FOREWORD

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It is a privilege to be the editor for the 2022 *Journal of the Australasian Tax Teachers Association*. This year we have had submitters from a number of jurisdictions. Several articles are from New Zealand and Australian authors, and we also have articles from Hong Kong and South Africa. In total there are nine articles in this issue.

The 33rd Annual ATTA Conference, originally scheduled to be held in 2021, was postponed until 2022 due to the devastating impact of COVID-19. A hybrid ATTA Symposium was held at the University of Canterbury (UC) in January 2021, with the Annual ATTA Conference hosted for the first time in a hybrid format by UC between 19 and 20 January 2022. The Conference theme was *The Future of Tax: More than Just Politics?*

There were five keynote addresses throughout the conference including one from The Hon Justice Sir William Young KNZM, recently retired Supreme Court Judge, whose contribution is presented first in this issue of *JATTA* and is based on his keynote address. Titled '*Looking back on the approaches of the courts to tax, after more than 24 years on the bench*', it provides an interesting insight into recent New Zealand tax administration and avoidance through a judicial lens. Justice Young's contribution is organised under the three headings of: care and management, the pre-assessment and challenge processes, and tax avoidance. Under the tax avoidance head, he reflects on the recent 4:1 decision of *Frucor Suntory Ltd v Commissioner of Inland Revenue* [2022] NZSC 13, a case that will engender robust discussion amongst the tax community for some time, not only on the application of section BG1 of the *Income Tax Act 2007* (NZ) (the general anti-avoidance provision), but also on the application of penalties for taking an abusive tax position. Given the disparate nature of the topics considered in his paper, Justice Young considers the identification of a theme may be a little artificial. These reservations notwithstanding, Justice Young discerns something of a thread which runs through what has happened – demystification. Justice Young's paper concludes that tax litigation has come to be treated in very much the same way as other litigation about money. The focus is on what, if anything, is owed. The parties, including the Commissioner, can approach tax disputes in the courts in a pragmatic way, settling, if they choose, on a basis that reflects the risks and benefits of litigation options. The courts have increasingly put to one side distracting procedural issues in order to better concentrate on whether tax is due and, if so, how much is owed. This same process of demystification has also been applied to tax avoidance.

The first two articles in this issue of the Journal are both tax education focused, relating to Australia's National Tax Clinic Program. A multi author, multi university article 'Work-integrated learning for international students: developing self-efficacy through the Australian National Tax Clinic Program' by Michelle Cull, John McLaren, Brett Freudenberg, Connie Vitale, Donovan Castelyn, Robert Whait, Ann Kayis-Kumar, Van Le and Annette Morgan considers the impact of the work-integrated learning experience as part of Australia's National Tax Clinic Program on the self-efficacy of international students studying in Australia. The nine authors make reflections on the program run by their respective university. The creation of tax clinics at 10 Australian universities is a relatively recent development in the establishment of a work-related learning experience for students. The authors' analysis has shown that the student experience at the tax clinics has had a positive impact on self-efficacy, particularly for international students. The study supports the need for authentic work integrated learning consulting experiences such as those offered by tax clinics to provide a stronger foundation for all students to transition from university study to professional work.

Robert Whait, Connie Vitale and Donovan Castelyn are the authors of the article 'Tax Clinics in Australia – the Road to Legitimacy'. They observe that tax clinics are now a recognised fixture of Australia's tax landscape. For this position to first be both attained and to continue, tax clinics needed to achieve legitimacy among several key stakeholders including taxpayers, professional bodies, university students, and the Australian Taxation Office and Federal Treasury. Tax clinics were established in Australian universities to fill a gap in the market by providing free services to those who cannot afford a tax agent. Students, under supervision, provide these services. This article evaluates the process undertaken by participants in the National Tax Clinic Program ('NTCP') to achieve legitimacy in Australia during their first year of operation while the NTCP was being trialled. The article demonstrates how tax clinics have adopted pragmatic, moral and cognitive strategies to attain legitimacy. The article also provides a brief history of tax clinics. This study inductively analyses articles submitted and published by each participating clinic in the 2020 special edition of the *Journal of Australian Taxation*. The study shows a reliance on pragmatic legitimacy which is easier to attain, but it is not as durable as moral or cognitive types of legitimacy. The authors conclude it may be wise for clinics to shift focus toward attaining moral and cognitive legitimacy by adopting relevant and appropriate strategies.

Jonathan Barrett's article debunks the myth of the Akaroa window tax. This article is an offshoot of a larger research project on taxes and the constitution of the built environment and focuses on the specific claim that a doors and window tax operated in the nascent township of Akaroa on Canterbury's Banks Peninsula (Horomaka). That claim

is based on an implausible presumption that France (Wīwī) established a sovereign colony, with its own fiscal system, in Akaroa between 1840 and 1845. Akaroa is a popular destination for locals and visitors, around one hour by car from Christchurch. Barrett refers to an article published in the *Columbia Journal of Tax Law*, a prestigious United States journal, that has reported how 'a missionary in the French colony of Akaroa would climb in and out of his "home" on his hands and knees in an attempt to minimise the size of the windows and doors.' A sceptical analysis of the claim that the French doors and windows tax applied in Akaroa demonstrates that the claim has no foundation. The missionary had made a joke about his humble accommodation. A considerable number of European style buildings would have been needed to make such a tax viable and the French never levied such a tax in their colonies. Besides, Akaroa was in fact never a French colony. Although the Columbia article focused on a particular fallacy, this article has far broader application to tax and the built environment, indeed to academic research in general.

Wilson Chow's article 'Entering a new era: Time for a holistic review and revamp of the tax system in Hong Kong?' addresses the recent evolution of the Hong Kong tax system, and the need, according to the author, for significant reform. Once aptly described as the 'Jurassic Park in the Pearl River Delta', the simple low-rate tax system in Hong Kong has also been said to be 'troublingly successful'. Hong Kong has had extraordinary success, with low rates of tax, the government usually operating at a surplus, and the populace appearing to be generally content with both the tax system and the balance of taxation and public spending. This article argues for a timely and holistic review of the tax system to prepare for and meet the challenges for a new era from now to and beyond 2047. The article sketches out the way forward for a modernised and more 'fit for purpose' system. Chow concludes that while the Hong Kong tax system 'ain't broke', it would be better, as an ancient unattributed quote says, to 'have not thy cloak to make when it begins to rain'!

Lisa Marriott's article 'Tax Principles and the Serious Hardship Provisions in Aotearoa New Zealand' analyses the serious hardship provisions contained in the *Tax Administration Act 1994* (NZ). The article reviews several cases where serious hardship has been claimed by taxpayers. The principles of administrative efficiency, equity and minimisation of tax distortions are used to frame the discussion. These principles were referred to by Labour's Hon David Parker, Minister of Revenue and Associate Minister of Finance, in the recently proposed Tax Principles Act. In determining that the serious hardship provisions meet none of the proposed principles, the article questions what impact a proposed *Tax Principles Act* will have on existing legislation that does not align with the proposed new Act. The article concludes that while there may be little disagreement that tax principles are an important component of tax design, they may be

of little benefit if not used to resolve potentially contentious components of existing legislation.

Pendency of cases plagues the Indian tax appeal system. A certain level of delay is understandable with respect to tax appeals. In India, tax cases can take anywhere between twelve to fourteen years to get decided if the appeals go all the way through to the Supreme Court, the last stage of appeal. In his article 'Pendency in the Indian Tax Appeal System' Sashi Mohan discusses the views of tax practitioners, former adjudicators, and retired tax officials regarding factors that influence the pendency of tax cases and recommendations on how to alleviate the problem in the context of the Indian tax appeal system. He concludes that pendency is a function of case volume, adjournments, delay in filling vacancies in the appellate fora, and a lack of tax expertise in courts. Case volume is further influenced by poor judiciousness of Income Tax Department ('ITD') officials, declining judiciousness and independence of some appellate authorities, strategies adopted by taxpayers, repetitive appeals, a dearth of accountability of appellate authorities and ITD officials, and the complexity as well as the uncertainty of law. Mohan discusses these factors in his article as well as suggesting various solutions to reduce pendency in tax appeals.

It is not only tax cases that have significant delays through India's judicial system. Recently it was reported in the media that India's longest running legal dispute has finally been settled, and by a judge who had not been born when it began more than 70 years ago. India's courts are currently sitting on a backlog of 50 million cases, with two pending cases dating back to 1952 and 1956.

Tax avoidance is an issue for any tax jurisdiction. It has various harmful effects, including a loss of revenue for governments but also the costs associated with identifying and judicially resolving an avoidance case. Teresa Pidduck, André Klopper, Tshephiso Malema and Michelle Kirsten's article 'Did New Zealand Get It Right? Lessons for the South African GAAR', seeks to make two contributions. First, the article analyses and compares the interpretation and application of the South African GAAR with those of the New Zealand GAAR with the aim to identify weaknesses in the South African GAAR and lessons that can be learnt from its New Zealand counterpart. Secondly, the article has applied the South African GAAR to the facts of three New Zealand tax avoidance cases (*Penny and Hooper*, *Ben Nevis* and *Frucor*) to further identify weaknesses in the South African GAAR, in order to propose amendments to improve its efficacy. While the New Zealand GAAR was used for comparative purposes, it is worth noting that the New Zealand GAAR itself is not without issue, and an embedded uncertainty remains. Some earlier New Zealand tax avoidance case law, and more recently *Frucor* reiterate the complexity in avoidance cases with regard to both the substantive tax and the imposition

of penalties. Similarly, reflecting on the delay in the *Frucor* Supreme Court decision results in an unavoidable sense of uncertainty for taxpayers and practitioners alike.

The final article, Steven Stern's 'Tax legislative Drafting: Superannuation Example: How Safe Is Your Pension?', fits well with the conference theme *The Future of Tax: More than Just Politics?* The success of legislation in effecting its purpose largely depends on the words drafters use to express their intention. Effective drafting requires the legislation to meet three essential criteria: transparency, accessibility and congruency. This article focuses on the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (Cth) and associated legislation. Stern examines this legislation, and compares its objects and purposes, enunciated by the then Treasurer of the Commonwealth of Australia, The Hon Scott Morrison MP in his second reading speech. Stern concludes that the legislation fails to meet the three key criteria for effective drafting. Stern concludes that taking the politics out of tax reform requires the simplification of tax laws to make then comprehensible. Tax teachers who oversee the training of the next generation of tax practitioners are well placed to pursue this objective.

The articles presented in this volume reflect the breadth and variety of taxation research in Australasia.

I would like to thank the authors who submitted their articles for this edition of *JATTA*. The production of this volume would not have been possible without the efforts of so many who gave so willingly of their time. The peer reviewers who each anonymously provide exemplary guidance to authors in assisting them to strengthen their respective articles also deserves a special mention.

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