

WHY FIRST-YEAR LAW STUDENTS SHOULD READ AT LEAST ONE APPELLATE TAX CASE!

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ABSTRACT

An early understanding of issues of law and policy is important for a successful transition to law school. It is necessary to foster students' capacity to become independent and effective learners at the very early stages of law school, such as during a pre-semester induction program occurring prior to the commencement of studies.

This article uses a recent Australian High Court decision concerned with an overpayment of customs duty and Goods and Services Tax (GST) to demonstrate that appellate tax cases can teach first-year law students much about law and policy. It is argued by example that analysis of an appellate tax case, particularly in an engaging manner, such as through a moot occurring during a first-year induction program, ought to allow students to begin to understand how to approach the study of law. This is particularly so when the moot is followed by a reflective workshopping exercise, guided by pre-set questions.

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I INTRODUCTION

Recent research on the first-year law student experience¹ has noted that first-year law students want what is required to learn law to be made more explicit.²

Students consider that they would benefit from ‘more specific and structured guidance about how to think and write like a law student’.³ This article begins, in Part II, with a brief examination of the first-year law school experience, and a literature review of ‘transition pedagogy’. This section concludes that an important aim of successful transition to law school is to foster students’ capacity to become independent and effective learners.⁴

In Part III, the question then arises as to how best to teach transitioning students how to study law. It is argued that first-year law students would benefit from examining at least one appellate tax case in detail during a law orientation or induction program. This article uses the case of *Thiess v Collector of Customs*⁵ (‘the *Thiess* case’) as an example of a suitable appellate tax case for teaching in an induction program. The literature reviewed in Part II indicates that it is important for transitioning law students to be engaged. For this reason, it is suggested in Part III that the students should moot the appellate tax case. A moot teaches students that law can be adversarial, and parties must make their arguments by reference to authority – that is, statute and case law. After the moot, there should be a reflective exercise on the issues raised by the case.

Part IV of the article demonstrates the issues that could be workshopped in a reflective exercise following the moot of the appellate tax case, specifically using the example of the *Thiess* case. It demonstrates an approach to the following four questions in relation to the *Thiess* case:

- On what grounds can the Australian Federal Government charge customs duty and GST?
- How should the courts interpret legislation limiting the rights of taxpayers to recover customs duty and GST paid in error?
- Can the courts imply a duty requiring taxpayers to ensure that they pay the correct tax?
- What are the human rights issues in a case like *Thiess*?

The first question is designed to ensure that students can read a case. Specifically, it is concerned with whether students were able to understand, from a reading of the *Thiess* case, the grounds upon which the Australian Federal Government may impose customs

¹ S Armstrong, M Campbell and M Brogan, ‘Interventions to Enhance the Student Experience of a First-Year Law Degree: What they really wanted’ (2009) 2 *Journal of the Australasian Law Teachers Association* (1 & 2) 135–48 and Susan Armstrong and Michelle Sanson, ‘From Confusion to Confidence: Transitioning to Law School’ (2012) 12(1) *QUT Law and Justice Journal* 21.

² Armstrong and Sanson, above n 1, 21–2.

³ *Ibid* 22. The evaluation of a transition program for first-year law students at the University of Western Sydney found, when asked what more the law school could do to help first-year law students adjust, that the majority wanted ‘more help about *how* to be a law student’. See Armstrong, Campbell and Brogan, above n 1, 139.

⁴ Anthony and Sanson above n 1.

⁵ *Thiess v Collector of Customs and Ors* [2013] QCA 54 and *Thiess v Collector of Customs* [2014] HCA 12.

duty and GST, and the issues that arose with that imposition in the *Thiess* case. The second question is designed to make students think about statutory interpretation, in this case, the interpretation is of legislation limiting the rights of taxpayers to recover erroneously paid tax. The third question introduces students to issues of policy and arguments for reform. It asks students to question whether taxpayers ought to be afforded greater warnings and education about the limitations that exist when seeking refunds of erroneously or overpaid tax. The fourth question raises the human rights issues in a case such as *Thiess*. Such issues would often arise in tax cases, where there is commonly an element of weighing the rights of the individual taxpayer against the interests of the collector of tax for the common good.

One important aim in asking these questions is to demonstrate the integration of different topics – from understanding the operation of a tax law, to statutory interpretation, to administrative law and human rights. This is significant for providing students with a framework of meaning in which to make sense of different parts of their degree.⁶ Students transitioning to the first year of law school need to come to understand that material delivered in one law subject is linked to, and built upon in, other subjects.⁷

Finally, Part V offers some conclusions about what first-year law students might gain from analysis of an appellate tax case, such as the *Thiess* case, in light of the literature review on transition pedagogy in Part II.

II THE FIRST-YEAR LAW SCHOOL EXPERIENCE AND TRANSITION PEDAGOGY

The University of Western Australia has reported on the transitioning experiences of first-year law students who find the experience ‘hostile, competitive, difficult and lonely’.⁸ Importantly for the purposes of this article, one of the reasons for this is thought to be the difficulty of adjusting to an independent, self-directed learning style.⁹

Transition to the study of law has been identified as an issue both for school leavers entering an undergraduate law program, and for students beginning graduate-entry law programs.¹⁰ This is because learning to learn at university involves learning how knowledge is constructed within a discipline.¹¹ Therefore all new law students,

⁶ Cassandra Sharp et al, ‘Taking Hints from Hogwarts: UOW’s First Year Law Immersion Program’ [2013] 1 *Journal of the Australasian Law Teachers Association* 134.

⁷ Ibid.

⁸ Tin Bunjevac, ‘Critical Reflection and the Practice of Teaching Law’ *Journal of the Australasian Law Teachers Association* 9 (2013) 1, 97. Studies have concluded that deterioration of law students’ well-being begins in the first year of study, with a statistically significant increase in symptoms of depression between the beginning and end of the first year of law school: see Rachael Field and James Duffy, ‘Better to Light a Single Candle Than to Curse the Darkness: Promoting Law Students Well-Being through a First Year Subject’ (2012) 12(1) *Queensland University of Technology Law and Justice Journal*, 133, 156.

⁹ Ibid. Other cited reasons include: the burdensome workload, distanced methods of teaching, lack of understanding of academic expectations, and bell curved grading systems.

¹⁰ Wendy Larcombe and Ian Malkin, ‘The JD First Year Experience: Design Issues and Strategies’ (2011) 21 *Legal Education Review* 1.

¹¹ Ibid, citing Wingate at footnote 38.

undergraduate¹² or post-graduate, are involved in a process of transition to the new disciplinary environment, its methods of inquiry and 'learning how knowledge is construed and communicated within law'.¹³

Consequently, much has been written about the responsibility of law schools to deploy 'transition pedagogy' within teaching programs.¹⁴ This need arises primarily from the fact that first-year law students transitioning to law school require teaching that supports students' construction of meaning.¹⁵ That is, first-year law students need help to devise strategies to learn to understand the content of their first year of legal studies.¹⁶ Accordingly, some law schools have developed law induction programs.¹⁷ Law induction programs tend to have multiple aims, including introducing students to the study of law and legal research, as well as fostering a cohesive cohort. The content of such programs, and more specifically, the way in which they introduce issues of law and policy, are the focus of this article.¹⁸

An introduction to issues of law and policy through students participating in a moot based on an appellate tax case should have two important aims. First, there must be engagement.¹⁹ Kift and Nelson argue that effective programs for articulating transition pedagogy are those that support learning through engagement.²⁰ They argue that students need to be inspired and excited by the academic curriculum in order to work towards mastery of the discipline.²¹ Second, the moot should build confidence through participation.²² First-year law students should come to understand that there are not necessarily 'right' or 'wrong' answers, but rather, arguments which they must make and defend through analysis and reasoning.²³

¹² Not only are first-year undergraduate law students exposed to challenging new content, but scaffolding for first year students transitioning to law school is also necessary to help them 'attain self-mastery in reading skills, study and time management, and to reconcile themselves to the realities of the workload'. See Liesel Spencer, 'Motivating Law Students to 'Do the Reading' Before Class: Appropriate Extrinsic and Intrinsic Motivational Tools' (2012) 16 *Journal of the Australasian Law Teachers Association* 16 1–15, 5.

¹³ Ibid.

¹⁴ Sally Kift and Karen Nelson 'Beyond Curriculum Reform: Embedding the Transition Experience' in Brew and Asmer (eds) *Higher Education in a Changing World* (HERDSA 2005, 225–235).

¹⁵ Sharp et al above n 6.

¹⁶ Dominic Fitzsimmons, Simon Kozlina and Prue Vines, 'Optimising the First Year Experience in Law: The Law Peer Tutor Program at the University of New South Wales' (2006) 16 *Legal Education Review* 99.

¹⁷ The pre-semester, two-week intensive foundation course at Melbourne Law School is described in Larcombe and Malkin, above n 10.

¹⁸ The inclusion of Alternative Dispute Resolution programs during first year, designed to increase a student's sense of belonging to the law school and create higher levels of student engagement, is discussed in Field and Duffy, above n 8, 152.

¹⁹ See above n 10.

²⁰ Sharp et al, above n 6, 129.

²¹ Sally Kift, Karen Nelson and John Clarke, 'Transition pedagogy: A Third Generation Approach to FYE – A case study of policy and practice for the higher education sector' (2010) 1(1) *The International Journal of the First Year in Higher Education* 1–20, 3.

²² Fitzsimmons, Kozlina and Vines, above n 16.

²³ Leon Wolff and Maria Nicolae, 'The first-year experience in law school' in Wolff and Nicolae (eds) *The first-year law experience: A new beginning* (Halstead Press, 2014) 8–18).

III HOW BEST TO TEACH TRANSITIONING STUDENTS HOW TO STUDY LAW

It is argued that a moot recreating a recent appellate tax case is an effective teaching strategy for a law induction program.

Problem-based learning and experiential learning has been described as ‘the way people learn in real life’.²⁴ It is said to foster deep learning, as opposed to mere surface learning.²⁵ A moot achieves this by requiring students both to argue points of law before the bench and to answer questions from the bench relating to the arguments presented, or any other relevant law the students may not have considered.²⁶

A moot of the *Thiess* case would involve one team mooting for Thiess and the other for the Collector of Customs. The students would pretend the appeal to the High Court had not occurred and act as though they were arguing the appeal before the High Court. The advantage of this approach is that it requires the students to read a High Court case, and based on that case, formulate arguments for the moot based on what was argued before the High Court.

At the conclusion of the moot during the induction program, it is important that first-year law students be able to answer some questions, such as the four questions posed in this article with respect to the *Thiess* case, designed to demonstrate to students a variety of law topics. This can be done by the bench during the moot, or workshopped in a reflective session occurring after the moot – or a combination of both. This is important for at least two reasons. First, to demonstrate an understanding of issues of law and policy raised by the moot, and second, to show students that they should not compartmentalise their studies, but rather be aware that law subjects are constantly built upon throughout the degree, and recognise that there are many issues to be discussed in relation to any one case.

The four questions raised by the *Thiess* case are now examined.

IV QUESTIONS RAISED BY *THEISS*

A. On What Grounds Can the Australian Federal Government Charge Customs Duty and GST?

Prior to commencing the moot it is necessary for students to read the case and understand the facts and the issues that the case raises. It may be useful to provide commencing first-year students with a brief that explains the material facts and issues raised by the case. However, in addition to an understanding of the issues of law arising from the set of facts in the case, an important aspect of the exercise is having the students read the case and come to an understanding of the avenues pursued by the taxpayer prior to the taxpayer seeking an appeal from the High Court of Australia, and the court hierarchy more generally.²⁷ The following discussion raises the points that could be included in both a

²⁴ Keith Kendall, ‘Mooting in an undergraduate tax program’ *Journal of the Australasian Law Teachers Association* pp109–18, (2011) 10(1), citing Biggs and Tang 110.

²⁵ Ibid 111.

²⁶ Ibid 113.

²⁷ S White, ‘Teaching Novices How to Read Law Reports’, *Law Teacher* (1989) 23(2) 142–61, 145.

moot brief provided to commencing students, and in discussion notes for the workshopping exercise following the moot.

(a) Facts of the Thiess case

Mr Thiess engaged a customs broker to act for him in importing a yacht into Australia. The broker misclassified the yacht's weight, and Thiess paid \$494,471.74 customs duty, and \$49,447.17 GST on customs duty in December 2004.²⁸ In fact, no customs duty/GST should have arisen in respect of the yacht, if it were properly classified by its correct weight by the broker. Thiess was not aware of the broker's mistake, and that no customs duty or GST should have been paid, until October 2006, when he was alerted of the mistake in making plans to sell the yacht.²⁹

In November 2006, Thiess wrote to the Department of Finance and Deregulation seeking an act of grace payment for a refund of monies overpaid.³⁰ This request was refused in May 2007.³¹ Thiess then wrote to Queensland senators and members of Parliament requesting assistance in obtaining a refund. In October 2010, the Minister for Home Affairs and Justice wrote to the Queensland senators and members of Parliament from whom Thiess had requested assistance, advising that the Australian Customs and Border Protection Service was not authorised to make a refund in relation to the importation, but referring a potential reconsideration of an act of grace payment to the Minister for Finance and Deregulation.³² On 12 January 2011, the delegate of the Minister for Finance and Deregulation notified Thiess's solicitors of the minister's refusal of a reconsideration.³³ Then on 15 December 2012, Thiess filed a claim in the Trial Division of the Supreme Court of Queensland.³⁴ On 19 June 2012, Fryberg J ordered referral of the matter to the Court of Appeal.³⁵

²⁸ Chronology of Case B57-2013 *Thiess v Collector of Customs and Ors*: see High Court website, www.hcourt.gov.au/assets/cases/b57-2013/Thiess_Chrono.pdf, entry 14.

²⁹ *Ibid* 18 and 19.

³⁰ *Ibid* 20.

³¹ *Ibid* 21.

³² *Ibid* 31.

³³ *Ibid* 34.

³⁴ *Ibid* 36.

³⁵ *Ibid* 39.

The issues for determination by the Queensland Court of Appeal were as follows:

- Did s 167 (4) of the *Customs Act 1901* (Cth) prevent Thiess from recovering the customs duty?
- Did s 36 of the *Income Tax Assessment Act 1936* (Cth) exclude any common law action to recover an overpayment of GST as Thiess did not give notice to the Commissioner of Taxation within 4 years?
- (The plaintiff conceded that his claim to recovery of GST stood or fell upon the issue of whether he was entitled to recover the import duty. This was said to reflect the legislative scheme in relation to GST payable on customs duty, see: *Thiess v Collector of Customs & Ors* [2013] QCA 54 [42]).
- Were statutory time limits invalid under the Constitution's requirement (in s 51 (xxxii)) for just terms for any deprivation of property?

(b) Relevant legislation

The *Customs Act 1901* (Cth) provides for the refund of customs duty in s 163, and for disputes in s 167.

The refund provisions and dispute provisions are independent regimes, and subsection 167(5) states that 'nothing in this section shall effect any rights or powers under s 163'.³⁶ Relevantly, the *Customs Act 1901* (Cth) provides for a refund of customs duty paid by mistake under s 163. However, the problem for *Thiess* was that regulation 128A(5) requires an application for refund of duty under s 163(1)(b) to be made within 12 months of the duty being paid where, under regulation 126(1)(e), 'duty has been paid through manifest error of fact or patent misconception of the law'. *Thiess* realised the error of paying customs duty when it was not in fact payable, only after the expiration of 12 months from the date of paying duty. It is perhaps for this reason that *Thiess* did not argue that s 163 of the *Customs Act 1901* (Cth) provided for a refund of duty.³⁷

Rather, *Thiess* argued that s 167(4)³⁸ of the *Customs Act 1901* (Cth) did not apply to prevent the application of common law restitution.

³⁶ *Comptroller-General of Customs v Kawasaki Motors Pty Ltd* (1991) 103 ALR 63 found that s 167 excludes common law recovery and is an exclusive code.

³⁷ This occurred in *Table Eight Pty Ltd v Collector of Customs* (1993) 40 FCR 524. The issue in *Table Eight* was similarly one of incorrect classification of goods being entered, such that a concessional rate of duty was not applied. The question arose as to whether the case ought to be a refund case, so that the provisions of s 163 applied (and there was no need for a 'payment under protest') or whether the provisions in s 167 applied, that is a dispute as to classification, which meant that if the payment was not made under protest, the importer could not bring an action against Customs. Ultimately a refund under s 163 was available in that case, see G Fisher, 'Recovery of Customs Duty Paid Under Mistake' (1994) 15 Queensland Lawyer 34 and J Coelho, 'Customs Duty Refund Disputes: the current position in law' (1993) 31(5) *Law Society Journal* 60-2.

³⁸ Section 167, the dispute resolution provisions, relevantly provides:

- (1) If any dispute arises as to the amount or rate of duty payable in respect of any goods, or as to the liability of any goods to duty, under any Customs Tariff, or under any Customs Tariff or Customs Tariff alteration proposed in the Parliament (not being duty imposed under the *Customs Tariff (Anti-Dumping) Act 1975*), the owner of the goods may pay under protest the sum demanded by the Collector as the duty payable in respect of the goods, and thereupon the sum so paid shall, as against the owner of the goods, be deemed to be the proper duty payable in respect of the goods, unless the contrary is determined in an action brought in pursuance of this section.
- (2) The owner may, within the times limited in this section, bring an action against the Collector, in any Commonwealth or State Court of competent jurisdiction, for the recovery of the whole or any part of the sum so paid.
- ...
- (4) No action shall lie for the recovery of any sum paid to the Customs as the duty payable in respect of any goods, unless the payment is made under protest in pursuance of this section and the action is commenced within the following times:
 - (a) In case the sum is paid as the duty payable under any Customs Tariff, within 6 months after the date of the payment; or
 - (b) In case the sum is paid as the duty payable under a Customs Tariff or Customs Tariff alteration proposed in the Parliament, within 6 months after the Act, by which the Customs Tariff or Customs Tariff alteration proposed in the Parliament is made law, is assented to.
- (5) Nothing in this section shall affect any rights or powers under section 163.

Common law restitution allows for a longer period of time within which Thiess could seek to recover the mistakenly paid customs duty and GST. Thiess therefore needed to establish that s 167(4), which requires payment to have been made under protest, did not operate to prevent the bringing of an action for restitution under common law.

Section 167(3) and (3A) set out exhaustively when a payment is taken to be made under protest.³⁹ Thiess did not pay the customs duty under protest and within the prescribed timeframe (within 6 months of payment) as he was unaware of any mistake in paying the duty, and in practical terms, did not realise the need to pay under protest. Accordingly, Customs argued that, as the duty was not paid under protest, s 167(4) of the *Customs Act 1901* (Cth) prevented Thiess from taking any action against Customs.

Thiess argued that s 167(4) was limited to cases where there was a dispute at the time of payment. That is, if the importer is unaware that there is a dispute as they have mistakenly paid customs duty/ GST when it was not payable, then the importer cannot know to pay under protest. Counsel for Thiess argued that s 167 of the *Customs Act 1901* (Cth) was never designed to operate in the context of a self-assessment regime: s 167(1) makes it clear that Parliament had in contemplation a situation where officers of Customs determine the customs duty and 'demand' that sum. If the importer disagrees, they can pay under protest and commence proceedings within 6 months.⁴⁰

Counsel for Thiess stated: 'None of this is readily transposed to a self-assessment regime, where there is no demand, no dispute, and no opportunity for payment under protest'.⁴¹

(c) Issues of law raised by the Thiess case

The Queensland Court of Appeal described the action brought by Thiess as being on a 'quasi contractual or restitutionary basis'.⁴² That is, Thiess argues that it may bring a common law action as s 167(4) of the *Customs Act 1901* (Cth) does not prevent this. In *David Securities Pty Ltd and Others v Commonwealth Bank of Australia*,⁴³ the High Court found that money is prima facie recoverable if a mistaken belief has caused the payment. In *Woolwich Equitable Building Society v Inland Revenue Commissioners*⁴⁴ the majority of the English House of Lords held that 'money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right'.⁴⁵ Under the common law, the time limitation for restitution is generally six years.

Thiess argued in the alternative before the Queensland Court of Appeal that if, contrary to his position, s 167(4) of the *Customs Act 1901* (Cth) did extinguish the right to recover

³⁹ *Thiess v Collector of Customs* [2014] HCA 12 (2 April 2014) per French CJ, Hayne, Kiefel, Gageler and Keane JJ [9].

⁴⁰ Appellant's submission in the High Court of Australia Brisbane Registry on 20 November 2013 [26]: www.hcourt.gov.au/assets/cases/b57-2013/Thiess_App.pdf.

⁴¹ *Ibid* [27].

⁴² [2013] QCA 54 [14] 'mistake of fact meant Thiess was not legally obliged to make any payment by way of customs duty or GST and the Collector of Customs had no right to receive payment'.

⁴³ (1992) 175 CLR 353.

⁴⁴ [1992] WLR 366 at 396.

⁴⁵ M Chowdry, 'Recovery of overpaid GST and VAT and the "passing on" defence' (2005) 34 *Australian Tax Review* 229.

mistakenly paid customs duty at common law, it contravened s 51(xxxi) of the *Australian Constitution* because it amounted to an acquisition of property otherwise than on just terms.⁴⁶ Specifically, Thiess argued that s 167(4) of the *Customs Act 1901* (Cth) was not within the taxation power, nor incidental to that power, because the collection of tax due to the Commonwealth did not require a law to deprive a person who erroneously paid money to the Commonwealth of a chose in action to recover money, when there was no tax due and payable at any time.⁴⁷

The Queensland Court of Appeal did not accept this constitutionality argument. It described s 167(4) of the *Customs Act 1901* (Cth) as a limitations law operating prospectively, within Federal power.⁴⁸ Whatever rights Thiess acquired to a refund of customs duty and GST depended upon the fulfilment of the conditions in s 167(4).⁴⁹

The Court of Appeal unanimously decided the matter in favour of the Collector of Customs on 22 March 2013.⁵⁰ Thiess applied for Special Leave to Appeal to the High Court of Australia, which was granted on 11 October 2013.⁵¹ Special leave was granted only as to the proper construction of s 167(4) of the *Customs Act 1901* (Cth) (not the constitutionality argument), in particular:

- the meaning of the expression ‘the payment is made under protest in pursuance of this section’ in subsection 167(4); and
- whether the procedure mandated by subsection 167(1) must be invoked before subsection 167(4) becomes operative.

Leave was granted, and the High Court dismissed the appeal by a judgement dated 2 April 2014.

B. How Should the Courts Interpret Legislation Limiting the Rights of Taxpayers to Recover Customs Duty and GST Paid in Error?

The moot itself requires students to familiarise themselves with various provisions of the customs duty legislation. However, the reflective workshop following the moot ought also to alert students to the importance of statutory interpretation. Legislation is often complex, and it can be difficult to determine its meaning, and for this reason, numerous appellate cases are concerned with issues of interpretation of legislation.⁵²

Spigelman CJ has previously noted in his writing that:

The law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of law are determined entirely by statute. No area of the law has escaped statutory modification.⁵³

⁴⁶ *Thiess v Collector of Customs and Ors* [2013] QCA 54, para 43.

⁴⁷ *Ibid.*

⁴⁸ *Ibid* 45.

⁴⁹ *Ibid.*

⁵⁰ Chronology of Case B57–2013 above n 28, entry 41.

⁵¹ *Ibid*, entry 43.

⁵² Catriona Cook et al, *Laying Down the Law* (LexisNexis Butterworths, 8th ed, 2012) 287.

⁵³ The Honourable James Jacob Spigelman, AC QC, former Chief Justice of the NSW Supreme Court ‘The Poet’s Rich Resource: Issues in Statutory Interpretation’ (2001) 21 *Australian Bar Review* 224.

Further, the Chief Justice of Victoria, the Honourable Marilyn Warren AC, has recently noted the importance of law programs teaching statutory interpretation.⁵⁴ Her Honour notes that legislation is becoming increasingly dense.⁵⁵ Since lawyers present the arguments and determine the appropriate evidence for the court (and judges cannot 'go on a frolic of their own'), it is critical for lawyers to understand how to interpret legislation.⁵⁶

Statutory interpretation generally

The principles of 'purpose' and 'context' for the interpretation of legislation have been in use for centuries⁵⁷ and it is widely considered that Australia shifted from a literal approach to statutory interpretation, to a purposive approach from the 1980s.⁵⁸ During the 1970s and early 1980s, the High Court was criticised for handing down decisions which strictly construed taxation legislation rather than interpreting the legislation to give effect to its underlying purpose.⁵⁹ This led to the enactment in 1981 of s 15AA of the *Acts Interpretation Act 1901* (Cth), requiring provisions in an Act to be interpreted in a way that promotes the purpose or

⁵⁴ Remarks of the Honourable Marilyn Warren AC, Chief Justice of Victoria, Eleventh *Fiat Justitia* Lecture, 25 March 2014, Monash University Law Chambers, 'The Access to Justice Imperative: Rights, Rationalisation or Resolution', 2, available at: www.supremecourt.vic.gov.au/find/publications/speeches+by+date. Chief Justice Warren notes, in discussing law courses:

There are very important core areas which are taught in a way that is at least disappointing and in many respects unsatisfactory. Statutory interpretation is a prime example. The volume of statutes of which lawyers must have knowledge coupled with the ability to interpret them has changed. Whilst cases on statutory interpretation feature significantly in the High Court of Australia and intermediate appellate and superior courts' jurisprudence, statutory interpretation is not a compulsory subject. This is despite agitation from the highest levels for separate recognition in the curriculum. It may be readily assumed that most law schools find the curriculum so jam-packed there is a reluctance to expand the subjects that might be taught. Yet it is fundamental to legal education and, inevitably, the application of the rule of law for statutory interpretation to be taught. How can law graduates advise or act under, say, the *Migration Act*, the *Crimes Act*, the *Accident Compensation Act* and so forth, without a proper grounding in the interpretative craft? (at 14–15).

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ R S Geddes, 'Purpose and Context in Statutory Interpretation' in *Statutory Interpretation: Principles and Pragmatism for a New Age*, Judicial Commission of New South Wales Education Monograph 4, June 2007, 128.

⁵⁸ '[T]he high water mark of the literalist approach to interpreting tax legislation was seen in the years of the Barwick High Court (1964–1981)': John Tretola, 'The Interpretation of Taxation Legislation by the Courts – A Reflection on the Views of Justice Graham Hill' [2006] 1(5) *Revenue Law Journal* 78.

⁵⁹ Cook et al, above n 52, 297.

object underlying the Act.⁶⁰ Following the addition of s 15AA, similar provisions were enacted in the Australian states and the territories.⁶¹

The question then arises as to the extent to which courts can consider extrinsic materials, such as parliamentary debates and explanatory memoranda, relating to the purpose of the legislation.⁶² In 1983 the Commonwealth Attorney-General's department organised a seminar on the interpretation of legislation,⁶³ focusing on the use to be made of extrinsic materials.⁶⁴ This seminar led to the insertion of s 15AB in the *Acts Interpretation Act 1901* (Cth).⁶⁵ Section 15AB of the *Acts Interpretation Act 1901* (Cth) broadly provides that, in the interpretation of a provision of an Act, if any material (including, among other materials, an explanatory memorandum or any relevant report of a Royal Commission laid before either House of the Parliament before the time when the provision was enacted) can assist in the ascertainment of the meaning of the provision, consideration may be given to the material to: confirm the ordinary meaning of a provision; or determine the meaning of the provision when the provision is ambiguous or obscure; or determine the meaning of the provision when the ordinary meaning in context of the purpose of the Act leads to a result that is absurd or unreasonable. All states and territories, except for South Australia, have enacted provisions based on s 15AB of the *Acts Interpretation Act 1901* (Cth).⁶⁶

Statutory interpretation of taxation laws

It has been questioned whether, in some areas of the law, there is a body of interpretative principles that are more or less specific to those areas.⁶⁷ In a taxation context, the 'special rule' for interpreting taxation legislation provides an example.

⁶⁰ Section 15AA of the *Acts Interpretation Act 1901* (Cth) originally provided:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether thurpurpose or objective is expressly stated in the Act or not) shall be preferred to a construction that would not promote thurpurpose or object.

In 2011, s 15AA of the *Acts Interpretation Act 1901* (Cth) was amended (by the *Acts Interpretation Amendment Act 2011* (Cth)) and s 15AA now provides:

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not thurpurpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

⁶¹ State and territory provisions are as follows: *Legislation Act 2001* (ACT) s 139; *Interpretation Act 1987* (NSW) s 33; *Interpretation Act 1978* (NT) s 62A; *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1915* (SA) s 22; *Acts Interpretation Act 1931* (Tas) s 8A; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Interpretation Act 1984* (WA) s 18.

⁶² R S Geddes, above n 58, 132–3, notes: 'in *Commissioner for Prices and Consumer Affairs (SA) v Charles Moore (Aust) Ltd* (1977) 139 CLR 449 (at 457 per Barwick CJ, 462 per Gibbs J, 470 per Stephen J, 476–7 per Mason J), the High Court stated that courts should not refer to reports of parliamentary debates for any purpose to aid the construction of the statute. However, in *Wacando v Commonwealth* (1981) 148 CLR (at 1 25–26) in the High Court, Mason J said that an exception could be allowed if the Bill had been introduced to remedy a mischief.'

⁶³ Following the seminar it held prior to the enactment of s 15AA of the *Acts Interpretation Act 1901* (Cth).

⁶⁴ *Symposium on Statutory Interpretation* (AGPS, 1983). Discussed in: Cook et al, above n 52, 314.

⁶⁵ Inserted by s 7 of the *Acts Interpretation Amendment Act 1984* (Cth).

⁶⁶ *Legislation Act 2001* (ACT) ss141–143; *Interpretation Act 1987* (NSW) s 34; *Interpretation Act 1978* (NT) s 62B; *Acts Interpretation Act 1954* (Qld) s 14B; *Acts Interpretation Act 1931* (Tas) s 8B; *Interpretation of Legislation Act 1984* (Vic) s 35(b); *Interpretation Act 1984* (WA) s 19.

⁶⁷ Cook et al, above n 52, 287.

A choice between competing interpretations of legislation may ultimately involve a choice between favouring the revenue or the taxpayer.⁶⁸ The special rule regarded revenue law as 'special', so that there was a presumption against the construction urged by the tax collector.⁶⁹

The special rule was rejected by Kirby J, who stated that the court's duty is to determine what Parliament meant when it enacted the provision.⁷⁰ Kirby J stated:

*'In earlier times it used to be said that legislation imposing taxation was subject to a strict construction, in favour of the taxpayer. However, in more recent times, this Court has departed from the narrow and literal interpretation of words appearing in legislation, including that imposing taxation, in favour of an interpretation that seeks to achieve the apparent purposes or objects of the enactment as expressed in its terms.'*⁷¹

Statutory Interpretation in Thiess

Counsel for Thiess argued:

Subsection 167(1) makes it clear that Parliament contemplated a situation where Customs officers: inspect goods (or the paperwork relating to goods); make a decision regarding whether duty is exigible, and, if so, determine the rate and amount of duty payable; demand payment of that sum; and are met with a contrary contention by the importer. If the issue cannot be resolved immediately, the importer is allowed to pay under protest, retain the goods, and commence proceedings within 6 months.

This is not readily transposed to a self-assessment regime, 'where there is no demand, no dispute, and no opportunity for payment under protest'.

⁶⁸ Justice Hill, 'Some Thoughts on the Principles Applicable to the Interpretation of the GST', paper presented at the ATAX 15th Annual GST and Indirect Tax Conference, Noosa Queensland, 10–13 April 2003.

⁶⁹ The special rule was discussed and rejected by Kirby J in *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Ltd* (1995) 31 ATR 457, 459.

⁷⁰ John Tretola, 'The Interpretation of Taxation Legislation by the Courts – A Reflection on the Views of Justice Graham Hill' *Revenue Law Journal* Volume 16 [2006] Iss. 1 Art. 5, 83.

⁷¹ *Austin v The Commonwealth* (2003) 51 ATR 654, 723–4. Note also comments by The Honourable Murray Gleeson AC in 'Justice Hill Memorial Lecture Statutory Interpretation' 24th National Convention, Taxation Institute of Australia, Sydney, 11 March 2009:

Before referring to some principles of statutory interpretation and their relevance to revenue law, it is convenient to mention, in order to put it to one side, an approach that once was fashionable, but no longer commands judicial acceptance. It is possible to find in some judicial statements of former times, and even as recently as the third quarter of the 20th century, the proposition that a taxing Act interferes with rights of property, and therefore should be construed narrowly and in favour of the taxpayer. This proposition was normally qualified by a disavowal of some special rule for revenue laws, but it reflected what Lord Devlin, writing extra-judicially, described as a judicial philosophy that was 'highly suspicious of taxation' (Devlin, 'Judges and Lawmakers' (1976) 39 *Modern Law Review* 1 at 13–14). For example, in 1945, in *Scott v Russell* (1945) 3 T.C. 375 at 424, Viscount Simon in the House of Lords said that the language of a certain United Kingdom rule was obscure and difficult to expound and 'the taxpayer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness before he is adversely affected'. That passage was cited with approval by the Privy Council in a 1964 case (*Naranjee v Income Tax Commissioner* [1964] AC 1238 at 1250–1251).

If s 167(4) of the *Customs Act 1901* (Cth) was intended to apply in the context of a self-assessment regime, 'then the appropriate course is to legislate for it. Until such legislation is enacted, the clear duty of the courts is not to introduce specious concepts involving a duty ... on the part of the importer [to be careful and diligent]'

The process of entering goods for home consumption begins with an 'import entry', a communication of information to Customs.⁷² In *Thiess*⁷³, the import entry was transmitted to Customs by means of computer facilities known as the 'COMPILE computer system'.⁷⁴

The COMPILE system operated to assess automatically the amounts of Customs duty and GST payable.⁷⁵ Customs then transmits an 'import entry advice' by means of the COMPILE computer system.⁷⁶ The advice would include a statement that the goods were cleared for home consumption.⁷⁷

The Queensland Court of Appeal found that the legislation established a system of self-assessment under which the amount of duty and GST payable by an owner who imported goods ordinarily depended upon information entered in the COMPILE computer system by the owner.⁷⁸ The Court of Appeal cited Ormiston J in *A and G International Pty Ltd v Collector of Customs*⁷⁹ to establish that there was a 'demand' when the COMPILE system stated the total amount of duty payable – even where a protest was not possible because the importer was unaware of the mistake.⁸⁰ While in a practical sense, Thiess could not pay 'under protest' if unaware of the mistake, as a matter of construction, Customs had made a demand for payment and Thiess was entitled to pay under protest. The Queensland Court of Appeal cited Ormiston J in discussing the purpose of s 167(4):

*the clear purpose of s 167(4), as construed in the cases by which I am bound, is to prevent actions from being brought disputing customs duty unless the requirements of that section have been satisfied.*⁸¹

The Court further cited Rolfe J in *Matchbox Toys Pty Ltd v Chief Executive of Customs*⁸² in finding that s 167(4) operates to encourage importers to take care and avoid mistakes favouring the revenues.⁸³

⁷² *Thiess v Collector of Customs* [2014] HCA 12 [4], citing *Customs Act 1901* (Cth) s 71A(1)(d), as it applied in 2004.

⁷³ *Ibid*, citing the *Customs Act 1901* (Cth) s 71B, as it applied in 2004.

⁷⁴ *Ibid*, citing *Customs Act 1901* (Cth) s 71A.

⁷⁵ Submissions of the First and Second Respondents, on appeal from the Supreme Court of Queensland, Court of Appeal Division, dated 10 December 2013, in the High Court of Australia Brisbane Registry [18].

⁷⁶ *Thiess v Collector of Customs* [2014] HCA 12 [5], citing *Customs Act 1901* (Cth) s 71B, as it applied in 2004.

⁷⁷ Submissions of the First and Second Respondents, on appeal from the Supreme Court of Queensland, Court of Appeal Division, dated 10 December 2013, in the High Court of Australia Brisbane Registry [21].

⁷⁸ (2013) QCA 54, 18.

⁷⁹ (1995) 129 FLR 23.

⁸⁰ (2013) QCA 54, 25–8.

⁸¹ *Ibid*, 26.

⁸² (1997) NSWSC 494.

⁸³ (2013) QCA 54, p30–34.

on a proper construction of s 167 there is an obligation on the owner, at the time of paying duty, to satisfy himself that the duty demanded is payable. If this were not so then, arguably, the provision of s 167 would be circumvented by an owner not bothering to consider or to consider properly whether such an obligation arose at the time of payment, but later concluding that the duty was not properly payable.

The Queensland Court of Appeal agreed with the argument of Customs that, on Thiess' construction, the consequences would be 'odd' if taking care and paying duty under protest would mean an importer would only have 6 months to claim a refund – whereas the careless importer who does not pay under protest would not be bound by that limitation period.⁸⁴ The Court of Appeal noted:

The High Court recently affirmed that, whilst context and legislative history may be significant in ascertaining the proper construction of a legislative provision, the exercise of construing legislation must begin and end with the statutory text (Commissioner of Taxation v Consolidated Media Holdings [2014] HCA 55 at [39]). The clarity of the language in s 167(4), the amelioration by s 163 and regulations made under it of what otherwise may be unjust consequences of a literal construction, and the odd consequences which would result from the plaintiff's construction, combine to require rejection of that construction. The plaintiff's claim for recovery of the import duty was barred by s 167(4).⁸⁵

The appeal to the High Court of Australia was limited to the construction of s 167(4) of the *Customs Act 1901* (Cth). Thiess again argued that s 167(4) cannot have application in the absence of a 'dispute' within the meaning of s 167(1). Thiess argued that if there were no 'dispute', then there could not be a payment under protest, and therefore s 167(4) of the *Customs Act 1901* (Cth) did not apply. Consequently, if s 167(4) did not apply, Thiess could commence a common law restitution action.⁸⁶

The High Court cited *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd*⁸⁷ for the purpose of construing s 167(4) of the *Customs Act 1901* (Cth):

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and only in so far as, it assists in fixing the meaning of the statutory text.

⁸⁴ Ibid, 36.

⁸⁵ Ibid, 39.

⁸⁶ Thiess relied on Sackville J (in dissent) in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 2)* (1991) 32 FCR 243: 'Hill and Heery JJ appeared to have accepted that if no dispute had arisen as to the amount or rate of duty, or as to the liability of any goods to duty, the limitations imposed by s 167(4) did not apply'.

⁸⁷ (2012) 87 ALJR 98 107.

The High Court considered that the scheme of the *Customs Act 1901* (Cth) is clear.⁸⁸ That is: Customs has control over goods imported into Australia; goods are entered for home consumption via an import entry advice; and the payment of customs duty is a condition of Customs relinquishing control of the goods by giving an authority to take the goods into home consumption. The function of s 167 within that scheme is to provide, by s 167(1) a mechanism for payment under protest, so as to allow goods to be entered for home consumption.⁸⁹

Section 167(4) of the *Customs Act 1901* (Cth) clearly states that no action shall lie for the recovery of any sum paid to customs, other than in two circumstances: first, if under s 167(2) the duty is paid under protest and the action is commenced within the prescribed timeframe; and second, if there are rights to a refund of duty under s 163 of the *Customs Act 1901* (Cth). The High Court concluded that s 167(4) of the *Customs Act 1901* (Cth) enhances the operation of the scheme of the Act by creating an incentive for the owner to be vigilant in the process of entering goods for home consumption, to identify what the owner of the goods considers to be the duty payable.⁹⁰

The High Court further referred to s 15AA of the *Acts Interpretation Act 1901* (Cth) to note that statutes always have some purpose or objective to accomplish.⁹¹ In 1910, individual members of the High Court answered differently the question of whether an action was available at common law for the recovery of customs duty outside the operation of s 167 of the *Customs Act 1901* (Cth).⁹² Isaacs J⁹³ stated, on the operation of s 167 and the availability of a common law action for restitution, that a common law action was not available and would throw the revenue into chaos.⁹⁴ The High Court described the substitution of s 167(4) of the *Customs Act 1901* (Cth) three months after the statement of Isaacs in *Sargood*⁹⁵ as a 'preventative measure'. The High Court found:

Those words as then enacted operated in combination with s 167(5) to ensure that, apart from the statutory action for recovery newly created by s 167(2) no action was to lie for the recovery of any sum paid to customs ... other than an action to enforce a right or to compel the exercise of a power under s 163'.⁹⁶

It can be seen that the *Thiess* case was mostly concerned with the proper interpretation of the customs duty statute. It is important for students to understand the process of construction that was followed in the *Thiess* case.

Can the courts imply a duty requiring taxpayers to ensure that they pay the correct tax?

The third issue to be workshopped following a moot based on the *Thiess* case follows on from the previous examination of statutory interpretation. It asks whether the courts can imply a duty requiring taxpayers to ensure that they pay the correct tax. Counsel for

⁸⁸ *Thiess v Collector of Customs* [2014] HCA 12 [24] and [27–9].

⁸⁹ *Ibid* [28].

⁹⁰ *Ibid* [29].

⁹¹ *Ibid* [23].

⁹² *Sargood Bros v the Commonwealth* (1910) 11 CLR 258.

⁹³ In dissent.

⁹⁴ *Thiess v Collector of Customs* [2014] HCA 12 [31].

⁹⁵ Above n 92.

⁹⁶ *Thiess v Collector of Customs* [2014] HCA 12 [32].

Thiess argued that s 167 of the *Customs Act 1901* (Cth) was never designed to operate in the context of a self-assessment regime. If s 167(4) of the *Customs Act 1901* (Cth) was intended to apply in the context of a self-assessment regime, 'then the appropriate course is to legislate for it. Until such legislation is enacted, the clear duty of the courts is not to introduce specious concepts involving a duty ... on the part of the importer [to be careful and diligent]'.⁹⁷

(a) Self-assessment

There is much academic commentary on self-assessment of income tax in Australia.⁹⁸ This is instructive in the customs duty context at issue in the *Thiess* case as it describes the rationale for, and operation of, self-assessment.

It particularly allows for analysis of the argument by Thiess that the courts cannot cite self-assessment as the basis of a duty being imposed upon the importer to ensure that the correct duty and GST are paid.

Self-assessment has been described as 'privatisation of the process of assessing and collecting the government's revenue'.⁹⁹ Self-assessment is generally regarded as a cost-effective means of administering a tax (or in Thiess' case, customs duty). Self-assessment of income tax in Australia replaced assessment by the government as it was considered by the Auditor General Report in 1984 that full assessment was not cost-effective and had little impact on taxpayer compliance with the law.¹⁰⁰

In the context of self-assessment of income tax in Australia, self-assessment has been described as placing a heightened responsibility on taxpayers.¹⁰¹ It places responsibility on taxpayers to protect themselves against penalties for incorrect assessment. The penalty provisions supporting the self-assessment regime apply a 'reasonable care' test. In discussing the penalty provisions, Nethercott and Stephen state: 'The main thrust of the new penalty provisions is to apply a penalty where a tax shortfall is caused by the taxpayer's failure to exercise reasonable care in carrying out his tax obligations'.¹⁰² At the time of introduction of self-assessment of income tax in Australia, Nethercott and Stephen opined that the courts would, in the self-assessment of income tax context, interpret 'reasonable care' by imputing a standard, as has been done in the tort of negligence.¹⁰³

(b) Are taxpayers sufficiently educated about their obligations under self-assessment?

At this point, it is important to consider some policy issues that arose with the *Thiess* case. It is often questioned, in the self-assessment of income tax context, whether the regime adequately

⁹⁷ Appellant's submission to the High Court of Australia Brisbane Registry, '*The operation of s 167(4) in the context of a self-assessment regime*' discussed at [26-8], High Court website, above n 28.

⁹⁸ See for example R Fisher, 'An Assessment by Another name ... 'making an assessment' under self-assessment' (2005) 34 *Australian Tax Review* 7; and L Nethercott and Tony Stephen, 'Tax Management - A New Era Under Self-Assessment' (1993) 22 *Australian Tax Review* 7.

⁹⁹ Nethercott and Stephen, above n 98, 7.

¹⁰⁰ Auditor-General, *Report of the Auditor General on Efficiency Audits* (AGPS, 1984).

¹⁰¹ Nethercott and Stephen, above n 98, 7.

¹⁰² *Ibid* 10.

¹⁰³ *Ibid* 13.

protects taxpayers.¹⁰⁴ Self-assessment assumes that taxpayers have the knowledge and skill required to fulfil their obligations, when in fact they may not.¹⁰⁵ It is suggested that self-assessment requires that taxpayers be given support in determining the tax implications of certain courses of action, particularly through education programs and publications.¹⁰⁶ Arguably, in the case of self-assessment, revenue bodies have some responsibility to assist taxpayers' efforts to comply with relevant taxing statutes.¹⁰⁷ Such education programs and publications are useful in increasing taxpayer awareness of a revenue body's stance in administering a statute.¹⁰⁸

The question then arises, in the customs duty context, whether importers are sufficiently educated about their rights to pay customs duty under protest under s 167(1) of the *Customs Act 1901* (Cth), and the time limits on application for a refund of overpaid or erroneously paid customs duty under s 163 of the *Customs Act 1901* (Cth).

The Australian Customs website currently provides information to importers on customs duty and tariff classification.¹⁰⁹

It provides resources to assist importers with classifying the goods that they are importing. Under the heading 'How do I use the Tariff when importing goods?' the website currently states:

Importers are required to self-assess their goods, including the tariff classification of their goods. Importers have a legal obligation to correctly assess their goods, and penalties may apply for incorrect or misleading information provided to the Australian Customs and Border Protection Service.

Importers are encouraged to use the services of a licensed customs broker if they are unsure how to classify their goods ... Customs brokers are licensed by the Australian Customs and Border Protection Service.

The *Australian Customs and Border Protection Notice 2013/09: Continuing Professional Development Scheme for Licensed Customs Brokers – Update*, dated March 2013, notes in the background information that: 'Because of the complexity of the laws governing the importation of goods into Australia ... and the potential financial and other implications of lodging an incorrect entry, most importers of goods choose to engage a customs broker to act on their behalf'.¹¹⁰ The Notice states that from 1 April 2014, Continuing Professional Development

¹⁰⁴ S Villio, 'The legislative interface between the creation of a liability to tax and the right to challenge that liability' (2014) 29 *Australian Tax Forum* pp551–78.

¹⁰⁵ E Loo, M McKerchar, and A Hansford, 'Findings on the Impact of Self-Assessment on the Compliance Behaviour of Individual Taxpayers in Malaysia: A case Study Approach', (2010) 13 *Journal of Australian Taxation* 1–23, 10–11.

¹⁰⁶ F Zumbo, 'Educating taxpayers through seminars: a case study' *Australian Tax Review* (1996) 25 (Sept) 143–7, 143.

¹⁰⁷ *Ibid* 144.

¹⁰⁸ *Ibid* 144.

¹⁰⁹ www.border.gov.au/.

¹¹⁰ Former Customs website. Now www.border.gov.au/.

obligations must be met by customs brokers annually, so that brokers are better able to provide their services with skill and expertise with regular participation in educational activities.¹¹¹

It appears that the Department is operating on the assumption that most importers will use a customs broker,¹¹² and presumably the broker is aware of the limitation periods for seeking a refund under s 163 and the requirements of the dispute provisions under s 167 of the *Customs Act 1901* (Cth). However, it remains to be established whether the Department affords sufficient warnings to all importers of the operation of ss 163 and 167(4) of the *Customs Act 1901* (Cth). To this end, it is interesting to examine the recent requirement for warnings to guarantors providing a guarantee under the *National Consumer Credit Protection Regulations 2010* (Cth), and whether such a warning is a good lesson for customs duty.

To strengthen the position of guarantors, s 55 of the *National Credit Code*¹¹³ ('the Code') prescribes the form that a written guarantee covered by the Code is required to take. It states in subsection 3 that the regulations may make provision for or with respect to the content of guarantees and the way that they are expressed. Under section 55(4) of the Code, a guarantee must comply with the regulations in order to be enforceable. Regulation 81 of the *National Consumer Credit Protection Regulations 2010* (Cth) states that, for section 55 of the Code, a guarantee must contain the warning set out in Form 8 of Schedule 1 of the Regulations. Form 8 contains a box of information under the heading 'IMPORTANT'. Under the subheading 'Before you Sign' it contains five short paragraphs, one of which recommends obtaining independent legal advice. Under the subheading 'Things you Must Know' there are four paragraphs, one stating: 'If the debtor does not pay you must pay. This could mean you lose everything you own including your home'. It is suggested that importers may benefit from a similar 'IMPORTANT' warning box when completing payment of customs duty and GST.

It is also necessary to consider the Australian Government Australian Customs and Border Protection Service *Client Service Charter 2014–2015*. The Charter does not note the time limits for seeking a refund of customs duty, nor the requirement to pay under protest if the importer seeks to take action against Customs. However, the Charter does note the self-management nature of customs duty.¹¹⁴ The CEO's foreword to the Charter states: 'We use a range of services to help you self-manage your interaction with the border'. Under the heading 'How You Can Help Us' the Charter states: 'So We Can Provide High Quality Service, We Ask You To: Familiarise yourself and comply with Australian Government requirements relevant to your enquiry.'

(c) Conclusions on self-assessment

Both the Queensland Court of Appeal and the High Court in *Thiess* considered that the self-assessment regime places a burden on the taxpayer/importer to ensure that they understand their

¹¹¹ The Continuing Professional Development ('CPD') obligations of customs brokers was gradually introduced from 1 July 2012, with no mandatory CPD requirements from 1/7/12 to 31/3/13. From 1/4/13 to 31/3/14 the CPD obligations were at 50% of the full annual rate. The full annual rate of CPD obligations commenced from 1/4/14.

¹¹² Leaving aside the issue of whether this is a desirable position.

¹¹³ Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth).

¹¹⁴ Australian Government, Department of Immigration and Border Protection Service *Client Service Charter 2015*: <http://www.border.gov.au/AccessandAccountability/Documents/DIBP-Client-Service-Charter-2015.pdf#search=Client%20Service%20Charter>.

obligations and their rights, as is the case under Australian income tax legislation. This finding followed from the text of the Act, structure and history of the Act, and principles of statutory interpretation. Both courts considered that the text in s 167(4) of the *Customs Act 1901* (Cth) was clear. The harshness of s 167(4) of the *Customs Act 1901* (Cth) was ameliorated by s 163 (refund provisions). Further, Thiess' construction of s 167(4) would produce the odd result that an importer paying under protest would only have 6 months within which to commence an action, whereas an importer who does not pay under protest may not be similarly limited by time. From a policy point of view it would perhaps be beneficial, and consistent with other areas of Australian statutory law, for Customs to warn importers of the time limits for refunds and requirements for paying under protest if an action for the recovery of erroneously paid duty is to be made.

What are the human rights issues in a case like Thiess?

The fourth and final issue to be discussed in the *Thiess* example is a tension that is often at the centre of taxation cases: the balance between the rights of the individual taxpayer and the common good pursued by the tax collector. This position was observed by *The Hon J Daryl Davies AJA*:¹¹⁵

A proper balance between the interests of the citizen and those of the Government is, as Sir Gerard Brennan said in his foreword to the 1977 Report of the Administrative Review Council, 'critical to a free society'. Yet the establishment and maintenance of such a balance can be a difficult, controversial and sometimes despairing task.

Thiess argued before the Queensland Court of Appeal (but not the High Court) that, if s 167(4) of the *Customs Act 1901* (Cth) were effective to prevent Thiess recovering its mistaken payment, then s 167 contravened s 51(xxxi) of the *Australian Constitution* and was invalid as appropriations of the plaintiffs property otherwise than on just terms. Although this argument was not accepted by the Court nor allowed as a ground for appeal before the High Court, it does demonstrate the tension between the rights of the individual taxpayer and the collection of revenue for the common good. In the end, Thiess paid half a million dollars in customs duty and GST which was never due. However, there may be good reason for limiting the time within which a taxpayer can recover overpayments – such as protecting the certainty of the revenue base. That is, it is considered that if importers had unlimited time and opportunity to take action for the recovery of erroneously paid duty, the revenue base would be thrown into chaos.

This idea of the revenue being thrown into chaos raises interesting human rights issues. If the revenue base is uncertain, governments may be forced to adopt austerity measures that they otherwise might not adopt. Austerity measures may breach Australia's human rights obligations, as the Australian Government is required to use the 'maximum available resources' to secure the economic, social and cultural rights of its population.¹¹⁶ Indeed, the United Nations General Assembly Special Rapporteur on extreme poverty and human rights dated 22 May 2014 presents fiscal policy, and particularly taxation policies,

¹¹⁵ *The Hon. J Daryl Davies AJA*, 'The Administrative Appeals Tribunal and the Rule of Law', (2001) 8 *Australian Journal of Administrative Law* 176–82.

¹¹⁶ Magdalena Sepulveda, 'Taxation for Human Rights', (2014) 9(2) *Tax Justice Focus* at www.taxjustice.net/wp-content/uploads/2013/04/TJF-June-2014-Human-Rights.pdf.

as a major determinant in the enjoyment of human rights.¹¹⁷ Relevantly, the Special Rapporteur states in Part III 'Tax: a critical tool for realizing human rights and tackling inequality', that more 'stable revenues' result in increased sustainable investment in public services, infrastructure and other development needs.

Accordingly, while one may have sympathy for Thiess, who mistakenly paid customs duty and GST where it was not in fact due, and was barred by statute from seeking restitution that might otherwise have been available at common law – without such a limiting statute, if his argument had prevailed, the revenue would be less stable. A revenue base which is unstable might reasonably be linked to reduced government spending to benefit the poor – and this is now viewed as being contrary to a government's human rights obligations.

V CONCLUSIONS

The engagement of new law students in a moot during a law induction program ought to enable the students to appreciate that case law is adversarial, and parties must make their arguments by reference to authority, that is, statutes and case law. It is important for law students to argue the law rather than their beliefs of what is fair and just.

Through discussion of the workshop exercise that would follow the moot of the appellate tax case, this article has demonstrated that analysis of a recent Australian High Court case on mistakenly paid customs duty and GST raises issues of: statutory interpretation; constitutional law; policy (as to the adequacy of warnings to importers on recovering overpaid customs duty); and even human rights.

Members of the judiciary have argued that it is essential for law students to understand the principles of statutory interpretation. Both the Queensland Court of Appeal and the High Court in *Thiess* considered that the self-assessment regime places a burden on the taxpayer/importer to ensure that they understand their obligations and their rights. This is due to the text of the Act (the requirements in s 163 and s 167(4) of the *Customs Act 1901* (Cth)), the structure and history of the statute, and the fact that on Thiess' construction, s 167(4) would have no effect.

First-year-law students should also consider the broader policy issues of a case, and even make recommendations as to appropriate law reform, following analysis of whether the law should operate as it does. This article has made one suggestion for law reform – that is, the use by Customs of greater warnings to importers of the time limits for seeking refunds of duty, and the need to pay under protest if the importer intends to dispute the duty paid.

The workshop exercise should demonstrate that there may be a human rights issue in an appellate tax case that may not appear obvious on the first reading of the case.

¹¹⁷ Sepulveda, C., 'Report of the Special Rapporteur on extreme poverty and human rights' Human Rights Council, UN General Assembly, 22 May 2014.

There is a newly emerging area of research examining whether government taxation policies adequately promote the achievement of basic human rights.¹¹⁸ Arguably, there is a need to ensure stability of the revenue base, as the more 'stable' the revenue, the greater the sustainable investment in public services, infrastructure and other development needs.

Finally, in order to teach transitioning first-year law students the importance of the idea of currency (updated law), the appellate tax case studied during a law induction program ought to be a recent case that changes each year for each induction program. Presenting a recent case will also demonstrate to new law students the importance of keeping up with new developments in the law. There should not be a shortage of appellate tax cases suitable for a law induction program. Most cases will involve the interpretation of legislation and most cases will involve a dispute between a taxpayer and a tax collector, and therefore a weighing of the interests of an individual taxpayer as against the collection of revenue for the common good. This approach requires analysis of whether the law should operate as it does, and such analysis may, in turn, raise issues of policy.

While the benefits of studying an appellate tax case during law induction have been analysed here, one needs to be cautious about reaching conclusions based on limited experience. For this reason, student evaluations should follow the induction program.

Such evaluations should be designed to discern, among other things, whether students consider that the learning of an appellate tax case through a moot and workshop during an induction program has helped students learn the approach to studying the discipline of law. It has been argued that student evaluations have their limitations,¹¹⁹ but even so, a properly drafted evaluation questionnaire should provide feedback to the architects of the law induction program. Useful feedback is perhaps best achieved by requiring students to give a narrative response, rather than a numerical one.¹²⁰

A student evaluation of a law induction program could also achieve two further goals, if properly drafted. First, if properly framed, the questions in the student evaluation should lead the student to understand that learning is not a passive exercise in which teachers provide, and students receive, knowledge.¹²¹ Rather, questions on an evaluation ought to 'orient students more to the collaborative nature of the teaching-learning process'.¹²² This

¹¹⁸ See McGill University, Montreal's 'Tax Justice and Human Rights Research Collaboration Symposium' 18-20 June 2014 at: www.mcgill.ca/tax-law/events/tax-justice-human-rights-symposium:

The Faculty of Law at McGill University invites you a conference on tax justice and human rights, that will bring together students, academic researchers, and tax justice advocates and activists to collaborate on the topic of tax justice: what is it, how is tax connected to human rights or how could it be, and what research needs to be done to further this emerging field?...

Overview: Until recently, tax policy was a technical speciality left to experts. Today, researchers, community groups and social justice activists are examining whether government tax policies lead to healthy communities and environments, support people in meeting their needs, and promote the achievement of basic human rights.

¹¹⁹ See for example research by Deborah Merritt, discussed in Julia Glencer et al, 'The Fruits of Hope: Student Evaluations', (2010) 48 *Duquesne Law Review* 233-72.

¹²⁰ Arthur Best, 'Student Evaluation of Law Teaching Works Well: Strongly Agree, Agree, Neutral, Disagree, Strongly Disagree' (2008) 38(1) *Southwestern Law Review* 1-36, 8.

¹²¹ *Ibid* 2.

¹²² *Ibid*.

may be achieved by an open-ended question asking students to explain how they consider that the moot exercise and following workshop allowed them to engage in the process of analysing the law at issue in the appellate tax case. Such a question should indicate that there is an expectation that students learn to be independent learners, as opposed to a question which states, for example: 'The moot during induction helped me to learn how to learn law: Strongly Agree, Agree, Neutral, Disagree, Strongly Disagree'.

Second, the questionnaire should indicate that its purpose is for successful planning of future induction programs.

Such a sentiment may allow the students to feel valued as members of the law school whose opinions are being used to support the education of future members of their law school.

That being said, modelling how to learn law through a recent appellate tax case should not be the only aim of an induction program for new law students. Other important objectives – such as establishing pastoral care, and fostering a cohesive cohort – should also be addressed. It is important that students feel connected to their peers and their teachers from the time of the induction program.¹²³

¹²³ Susan Armstrong, Marnie Campbell and Michael Brogan, 'Interventions to Enhance the Student Experience of a First-Year Law Degree: What they really wanted', (2009) 2(1&2) *Journal of the Australasian Law Teachers Association* 135–48.