreement was of a capital nature and non-assessable.

In the *Ashgrove Case* the Commissioner assessed each taxpayer on the basis that the payments for the standing timber were amounts assessable:

(a) under s25(1) as ordinary income being:

(i) royalties; or

(ii) amounts referable to a venture in the nature of trade, that is, a business of selling standing timber; or

(b) under Part IIIA as the agreements involved the creation of an asset for the purpose of s160M(6) or s160(7), being the:

(i) grant of an interest in land, being a "profit à prendre"[23] rather than a contract for the sale of the timber; or

(ii) sale of timber as distinct from the sale of standing trees.

The agreements, therefore, involved the creation of an asset for the purposes of ss160M(6) or (7) of the Tax Act and the proceeds were fully assessable under Part IIIA.

Each taxpayer claimed the contracts were for the sale of goods and as the goods were acquired before 20 September 1985, that is, pre-capital gains, the proceeds were non-assessable capital receipts. Alternatively if the agreements did create an interest in land subject to Part IIIA then the consideration should be apportioned under s160ZD(4) of the Tax Act. Each taxpayer denied that the proceeds were assessable under s25(1) or as royalties under s26(f) of the Tax Act.

In making his decisions in the *Ashgrove Case*[24] Hill J considered the possible application of Part IIIA, the creation of assets and ss160M(6) and 160M(7) prior to their amendment following the decision of the High Court in *Hepples' Case*,[25] income under ordinary concepts, apportionment under s160ZI, part disposal under s160R and royalties for the purposes of the Tax Act. In particular the decision raises a fundamental capital gains issue regarding the granting of interests over real property and therefore has implications for the

23 [1994] ATC 4549 at 4557.
24 As above.
25 [1991] ATC 4808.

interpretation of the current s160M(6) of the Tax Act and the provisions that will replace that subsection.

In addition, from a tax planning perspective, the decision highlights first the need to analyse carefully the rights to be granted, created or destroyed by contracting parties prior to executing timber and other agreements creating similar rights. Secondly the decision highlights the need to ensure that the intended income tax consequences of such agreements are in fact achieved and no unforseen income tax liabilities crystallise.

Following the *Ashgrove Case*, on 25 May 1995 the Commissioner issued Income Tax Ruling TR 95/6.[26] In that ruling the Commissioner sets out his views on the taxation of receipts arising from the forestry industry, including the taxation of receipts, under s160M(6), referable to a profit à prendre. The Commissioner's views are discussed below.[27]

Capital Gains

Nature of the Interest Sold

The critical Part IIIA issue in the *Ashgrove Case* was the determination as to whether each taxpayer was disposing of an existing asset (the timber) as distinct from an asset created from an existing asset (the right to the produce from the land). Hill J found, after a detailed review of case law and legislation dealing with the sale of goods, that as each taxpayer had disposed of an asset, namely the timber, and as the asset had been acquired before 20 September 1985, Part IIIA had no application to the disposal of the timber.

Hill J applied the decision in *Marshall v Green*[28] to conclude that the agreements were for the sale of goods and not an interest in land. Hill J quoted the following passage of Sir Edward Vaughan William's judgment in *Marshall v Green:*

> The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods.[29]

26 Income Tax Ruling TR 95/6, *Income Tax: Primary Production and Forestry.*
27 See below, pp250-251.
28 [1875] 1 CDP 35.
29 At 39, quoted in [1994] ATC 4549 at 4558.

Applying the principle in *Marshall v Green* to the facts of each taxpayer, Hill J concluded that the contracts did not give the purchasers an interest in the land but provided for a disposal of part of the land: the standing timber. Hill J stated:

> The surrounding circumstances make it abundantly clear in each case that the interest of the purchaser in the transaction was to secure a supply of timber to be felled and carried away. As has already been noted, the tests in *Marshall v Green* involve discerning from the terms of the agreement and the events which in fact happened, whether the contemplation was that the purchaser would derive a benefit from further growth. ... Although none of the agreements created an obligation upon the purchaser to remove timber immediately, in all cases it appears that logging began almost immediately the agreements were entered into. ... I see no reason to conclude that the purchaser desired to obtain a benefit from the land itself rather than to acquire the timber "warehoused" on the land.[30]

Granting Rights of Access, Storage and Road Construction

Each contract in the *Ashgrove Case* also gave the purchaser the right of entry to the taxpayer's land and the right to construct access roads. For example, clause 5 of the agreement between taxpayer Gooch and North Broken Hill Ltd granted a right of access

> to the Purchaser and its contractors and its and their servants, agents and employees together with its or their vehicles, tools and machinery free access at all times during the period of and for the purposes of this Agreement.[31]

Clause 6 of that agreement gave North Broken Hill Ltd the right to construct access roads (clause 6(a)) and to quarry material from the taxpayer's land for the purposes of building and maintaining any road required for the purposes of extracting the timber (clause 6(b)). Those rights of access and road construction were regarded by Hill J as ancillary to the timber rights notwithstanding the fact that the granting of such rights created an equitable profit à prendre. As was stated by Hill J:

> I have concluded that each of the agreements should be treated as being an agreement for the sale of goods to which the right to enter and sever the timber was ancillary, rather than as being an agreement for the sale or creation of an interest in land. To the extent that each agreement conferred upon the purchaser a right to quarry for the purpose of building roads through the property and in aid of the timber getting agreement, it did create an equitable *profit à prendre*, but the grant of the right was ancillary

30 [1994] ATC 4549 at 4561.
31 At 4565.

to the timber rights and no separate consideration was payable in respect of it. It may thus be disregarded for present purposes.[32]

Section 160ZI and Apportionment

Hill J found that the timber was in all cases an asset acquired before 20 September 1985 and consequently an asset not subject to Part IIIA. However, Hill J noted that if the timber had been subject to Part IIIA then the appropriate method of determining any capital gain or loss would require an apportionment, as required by s160ZI, of the composite asset's cost base, that is, the land and the timber. Hill J remarked:

> Had the land been acquired after 20 September 1985, the provisions of Part IIIA would apply as a disposal of part of the realty and s. 160ZI of the Act would have application to determine the cost to be attributed to the trees.[33]

Section 160M(6): The Creation of New Assets and Competing Theories

As noted above, Hill J found that the agreements did not create a profit à prendre, that is, an interest in the land. However by way of obiter dicta, Hill J made some comments regarding a profit à prendre and Part IIIA. Hill J's comments are very clear on these points:

> Had I been of the view that the agreement should be characterised as an agreement for the sale or creation of an interest in land (rather than a sale of that which was formerly part of the land), then I would have had no difficulty in concluding that there was a disposal, within s. 160M(6), which resulted in the total receipts under each of the timber agreements being included in assessable income by the provisions of Part IIIA of the Act.
>
> Whatever the difficulties may be in construing s. 160M(6), there seems no difficulty in that sub-section applying to the creation out of an existing asset of a new proprietary right. ... Whatever else s. 160M(6) may embrace, its language is apt to treat the grant of a *profit à prendre* as a disposition. The interest created, if there be a grant of a *profit à prendre*, is clearly an asset as defined in s. 160A; the interest is an asset which did not exist prior to the grant operated to create that interest. The *profit à prendre* would have been created by the very act which constituted the disposal and in the result s. 160M(6) would apply. There would be no offsetting amounts of the kind described in the section, with the

32 At 4562.
33 As above.

> consequence that the gross proceeds would form part of assessable income.[34]

This remark by Hill J is very significant as his Honour has, at least in respect of a profit à prendre, indicated that he regards the granting of an interest in land as the creation of a new asset. This view is of particular significance with respect to the application of the capital gains provisions of the Tax Act because if Hill J is correct then the creation of such a new asset will give rise to a capital gain (under the old s160M(6)) at the time the new asset is created irrespective of when the asset (from which the new asset was created) was acquired. But, more importantly, Hill J's approach indicates that he subscribes to the single asset theory as discussed below.

ASSET CREATION OR PART DISPOSAL OF AN EXISTING ASSET?

Hill J's comments indicate that his Honour accepts the view that a freehold interest in land is a single asset, as discussed in Quinn's article.[35] That particular view is diametrically opposed to the bundle of rights theory as discussed and favoured by Barkoczy and Cussen.[36] Their article builds upon the written comments of Inglis[37] that a series of rights are conferred on the owner, for example, the right to grant a lease interest, a licence or a profit à prendre. This issue is also discussed with respect to easements by Cussen.[38]

The distinction between the bundle of rights theory and the single asset theory is of critical importance where the taxpayer acquires an asset before 20 September 1985 and then disposes of an interest in that asset after that date. If the single asset approach is adopted then the granting of a profit à prendre or indeed any right in respect of a freehold interest will fall within s160M(6) (as it was then). Alternatively if the bundle of rights theory is adopted the taxpayer is disposing of a right acquired at the time the taxpayer acquired the freehold and consequently s160M(6) could never apply to assess the consideration paid or payable to the taxpayer as the taxpayer would be disposing of a pre 20 September 1985 asset. The distinction would be equally important where the asset was acquired after 19 September 1985 because s160M(6) would apply, and the realised capital gain would be calculated with a minimal cost base as calculated under s160M(6A) and not the potentially greater cost base which would be calculated under s160ZH of the Tax Act.

34 As above.

35 Quinn, "'O Death, Where Is Thy Sting?': Capital Gains Tax, Life Estates and Remainder Interests Under a Will" (1994) 6 *CCH J of Aust Tax* 56.

36 Barkoczy & Cussen, "Capital Gains Tax and the Grant of Life and Remainder Interests Under Wills: The Debate between the Creation and Part Disposal Views" (1993) 22 *AT Rev* 209.

37 Inglis, "Comments on Commissioner's Views Concerning CGT and Life Estates" (1991) 50 (12 Nov) *BWT Bull* [828].

38 Cussen, "The Grant of Easements and Capital Gains Tax - Has the Commissioner Lost His Way?" (1994) 23 *AT Rev* 64.

The issue of the part disposal or the creation of an asset is also critical in the application of the new s160M (as discussed below).

The Arguments for the Bundle of Rights Theory

In the author's opinion the bundle of rights theory, in respect of interests in real property and other forms of property, is to be preferred to the single asset theory for the following reasons:

(a) The definition of asset in s160A is widely drafted and includes any form of property, a chose in action or other right. This definition would include any interest in land such as a profit à prendre, a leasehold interest or a licence;

(b) The bundle of rights theory has judicial support in at least two cases: the majority decision of Davies and Einfeld JJ in *Gray's Case*[39] and the High Court judgment of Deane J in *Hepples' Case*;[40]

(c) The bundle of rights theory is consistent with long established principles of property law.[41] As such, there can (in respect of at least real property) be a part disposal of a lesser asset than the freehold and consequently the taxpayer is required to apportion the cost base of the asset fragmented by the alienation;

(d) The bundle of rights theory is specifically reflected in the capital gains provisions of the Tax Act, such as s160R, s160ZS and s160ZSA. That is, the bundle of rights theory is only displaced by the single asset theory when the Tax Act specifically provides for such displacement; and

(e) Arguments for the single asset theory, as analysed below, are based on cases that deal with taxation statutes other than the Tax Act and are inconsistent with basic principles of property law.

As the definition of asset in Part IIIA is widely drawn, any interest in real property is an asset for Part IIIA purposes and such an asset will be subject to the general provisions of Part IIIA unless Parliament has decided otherwise. An example of where Parliament has decided otherwise is s160ZS (grant of lease to constitute disposal). In the absence of a specific provision the asset will be subject to the ordinary rules of Part IIIA and the time of acquisition of that asset will be determined under either s160U(3); (acquisition or disposal under a contract) or s160U(4) (acquisition or disposal not under contract). Section 160U(3) provides that the time of acquisition is the time of the making of the contract and

39 [1989] 2 ATC 4640.

40 [1991] ATC 4808.

41 For example, Blackstone, *Commentaries on the Laws of England Book II* p53 and Neave, Rossiter & Stone, *Sackville and Neave: Property Law: Cases and Materials* pp195-196.

s160U(4) provides that the time of acquisition is when the change of ownership of the asset occurred. As such, when a taxpayer acquires, for example, a freehold interest in respect of real property the taxpayer acquires a series or a bundle of rights, in respect of that freehold interest and the acquisition time of those rights will be determined under s160U(3) or s160U(4) unless a specific provision such as s160ZS applies.

As discussed above, in *Gray's Case* Davies and Einfeld JJ stated that the submission of the taxpayers that the grant of a lease constitutes the part disposal of an asset had much to commend it.[42] Similarly, in *Hepples' Case* Deane J by way of obiter dicta stated that: "the grant of an enforceable easement or *profit à prendre* would come within s. 160R as a disposal of part of the pre-existing right to use or exploit...".[43]

Both these remarks indicate that their Honours took the view that the granting of the respective interests was the disposal of an existing asset, as distinct from the creation of a new asset.

The drafting of Part IIIA is based on an underlying assumption that favours the bundle of rights theory as against the single asset theory. For example, s160R is a general provision providing for the part disposal of a Part IIIA asset. That is, the drafting of Part IIIA recognises that an asset may be divided into parts. Such a division would include the fragmentation of the various interests (each a Part IIIA asset) that are acquired when a taxpayer acquires an interest in real property. In direct contrast to s160R the single asset theory is only recognised in the Tax Act by statutory exception. Section 160ZS (grant of lease to constitute disposal) is drafted in a manner that recognises that the granting of a lease is the disposal of a pre-existing asset from a collection of assets. The effect of s160ZS is to deem the granting of the lease to constitute the disposal of an asset by the lessor to the lessee and not "to constitute the disposal of part of the property". That is, s160ZS abrogates the common law position of the fragmentation of proprietary interests in land that has been adopted as an underlying principle in the drafting of Part IIIA. This abrogation was recognised by the Full Federal Court in *Gray's Case*, where Davies and Einfeld JJ commented:

> we reject the alternative view ... that Parliament had in mind that capital gains tax would not apply to premiums received on leases granted over property acquired prior to 20 September 1985. The Act prescribes that the grant of a lease will not be looked upon as the part disposition of property.[44]

---

42 [1989] 2 ATC 4640 at 4643.
43 [1991] ATC 4808 at 4821.
44 [1989] 2 ATC 4640 at 4644.

Arguments for the Single Asset Theory

In the *Ashgrove Case*[45] Hill J cited his own judgement in *Federal Commissioner of Taxation v Cooling*[46] where he referred to a profit à prendre as an example of a situation falling within s160M(6):

> In this Court I illustrated the case of a grant of a *profit à prendre* or easement as an example of a case falling within the sub-section: see *FC of T v Cooling*.[47]

Hill J also believed his opinion regarding s160M(6) and the granting of a profit à prendre was correct because the High Court had not rejected his proposition. He remarked that: "no judge of the High Court expressed the view that the grant of a *profit à prendre* did not fall within the section."[48]

Whereas the High Court in *Hepples' Case* did not reject Hill J's proposition, the rejection, acceptance or refinement of that proposition by the High Court was not necessary as the High Court was not considering the issue of s160M(6) and a profit à prendre (an interest in real property) but a restrictive covenant granted by an employee to an employer which was a matter dealing with the employer's goodwill.

The view of Hill J in the *Ashgrove Case* is in direct contrast to the view of Deane J in *Hepples' Case*. It would appear that whilst both views are only of persuasive authority (being merely obiter dicta) the view of Deane J would carry more weight since it is a judgement of the High Court. In addition, Hill J's opinion is contrary to that of Davies and Einfeld JJ in *Gray's Case*,[49] as noted above.

Quinn makes the following points regarding the argument by Barkoczy and Cussen that a profit à prendre is not a part disposal of a pre-existing asset:[50]

(a) such a view is not supported by the Commissioner of Taxation in IT 2561;

(b) IT 2561 follows the decision in *Gray's Case*, and that case can be used to support the proposition that an easement or a profit à prendre is an asset created and disposed of at the same time.[51]

---

45 [1994] ATC 4549.
46 [1990] 2 ATC 4472 at 4489.
47 [1994] ATC 4549 at 4562.
48 As above.
49 [1989] 2 ATC 4640 at 4643.
50 Quinn, "'O Death, Where Is Thy Sting?': Capital Gains Tax, Life Estates and Remainder Interests Under a Will" (1994) 6 *CCH J of T* 56.
51 At 61. Quinn is referring to the following comments (by way of obiter) of Sheppard J in *Gray's Case*: "In passing I should mention that the provisions of subsec 160U(3) and (6) of

(c) Quinn states that "the grant of an easement or a *profit à prendre* is more akin to the creation of assets in that the full ownership of the asset is reserved by the grantor notwithstanding the fact that the value of that asset may diminish as a result of the transaction";[52] and

(d) the views of Deane J that the grant of a profit à prendre falls within s160R "also appear to be in conflict with the decisions in *DKLR Holding Co (No 2) Pty Ltd v Commr of Stamp Duties (NSW)* and *Commr of Taxes (Qld) v Camphin*."[53] In particular the decision in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* "stands for the proposition that ownership when vested in the one person does not include a substratum of proprietary rights as a legal abstraction".[54]

Although there is some merit in the views of Quinn, the present author believes that the following matters qualify and reduce the effectiveness of Quinn's arguments:

(a) The views in IT 2561 are the Commissioner's views and not do not necessarily correctly state the law. IT 2561 uses the single asset theory as its basis whereas, for the reasons discussed in this article, that theory is inappropriate for the general interpretation of Part IIIA.

(b) *Gray's Case* deals with the granting of a lease and not an easement or a profit à prendre. More importantly, as discussed above, the court in *Gray's Case* recognised that s160ZS was an exception to the general rule regarding the alienation of interests in land and Part IIIA.

(c) There is either the creation of an asset or there is not. Arguing by analogy that something is "akin to the creation of an asset" is useful but not determinative particularly where there is High Court authority (Deane J in *Hepples' Case*) which recognises that the granting of an enforceable right such as a profit à prendre is a disposal of a pre-existing asset.

(d) Quinn acknowledges that the granting of an interest in land may diminish the value of the superior interests in the real property. Whereas the issue of value is important, it is not a conclusive factor in ascertaining whether there has been the creation of a new asset. Indeed the alienation of a leasehold interest may actually increase the value of the freehold interest. For example, the valuation of high rise office buildings is usually based on the rental income that the building will generate and the acquisition of long term tenants for

---

the Act are such as to bring to tax gains made on the grant, on or after 20 September 1985, of other interests in land held before that date, for instance, an easement or a *profit à prendre*": [1989] 2 ATC 4640 at 4645.

52 At 61.

53 As above. *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431; *Commissioner of Taxes (Qld) v Camphin* (1937) 57 CLR 127.

54 At 59.

such buildings makes such buildings attractive investment properties. This factor was behind the various lease incentives that were offered to and accepted by many tenants in the late 1980s and early 1990s resulting in such cases as *Federal Commissioner of Taxation v Cooling*[55] and *Selleck v Federal Commissioner of Taxation*.[56]

(e) The decision in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)*[57] can be distinguished on a number of grounds. That decision was dealing with the *Stamp Duties Act* 1920 (NSW) and not the Tax Act. Even if that case does stand for the proposition that ownership when vested in the one person does not include a substratum of proprietary rights as a legal abstraction, such a distinction is not a sound basis for arguing that the alienation of an interest by the owner is necessarily the creation of a new asset. The absence of a substratum of proprietary rights does not mean that such rights do not exist. The critical issue is the ability of the owner of the fee simple to alienate such rights. The owner, for the reasons discussed above, does not create such rights. The owner acquires the rights when the owner acquires the fee simple interest. The act of alienation only severs the right (an existing asset) from the fee simple.

The Current s160M(6)

In the *Ashgrove Case* the court was considering s160M(6) as it was prior to the 1992 amendments, which apply to transactions which took place after 25 June 1992 (see *Taxation Laws Amendment Act (No 4)* 1992 (Cth) s25(b)). The new s160M(6) reads as follows:

> Subject to this Part (other than subsection (7) of this section), if:
>
> > (a) a person creates an asset that is not a form of corporeal property; and
> >
> > (b) on its creation, the asset is vested in another person:
>
> then subsections (6A) and (6B) apply.

The new s160M(6) has three threshold requirements. The first requirement is that s160M(6) plays a residual role as s160M(6) is read subject to the other provisions of Part IIIA. That is, s160M(6) only applies where no other provisions of Part IIIA apply. For example, if s160R (part disposals) or s160SZ (grants of leases) apply to a Part IIIA asset, then s160M(6) cannot apply.

55 [1990] 2 ATC 4472.
56 (1996) 33 ATR 543.
57 (1982) 149 CLR 431.

The second threshold requirement for the application of the new s160M(6) is that a person creates an asset that is not a form of *corporeal* property. The term "corporeal" is not defined in the Tax Act. Using common law principles from property law, a corporeal asset is an asset having a physical existence such as land. Incorporeal assets are assets having no physical existence, that is, intangible assets such as goodwill or contractual rights. As such the new s160M(6) prima facie applies to a profit à prendre or indeed any interest in land because such interests are forms of "incorporeal property".

However, the third threshold requirement for the application of s160M(6) is that the incorporeal asset was *created* by the person who disposed of that asset. If the asset was not so created s160M(6) cannot apply.

The application of the bundle of rights theory or the single asset theory becomes critical in determining the application of the new s160M(6), as two of the three threshold requirements (one and three as discussed above) for the application of s160M(6) are themselves determined by the application of either the bundle of rights theory or the single asset theory. If the single asset theory is correct then s160M(6) will apply to the alienation of any interest in land irrespective of when that land was acquired. Alternatively if the bundle of rights approach is correct the alienation of an interest in real property acquired after 19 September 1985 will be a part disposal and subject to s160R or a specific provision of Part IIIA such as s160ZS. If the real property was acquired before 20 September 1985 Part IIIA will not have any application in the absence of a specific taxing provision such as s160ZS.

Assuming that the bundle of rights theory is correct, then it follows that the ownership of real property gives the owner the right to dispose of part of the real property. This means, in turn, that the alienation of an interest in respect of that real property will be a part disposal of the asset. If the real property was acquired before 20 September 1985 then s160P and s160R will apply to apportion part of the cost base of the asset subject to the disposal proceeds.

The Explanatory Memorandum to the new s160M(6) states that it is a residual provision, that is, the new s160M(6) would only apply when some other provision of Part IIIA does not apply to the asset in question. In particular the Explanatory Memorandum makes it clear that s160M(6) will not apply if the asset is a pre 20 September 1985 asset:

> if either subsection 160M(6) or 160M(7) and another provision of Part IIIA could apply to a particular transaction, that other provision will apply. Subsection 160M(6) and 160M(7) will not apply. This will be the case, for example, where the transaction constitutes the disposal of the whole or of part of the existing asset for the purposes of Part IIIA, even if the asset was acquired before 20 September 1985.[58]

58 Explanatory Memorandum to Taxation Laws Amendment Bill (No 4) 1992 (Cth) p78.

In addition, that Explanatory Memorandum uses the example of the granting of a tenancy in common as an example of the disposal of part of an existing asset.

> For example, the owner of a block of land may sell part of his interest in the land to another, thereby creating a tenancy in common. Because the sale constitutes a disposal by the person of part of his land, neither subsection 160M(6) nor 160M(7) will apply.[59]

Lehman & Coleman note that the new s160M(6) plays a residual role in that, where a taxpayer grants a profit à prendre, the disposal will be a part disposal and the cost base of the assets will be determined under s160ZI.[60] They base their view on the obiter dicta of Deane J in *Hepples' Case*.[61] They also refer to Cussen's article as casting serious doubt on the Commissioner's views.[62]

Income Tax Ruling TR 95/6 and the Creation of Interests in Land

Paragraphs 76-82 of TR 95/6[63] deal with the granting of a profit à prendre. The Commissioner's views are as follows. Where the profit à prendre was granted:

(a) after 19 September 1985 but before 21 September 1989 there is a part disposal of an existing asset and Part IIIA will not apply if the land was acquired before 20 September 1985;[64]

(b) after 20 September 1989 but before 26 June 1992, the granting of the profit à prendre is the creation of a new asset by the grantor and a disposal of that asset. The disposal proceeds are taxable under s160M(6). In support of his stance the Commissioner cites the obiter from the judgment of Hill J in the *Ashgrove Case*;[65] and

(c) after 26 June 1992 the proceeds are taxable under the new s160M(6).[66]

In TR 95/6 the Commissioner splits the application of the old s160M into 2 periods, before and after 21 September 1989. The split is due to the date of the decision in *Gray's Case*

---

59 As above.

60 Lehmann & Coleman, *Taxation Law in Australia* (LBC Information Services, Sydney, 4th ed 1996) p267.

61 As above. For the obiter dicta of Deane J in *Hepples' Case*, see text to fn19, above.

62 Cussen, "The Grant of Easements and Capital Gains Tax - Has the Commissioner Lost His Way?" (1994) 23 *AT Rev* 64, cited in Lehmann & Coleman, *Taxation Law in Australia* p268.

63 Income Tax Ruling TR 95/6, *Income Tax: Primary Production and Forestry.*

64 At para 77.

65 At para 78-80.

66 At para 81-82.

(ie 1989). In *Gray's Case* Sheppard J, by way of obiter dicta, made the following comment regarding profits à prendre and the capital gains provisions:

> the provisions of subsec. 160U(3) and (6) of the Act are such as to bring to tax gains made on the grant, on or after 20 September 1985, of other interests in land held before that date, for instance, an easement or a *profit à prendre.*[67]

In Income Tax Ruling IT 2561 the Commissioner states that, following the decision in *Gray's Case*, easements, profits à prendre or licences granted after 20 September 1989 would be taxable under Part IIIA irrespective of when the land subject to the easement, profit à prendre or licence was acquired.[68]

The Commissioner's views in both IT 2561[69] and TR 95/6[70] are based on an opinion that accepts the single asset theory over the bundle of rights theory. The author believes, for the reasons set out above, that the Commissioner's view regarding the taxation of receipts referable to a profit à prendre (or indeed any interest in land) under both the old and the new s160M(6) are flawed except in respect of a profit à prendre granted after 19 September 1985 but before 21 September 1985.

APPORTIONMENT

The Real Issue

As discussed above, in the absence of statutory provisions to the contrary, the bundle of rights theory is to be preferred to the single asset theory in applying the capital gains provisions. As such, the real issue, in the author's opinion, for the taxpayer under the self-assessment system is to apply s160R (part disposal) and consequently make the correct apportionment in respect of the asset's cost base when the asset subject to the part disposal is an asset subject to Part IIIA.

How does a taxpayer determine the cost base of a profit à prendre, a leasehold interest or indeed any interest in land at the time the taxpayer acquired the land? There is no easy answer. Take, for example, a taxpayer who acquires in 1996 a freehold interest in land for $100 000. Two years later, in 1998, the taxpayer grants, for $50 000, a profit à prendre to a timber company to extract 10 000 tonnes of timber from the land for the next 10 years. The timber harvesting will begin in 5 years time, ie in 2003. Section 160M(6) cannot apply because, notwithstanding the fact that a profit à prendre is a form of incorporeal

67 [1989] 2 ATC 4640 at 4645.

68 Income Tax Ruling IT 2561, *Income Tax: Capital Gains: Grants of Easements, Profits à Prendre and Licences* at para 16-18.

69 As above.

70 Income Tax Ruling TR 95/6, *Income Tax: Primary Production and Forestry.*

property, it is not created, for the reasons discussed above, by the person disposing of that asset as that person acquired the asset when the freehold interest was acquired. As s160M(6) does not apply the cost base of the profit à prendre is not deemed by s160M(6)(c) to be nil. The asset's cost base will be determined under s160ZH. Depending on the taxpayer's records and circumstances the cost base will be anywhere between nil and $50 000.

A Solution?

To avoid the considerable practical problems of identifying the cost base of an asset acquired with other assets a simple solution would be to regard the "bundle of assets" as a composite asset for Part IIIA purposes. When the owner receives an amount (that is not assessable under some other provision of the Tax Act) referable to that composite asset the cost base or indexed cost base of that asset would be reduced by the amount of the consideration received for the disposal of part of the composite asset. If the proceeds exceed the cost base of the asset the excess would be assessable as a capital gain. This principle is already utilised in Part IIIA in s160ZM (return of capital on investment in trust) and s160ZL (return of capital on shares).

If the asset were acquired before 19 September 1985 then Part IIIA would have no application unless the Tax Act was specifically amended to deem, as a general principle, the fragmented asset to be acquired after that date. Currently, the Tax Act only uses such deeming with respect to specific circumstances. For example, this is the situation under s160ZS (grant of lease to constitute disposal).

THE NEW CAPITAL GAINS PROVISIONS

In June 1997 the Australian Taxation Office released the document entitled *Tax Law Improvement Project: Exposure Draft No 10: Capital Gains Tax Part 1* (CGT Draft 1).[71] That document is the first stage of the rewrite of Part IIIA. Part 2 was released in September 1997. The ATO expects that the new capital gains provisions will be enacted as Divisions 100 to 142 of the *Income Tax Assessment Act* 1997 (Cth), and will apply as from the 1998-99 income year.

The purpose of rewriting the capital gains tax (CGT) provisions was not to amend the existing CGT provisions but to reduce the language in which the CGT provisions were expressed to simple English that could be readily understood. The authors of CGT Draft 1 make the following comments:

---

71 Reproduced in *Tax Law Improvement Project: Exposure Draft No 10: Capital Gains Tax Part 1: Exposure Draft and Explanatory Memorandum*, June 1977, in CCH *Australian Income Tax Bills* service.

> In rewriting the CGT law, we have looked closely at what is going on in relation to each event so we can re-express that in terms not of an artificial structure but in terms of reality. ... Currently, all of this information is scattered throughout the law. In contrast, the redraft brings it together in a logical and coherent way. As a result, the legislative intention is more simply and directly expressed.[72]

As CGT Draft 1 merely redrafts the existing CGT provisions, the underlying principles of property law that applied to Part IIIA will apply equally to the proposed Divisions 100 to 142. A review of the replacement provisions confirms that those provisions adopt the underlying principles of property law upon which the old provisions were based. For example, as discussed above, s160ZS provides for the CGT consequences arising on the granting of a lease. That section operates to abrogate the underlying principle of property law that there is a part disposal of an existing asset when a leasehold interest is granted by the owner of the freehold. In a similar manner ss104-110 of the CGT draft provisions set out the proposed rules for the taxation of amounts received for the granting or extension of a lease. The charging provision is s104-110(3) which reads as follows:

> The lessor makes a *capital gain* if the capital proceeds from the grant, renewal or extension are *more* than the expenditure it incurred on the grant, renewal or extension. It makes a *capital loss* if those capital proceeds are *less*.

The consequences of s104-110(3) are exactly the same as those arising under s160ZS, that is, the amount received for the granting or renewal of the lease is fully assessable, irrespective of when the property in respect of which the lease interest has been granted was acquired by the lessor, and the amounts deductible against those proceeds are specifically restricted to the expenditure incurred in granting or extending the lease.

TEACHING TAXATION LAW

It is submitted that taxation law courses (at both graduate and undergraduate levels) as presently taught at tertiary institutions would benefit by the inclusion in their syllabuses of fundamental property law principles for pedagogical and educational purposes where those principles would not otherwise normally be covered. For example, many degrees in business studies do not have a subject that covers these principles. As well as acquiring skills for practice, a proper understanding of taxation law involves as a precondition a working knowledge of property law.

Many tertiary institutions require a student to have successfully completed property law before the student can study trust law. Perhaps property law, or at least the major principles of property law, should also be a prerequisite subject for taxation law.

---

72 At p1.

CONCLUSION

The principles of property law regarding the fragmentation of interests in real property that evolved as part of the English feudal system became part of the laws of Australia following the colonisation of Australia in 1788. That system was based on a hierarchical order where an interest in real property could only be fragmented from a superior interest. The principles of property law that evolved from the feudal system are also reflected in Australian revenue law, particularly with respect to the fundamental distinction between income and capital.

Those principles of property law are reflected in the bundle of rights theory as distinct from the single asset theory. In the author's view the bundle of rights theory is to be preferred to the single asset theory:

1. as the bundle of rights theory is:

a) consistent with historical principles of property law. That is, interests in land and other assets are capable of being fragmented and such fragmentation does not create a new asset; and

b) supported by the comments of a judge (Deane J) of the High Court of Australia in *Hepples' Case*[73] and two judges (Davies and Einfeld JJ) of the Federal Court in *Gray's Case.*[74] The only directly opposed judicial comments are those of the minority decision (Sheppard J) in *Gray's Case*[75] and Hill J, sitting alone, in the *Ashgrove Case*.[76]

2. as Part IIIA has been drafted with those traditional principles of property law as its foundation, including the presumption that interests in respect of real property can be fragmented;

3. as the only places where the single asset theory is found in Part IIIA are where the drafters have specifically opted for that theory and therefore deliberately excluded the bundle of rights theory.

It is hoped that, notwithstanding the Commissioner's view as expressed in TR 95/6 and IT 2561 the views of Hill J in the *Ashgrove Case* and Sheppard J in *Gray's Case*, that the Commissioner will interpret and apply the current s160M(6) (and the other provisions of Part IIIA) and Divisions 100-142, when enacted, in a manner consistent with the drafting of Part IIIA.

---

73 [1991] ATC 4808 at 4821.
74 [1989] 2 ATC 4640 at 4643.
75 At 4645.
76 [1994] ATC 4549.

In conclusion, the author also believes that an educational grounding in the basic principles of property law would assist students in developing their revenue law skills. If the fundamental principles of property law are firmly established and grasped by the student of taxation law then, both theoretically and technically, it should not matter that regular reform and amendments to particular provisions of the Tax Act occur. If frequent and detailed alterations to particular provisions of the Tax Act do occur (and this is known to be the case in practice), then any resulting uncertainty and confusion about the interpretation of new (and often technical) provisions can be more easily resolved by reference to the firmly established, firmly understood and well entrenched fundamental property law principles which will continue to underlie these provisions.